

Changing the Way We Think about Change

Shifting Boundaries, Changing Lives

The Australian and New Zealand Critical Criminology Conference 2012

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Introduction by Professor Rob White, Conference Convenor - Changing the Way We Think about Change: Shifting Boundaries, Changing Lives

Prof. Rob White

School of Social Sciences, University of Tasmania

The 2012 Australian and New Zealand Critical Criminology Conference was held in Hobart over two days in mid-July. More than 120 people attended the conference, with many staying over to spend the weekend experiencing the finest that Tasmania has to offer – trips to the Museum of Old and New Art (MONA), sampling of local wineries, breathtaking views from the top of Mount Wellington, picturesque drives along the East coast beaches.

This Critical Criminology Conference was organised around the theme of '*Changing the Way We Think about Change – Shifting Boundaries, Changing Lives*'. There were five general plenaries. These included a good mix of speakers, from Australia, Canada, the United Kingdom, France and the United States, and featured early career as well as experienced researchers. What mattered was the substantive topic and the content of the presentation. The plenaries included sessions on gender and imprisonment; the pursuit of truth and justice; Indigenous legal needs and justice reinvestment; policing and vulnerability; and migration and global security issues.

A wide range of workshops were catered for at the conference. Topics were diverse, and ranged from specialist diversion programmes (such as drug court initiatives) through to sexuality and offensive behaviour (relating to hetero-normativity and the law). As with other recent critical criminology conferences, the themes and topics generally focussed on questions of justice and fairness, and how the operations of the criminal justice system either address or concretise injustice in practice. Participants included students (undergraduate as well as postgraduate), early career researchers, established academics, and practitioners (many of whom work for corrective services in Tasmania). The dialogue between hands-on practitioners, and researchers and scholars, was particularly valuable as insights and experiences were traded in an atmosphere of genuine interest and mutual respect.

The notion of 'critical' criminology seemed to embrace two separate notions: one referring to the idea of being critical of some aspect of contemporary criminal justice practice, policy or programme; the other referring to a left-wing critique (usually based upon radical ideologies linked to feminism, Marxism, socialism and ecologism) of basic principles and orientations within existing institutional set-ups. These interpretations of critical criminology are not always compatible; but they were manifest in mutually creative and constructive tension for the duration of the conference.

We were proud to have continued the tradition, of critical criminology conferences in the Australasian region, of *not* charging a registration fee. This singular fact is what enabled and prompted many more people to attend the conference who otherwise would not have done so. Every aspect of the conference was organised and carried out with volunteer labour, thereby minimising overall costs. What money we managed to glean from the Faculty of Arts at UTAS was put into paying for morning and afternoon tea, and in providing sandwiches for lunch. Conferences do not have to be expensive – for either participants *or* organisers. Our key concern and the main focus were on the content and dynamics of the workshops and plenaries. Given the number of people who attended the conference each day and overall we think that, collectively, we got things about right.

This publication provides a sample of some of the presentations delivered at the 2012 Critical Criminology Conference. The editors have worked hard to ensure that the selection is exciting and the presentation clear. Our thanks go to all the contributors and reviewers, and to all those who helped make the conference the success that it was.

The Hobart conference demonstrated once again the vitality and widespread interest that accompanies innovative and challenging forms of criminology. Critical Criminology is growing in popularity – due to its relevance, cutting-edge conceptualisations, positive and progressive critiques, its strong link to activism, and its engagement with 'matters that count'. We look forward to *this* tradition, too, continuing into the future.

Conference Programme

Day 1			
9.00-10.30 am	Plenary 1: Reinventing Gender Imprisonment & Critical Criminology Kelly Hannah-Moffat; Eileen Baldry; Julie Stubbs		Welcome and Introduction <i>Chair: Rob White</i>
10.30-11am	Morning Tea		
11.00-12.30	Workshop 1 Specialists Diversion Programs Chair: Liz Moore Michael Hill Problem-Solving Initiatives in Tasmania: Changing the Mindsets Michael Daly Tasmania's Youth Justice Division D. Davies-Cotter The South East Queensland Drug Court Program	Workshop 2 Inequality and Visibility Chair: Nicole Asquith Julie Hamm & Alison Gerard Strategic In/visibility David Adair Crimes of Inequality Helen Forbes-Mewett & Jude McCulloch International Students and Gendered Crimes: Intersecting Inequalities	Workshop 3 LGBTIQ Issues Chair: Thomas Croft Angela Dwyer & Matthew Ball GLBTI police liaison services: a critical analysis Emma Russell Police Relations with SGBTQ communities: challenging the narratives of 'progress' Angela Dwyer Pedagogies of sexual normality? How police teach public lessons about non-heteronormative youthful bodies in public spaces
12.30-1.00pm	Lunch		
1.00-2.00 pm	Plenary 2: The Pursuit of Truth and Justice: Knowledge, Denial and Ambiguity Jude McCulloch; Barry Goldson; Rob White		<i>Chair: Isabelle Bartkowiak-Théron</i>
2.00-3.30 pm	Workshop 4 Due Process and the Conduct of Justice 1 Chair: Rob White Adam Graycar Penalising Corruption Asher Flynn & Kate Fitz-Gibbon Plea bargaining and defensive homicide Sally Kelty & Roberta Julian When is an accident a homicide and whose expertise do you rely on at a crime scene?	Workshop 5 Alcohol and Other Drugs Chair: Julie-Anne Toohey Kev Dertadian Proscribed Perception: Participant Perspectives on Legitimacy and Criminality in the non-Medical Use of Painkillers Hannah Graham Subject to Change: Identity, Culture and Change in the Alcohol and Other Drugs Sector in Tasmania Liz Moore Drug Courts around the world	Workshop 6 Disciplinary Boundaries and Criminology Chair: Eileen Baldry Gayle Hall Sisyphus, Social Work and Criminology: Is there a Connection? Brian Stout Cooperation in International Probation: Breaking down national, institutional and disciplinary boundaries Nicholas Verginis Populism, predictions & the unacceptable risks of positivism
3.30-4.00pm	Afternoon Tea		
4.00-5.00 pm	Workshop 7 Due Process and the Conduct of Justice 2 Chair: Sally Kelty Greg Barns Judicial Intervention in Prison Conditions Tyronne Kirchengast Beyond Normative Constraints: Declining Institutionalism & the Emergence of Substantive & Procedural Justice Antoinette Saliba The National Certificate as a risk assessment tool to govern the employment prospects of ex-offenders	Workshop 8 Accountability and Legitimacy 1 Chair: Isa Bartkowiak-Théron Mary Spiers Williams Makings sense of 'Riot': the fragile legitimacy of police powers and public order offences in an Intervention Darren Palmer The 'sacredness' of the Victorian Police Regulation Act: 40 years of legislative failure David Vakalis Militarised Protest Policing and the Eviction of Occupy Melbourne	Workshop 9 Innovation, Needs and Efficacy Chair: David Adair Samantha Jeffries, Christine Bond & Rachael Field Australian Domestic Violence Order Legislation: a Cross-jurisdictional Analysis of Victim Efficacy Mary Stathopoulos & Bianca Fileborn Can prisons be supportive of victims/survivors' needs? Considering the role of prison culture and alternative responses Elvise Methven An alternative approach to offensive language crimes
Day 2			
9.00-10.30 am	Plenary 3: Understanding Indigenous Legal Needs and Justice Reinvestment Chris Cunneen, Melanie Schwartz, Laura Boseley		<i>Chair: Rob White</i>
10.30-11am	Morning Tea		
11.00-12.30	Workshop 10 Research Methods in Critical Criminology Chair: Isa Bartkowiak-Théron Max Travers Ethnography and Cultural Criminology: what makes a research method critical? Bruno van Aaken Teach me about your life: a critical examination of standpoint theory, Indigenism and narrative method Elaine Fishwick "For want of a Nail": Can Complexity Theory help us understand the reality of juvenile justice policy decision-making?	Workshop 11 Accountability and Legitimacy 2 Chair: Roberta Julian Barbara Etter Changing the way we think about Justice! Dealing with Miscarriages of Justice: Shifting Boundaries and Changing Lives Tallace Bisset Policing African Young People in Melbourne: a New Story, an Old Story Shellee Wakefield Interviewing with Interpreters: Police Officer perceptions and experiences	Workshop 12 Capacity Building & Aboriginal Issues: signs of progress in Criminology and Justice? Chair: Julie-Anne Toohey Ellouise Davis The NAAJA Indigenous Throughcare Project Shane Smithers Getting the 'wrong' people to give the 'right' example
12.30-1.00pm	Lunch		
1.00-2.00 pm	Plenary 4: Risk and Vulnerability Nicole Asquith, Katrina Clifford, Lorana Bartels and Isabelle Bartkowiak-Théron		<i>Chair: Roberta Julian</i>
2.00-3.30 pm	Workshop 13 Security, Border Policing and Control Chair: Max Travers Sharon Pickering Policing Women at the Border Jeff Corkill Mapping the Security Domain and why it matters Derek Dalton Dark Tourism and Crime	Workshop 14 Sexuality and Offensive Behaviour Chair: Sally Kelty Bianca Fileborn GLBTIQ young adults' experiences and perceptions of unwanted sexual attention in licensed venues Danielle Tyson Critical Fictions: Masculinities Theory and Challenges to the Violence of Law's Narratives Alyce McGovern & Thomas Crofts "Sexting": What's the big deal?	Workshop 15 Prisons, Parents and Self-Belief Chair: Isa Bartkowiak-Théron Julie-Anne Toohey Children and their Incarcerated Parents: the Importance of Kids' Days and Tasmania's Risdon Prison Harriet Crisp "The tiger's got to know that he's got stripes": the Role of Self Belief in Reducing recidivism
3.30-4.00pm	Afternoon Tea		
4.00-5.00 pm	Closing Plenary: Border Crossing Horizons: Researching Migration and Security Globally Nancy Wonders, Leanne Weber		<i>Chair: Rob White</i>

209 = Workshops 1, 4, 7, 10 & 13
211 = Workshops 2, 5, 8, 11 & 14
212 = Workshops 3, 6, 9, 12 & 15
Arts Lecture Theatre: All plenary sessions

Being Critical in Conservative Times: Editors' Introduction

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As part of the team teaching criminology and police studies at the University of Tasmania, we were very pleased to host the sixth critical criminology conference in July 2012, and particularly for the opportunity to edit these proceedings. We would like to thank the authors of the fourteen papers published for taking the time to submit their work, and for making revisions following the suggestions of reviewers. We were particularly pleased that this year there were a large number of papers by postgraduate students, indicating that this is one of the friendlier criminology conferences around. This is partly because this is a relatively small conference, with about an hundred people attending each year, and there is no registration fee. We would also like to think that the conference has an egalitarian character. These proceedings are a means of sharing findings and ideas from the conference, relatively quickly, to a growing network that shares similar progressive values. This conference and related publications are a platform for researchers of all levels and undergraduates taking criminology courses to engage critically with each others' thoughts.

Although we were not planning to write an editorial introduction, the necessity to do so in 2012 emerged in light of the various papers submitted by conference participants. To put matters bluntly, it became clear to us during the conference, and in reading these papers, that relatively few are critical either in the sense of engaging with the existing literature in the critical tradition (for a discussion of this issue, see Anthony & Cunneen, 2008), or in advancing developed arguments in relation to critical concepts or themes. This is not, however, intended as a criticism of the papers (which includes our own contributions), since there are good reasons why, at the present time, the critical criminologist has to work within existing institutional structures, and ways of thinking, rather than as in the past, advancing a politically radical, alternative view of crime and criminal justice.

The best known theorists associated with critical criminology recognise this problem, and most have reached some kind of accommodation with the mainstream discipline. Pat Carlen (2011) has, for example, argued that the distinctions between critical and mainstream criminology no longer matter since any rigorous work with a scientific purpose is critical. Jock Young was critical towards prevailing trends in criminal justice when he accepted an award at the 2012 annual conference of the British Society of Criminology. However, as reported in the ANZSOC newsletter he "gracefully" accepted the award (Halsey 2012). It should be remembered that Young and others founded the National Deviancy Conference in the early 1970s to protest against the treatment of subordinate groups in the criminal justice system.¹ They saw working class crime as a healthy and understandable response to social and economic inequality. They also hoped to establish a new intellectual movement that might lead to a transformation of the criminal justice system.

While there is room for debate, we would argue that this transformation has not taken place. At least in the English speaking world, there is even greater inequality than during the 1960s. The criminal justice system has become considerably more punitive in that more people are imprisoned (still mainly from lower class backgrounds).² White, Haines and Asquith (2012, p.275) argue that a critical criminology perspective is essential as a means of recognising and understanding increasing social diversification and marginalisation in the criminal justice system. Bartkowiak-Théron and Asquith's study (2012) of the operationalisation of vulnerability advances a similar view. In this introduction, we hope to show that the critical tradition offers a distinctive theoretical and political position that cannot easily be incorporated within or made compatible with mainstream or administrative criminology. We will also demonstrate, without going into great detail, that it is possible to strengthen the argument in each paper through drawing on a wider literature and set of ideas in

1 For an interesting review that is sensitive towards the tensions between radicalism and reformism within critical criminology as an intellectual movement, see Downes and Rock (2007).

2 For a review of these developments in the USA and Europe, see Wacquant (2009). Further comprehensive critical study about rising rates of imprisonment or other control measures in Australia. For discussion of rising rates of imprisonment and other control measures in Australia, see White, Haines and Asquith (2012).

critical criminology. In the conclusion, we will offer a personal view on what it means to be critical in conservative times.

The Critical Tradition

There have been a few interesting discussions about critical criminology in recent years. For an overview, we would recommend Walter DeKeserdy and Molly Dragiewicz's introduction to the (2012) *Handbook of Critical Criminology*. They start by quoting David Friedrichs:

"The unequal distribution of power and material resources within contemporary societies provides a point of departure for all strains of critical criminology" (Friedrichs 2009, p.210).

From the perspective of critical criminology, crime is not "a manifestation of individual deviancy", but arises from "hierarchical social stratification and inequality along class, racial/ethnic, and gender lines" (DeKeserdy and Dragiewicz 2012, p.1). It follows that critical criminologists advance a distinctive view in researching the criminal justice system:

"Another common feature that critical criminologists share is the rejection of policies and practices such as 'zero tolerance' policing (eg. criminalizing begging on the street), 'three strikes, you're out' sentencing, private prisons, coercive counselling therapy, and other punitive approaches that view crime as a manifestation of individual deviancy. Rather, critical criminologists regard major structural and cultural changes within society as essential to reducing crime and facilitating social justice" (DeKeserdy and Dragiewicz 2012, p.1).

There is some degree of equivocation or ambiguity in this paragraph that is characteristic of many statements by critical criminologists in recent times. It gives the impression that critical criminologists object to the most punitive aspects of criminal justice such as "three strikes, you're out" in sentencing (practices which 'continue the 'subjugation of lower classes', White, Haines & Asquith, p263), but accept the existence of institutions such as the police or prisons when they are not being unduly punitive. This also means that critical criminologists welcome humanitarian reform movements such as restorative justice and therapeutic jurisprudence, and applaud the efforts of those campaigning for better resourced rehabilitative programmes in prisons informed by the 'rhetoric [of] social justice' and 'recognising the importance of empowering the less powerful' (White, Haines & Asquith, 2012, p.261). Clearly, anyone interested in social justice will support such initiatives. But there is more to being a critical criminologist than this, as indicated in the last part of the quotation. Critical criminologists do not understand crime as a "manifestation of individual deviancy", whereas the underlying assumption informing most rehabilitative programmes is that individuals are to blame, even though their offending can to some extent be attributed to social causes.³ Instead, critical criminologists see crime as arising from social structures of inequality that can only be addressed through "major structural and cultural changes within society".⁴ We would argue that most papers in these proceedings recognise the underlying causes of crime in inequality, and for this reason belong to the critical tradition. There is, however, usually no explicit engagement with the history of critical criminology as an intellectual movement, or in developing a political programme that goes beyond reform.

The papers

The proceedings could be organised into four sections (which are the editors' own partitioning of the contributions): humanitarian initiatives; social divisions; law reform; and researching from a critical perspective.

³ Whatever the underlying assumptions, rehabilitative programmes and initiatives such as therapeutic jurisprudence, attempt to assist individuals rather than reducing inequality. This might be contrasted to the approach of governments during the Keynesian era when the reduction of inequality was a central objective in social and economic policy. For discussion of this shift in thinking about crime and society, see Garland (2001).

⁴ Unfortunately, as is common in critical texts, little detail is given on the structural and cultural changes required to create a more equal society, or how to achieve these in a political programme. These have always been the big questions for the critical tradition.

Humanitarian issues

In this section, we have put papers that are concerned with humanitarian, rights based reform in different areas of the criminal justice system. Angela Dwyer and Mathew Ball look at liaison services established in Victoria to assist gay and lesbian people in contact with the police. They note that police officers have been reluctant to assist, or intervene in families, but that these initiatives promise more effective protection. Their paper resonates strongly with Bianca Fileborne's on similar vulnerability issues. Julie Toohey also looks at the treatment of prisoners, but also the effect of imprisonment on families. She makes a case for funding rehabilitative programmes that allow prisoners to have contact with their children. Hannah Graham considers the changing nature of work in drug rehabilitation, and the effect on job satisfaction and service delivery of government initiatives intended to promote competition and efficiency in the public sector. Isabelle Bartkowiak-Theron, Max Travers and Jeremy Prichard argue that more resources (or better shared resources and information) should be expended on initiatives to assist vulnerable defendants on bail. Instead of setting defendants up to fail, and increasing the remand prison population, bail offers an opportunity for a whole of government approach that can address the social conditions that cause crime.

Social divisions

The second group of papers are all concerned with social divisions that result in crime. David Adair argues that all working class people are victims of crime in the sense that the capitalist system inflicts unnecessary suffering and deprivation across large populations. This paper is, perhaps, closest in spirit to the National Deviancy Conference. Bianca Fileborn and Mary Stathopoulos' paper is concerned with initiatives to assist those women sent to prison who are victims of domestic violence. They also argue, perhaps controversially, that there is a large, unrecognised problem of sexual abuse that results from and reflects a patriarchal society.

There are two papers about the experiences of Indigenous defendants. Mary Spiers Williams offers an analysis of legislation in the Northern Territory that seeks to criminalise customary practices of punishment such as spearing. Bruno Van Aaken considers how, as a non-Indigenous researcher, it might be possible to research Indigenous experiences respectfully. We would argue that, although this paper hardly addresses crime or criminal justice as topics, it raises issues that should be considered by anyone working in the critical tradition. We are concerned not only with criminal justice institutions, but with subordinate groups who have distinctive experiences and viewpoints. These often disappear even in studies by critical researchers, without this being recognised as a theoretical or political problem.

Law reform

The next section contains two papers concerned with potentially oppressive or discriminatory law. Elyse Methven considers a statute in New South Wales that criminalises abusive language. She argues that this is particularly directed against working class defendants. It is an additional power used by police in managing difficult populations. Nicholas Vergenis looks at laws in Victoria that make it possible for medical practitioners to monitor those who have committed sex crimes after release. Through examining an appeal, he shows how this can lead to injustice especially since most offenders do not have access to legal representation.

Researching from a critical perspective

The final section contains papers that raise issues on how to conduct research from a critical perspective, although none of these papers align themselves directly with the critical tradition. Max Travers considers the arguments made about qualitative method by cultural criminologists, and explores how they are relevant to his research project about children's courts. Corkhill & Doole consider the importance of security as a problem for governments. They see some value in the work of the security services, although this paper makes one think about whether there are sufficient safeguards to protect civil liberties. George Dertadian looks at the illegal use of pain reducing drugs that can be obtained on prescription. This is an example of everyday deviance and suggests that there are many varieties that could be studied. Finally, in a jurisprudential paper, Tyron Kirchengast argues in favour of a new paradigm for law courts in which inquisitorial practices, such as those employed in restorative justice, replace the traditional adversarial contest.

Being Critical: Current Challenges

At the start of this introduction, we suggested that some of these papers submitted to these proceedings do not engage with literature in the critical tradition, or advance developed critical ideas or arguments. If you think this is a harsh assessment, it is worth considering the distinction made in the introduction to the *Handbook of Critical Criminology* between advocating reform within the existing system, and addressing the underlying causes of crime in different types of inequality. Many of these papers advocate reform. Such proposals for reform are rooted in the deep understanding of the historical *change* that led to critical criminology, such as profound social and political restructuring worldwide post 1980s, and the surfacing of those who 'had not previously been heard' (White, Haines & Asquith, 2012, p.249) and the multiplication of 'newly discovered' social categories and subgroups in the past 20 years (Bartkowiak-Théron & Asquith, 2012).

The papers in these proceedings argue for a humanitarian criminal justice system, with more emphasis on welfare measures, and in some cases rights for subordinate groups. Some contributors believe, like mainstream criminologists, that things are getting better through these initiatives

By contrast, the critical tradition has argued that crime is a myth that serves the interests of the economically dominant class, and that the main purpose of the police and courts, but also social workers, is to control and stigmatise subordinate groups. From this perspective, the criminal justice system will continue to expand as social divisions widen. Humanitarian initiatives such as restorative conferencing make little difference to how the system operates. It is no accident that the prison population has grown, and continues to grow dramatically, alongside such humanitarian initiatives.

Some papers in these proceedings advance a critical viewpoint, and reference the large critical literature in criminology and elsewhere on different dimensions of inequality. Most of the papers seem to place their hopes in liberal reforms rather than seeking more radical changes. This interest in reform, and willingness to work with mainstream institutions, is by no means unusual among critical researchers in recent times. The introduction to the *Handbook of Critical Criminology* offers this explanation, drawing on Messerschmidt (1986):

"critical criminologists regard major structural and cultural changes within society as essential to reducing crime and facilitating social justice. However, especially in the current neo-conservative era, critical scholars know that major economic, political and social transformations will not soon occur in patriarchal capitalist societies. Hence, they propose a range of short-term progressive initiatives designed to 'chip away' at the iniquitous status quo" (DeKeserdy and Dragiewicz 2012, p.1).

It is again worth noting, critically, that these critical criminologists provide no analysis on why we are currently in a neo-conservative era (what makes it conservative in relation to preceding decades?), and what forces might lead to a change. The relationship between different dimensions of subordination (class, race, gender and sexuality), that has always raised conceptual and political problems for critical criminologists, also remains unclear. This said, the clear and constant compartmentalisation of social sub-groups has been proven as nothing but a utilitarian exercise by those in charge of justice operations and social commentary. The opportunities created and damage caused by such an exercise have been explored elsewhere (Bartkowiak-Théron & Asquith, 2012; Richardson, 2013; White, Haines & Asquith, 2012). So, there is much theoretical work to be done, not only in Australia, in renewing and taking forward the critical project, in addition to describing different dimensions of inequality and injustice. We hope that the papers published in these proceedings, and these introductory remarks, will stimulate discussion about how to be critical in these conservative times.

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PART ONE - HUMANITARIAN ISSUES

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GLBTI police liaison services: a critical analysis of existing literature

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Equality for sexually and gender diverse people is a goal grounded in the international human rights covenants ratified by Australia (Australian Human Rights Commission, 2011), yet such equality remains to be achieved in relation to policing. While there are many examples of greater connections being made between GLBTI communities and the police, and more awareness among the police of the unique needs and experiences of GLBTI communities, it still remains that there is inconsistent and ineffective reporting of the widespread victimisation perpetrated against gay, lesbian, bisexual, transgender, and intersex (GLBTI) people in public, private, and institutional spaces (Herek, Cogan & Gillis, 2002; Herek et al., 1997; Hillier et al., 2010; Berman & Robinson, 2010; St. Pierre & Senn, 2010). Relationships between GLBTI communities and police have improved (Tomsen, 2009), partly through the adoption of community policing methods by the police (Bartkowiak-Théron & Corbo Crehan, 2010), and the implementation of GLBTI police liaison programs across Australia. However, the increasing *awareness* among the GLBTI community that liaison services exist does not necessarily translate to their use, with these services only infrequently *accessed* (Berman & Robinson, 2010). Thus, it is clear that there is still some way to go in improving relationships between GLBTI communities and the police, especially given that research shows people using liaison services feel better supported than those accessing mainstream police (Leonard et al., 2008).

This paper critically engages with existing literature that explores how GLBTI people report victimisation to GLBTI police liaison officers. It argues for the need to further explore how GLBTI people engage with police liaison services to investigate the gap between *awareness* and *access* of these services*. Knowledge of this kind is essential, we suggest, if police are to respond effectively to the needs of GLBTI communities. The paper makes this argument by first examining the literature about the ongoing issue of victimisation of GLBTI people and the continuing trend of non-reporting, and the gap in knowledge that exists specifically around young people. Discussion then moves to elaborating the dissatisfaction of GLBTI people when they do report victimisation to police and the factors that may influence this process. Following this, the paper highlights the minimal research that exists on police liaison services generally, and the lack of research elaborating specifically on GLBTI police liaison services in any part of the world. The paper concludes suggesting further research is required with GLBTI liaison officers and GLBTI communities if we are to better understand how, or even *if*, GLBTI people choose to report victimisation to police, and, if they do, how this process might best be facilitated.

The prevalence of GLBTI victimisation and its underreporting

To understand the issue of reporting victimisation among GLBTI communities, we must first consider the extent to which GLBTI communities have been victimised in public, private, and institutional spaces. While there has been some progress made in the social acceptance of GLBTI people, it still remains the case that GLBTI lives are lived in a context of discrimination, homophobia, heteronormativity. These broader social relations produce various inequalities, including forms of violent victimisation. This victimisation has been ongoing for some time (Cox, 1990, 1994; GLAD, 1994; Hunter, 1990; Sandroussi & Thompson, 1995), with research elaborating discrimination and abuse (verbal, physical, emotional, psychological, social, economic) perpetrated against GLBTI people by strangers, school peers, and family (Berrill, 1992). To summarise this research, GLBTI communities experience:

- nearly twice the level of public violence as their heterosexual counterparts (Bernhard, 2000; Dick, 2008; Herek, Cogan & Gillis, 2002; Kuehnle & Sullivan, 2001);
- violence so brutal it leads to death at higher rates than the general public (Tomsen, 2002), and;
- violence in institutional spaces, with school violence frequent and increasing (Hillier et al., 1998, 2005, 2010), and violence in workplaces persisting (Barrett, 2011; Couch et al., 2007).

In addition, GLBTI people often experience homophobic violence from family members and intimate partner violence in private spaces (at rates equivalent to heterosexual partners) (Chan, 2005; Jeffries & Ball, 2008;

Turell, 2000; Farrell & Cerise, 2006; Island & Letellier, 1991; Renzetti, 1992; Vickers, 1996; Freedner et al., 2002; Merrill & Wolfe, 2000).

Levels of victimisation among GLBTI communities are consistently higher than the general Australian public (ABS, 2005a; Couch et al., 2007; Cox, 1990; Berman & Robinson, 2010; GLAD, 1994; Gay and Lesbian Rights Lobby, 2000; Leonard et al., 2008). For example, in 2005, young people in general were assaulted at rates of 9.9% (15-19 years) and 7.9% (20-24 years) (ABS, 2005b). In a study of 1749 same-sex attracted and gender-questioning young people around the same time period, 15% of them were assaulted (Hillier et al., 2005). While we will never get an equally matched comparison (because we are yet to record sexuality or gender identity in any statistics at the Australian Bureau of Statistics), these numbers highlight that same-sex attracted and gender-questioning young people appear to be assaulted more than young people in the general population. The increasing level of violence is especially concerning given reporting is decreasing among GLBTI adults. Unfortunately there is no research documenting reporting and help-seeking behaviours of GLBTI young people (Hillier et al., 1998, 2005, 2010).

The most recent Australian research reports 87% of 600 New South Wales respondents (Attorney Generals Department of NSW, 2003), 75% of 1,094 Queensland respondents (Berman & Robinson, 2010), and 57% of 339 Victorian respondents in GLBTI communities did not report victimisation (Leonard et al., 2008). These levels are higher than the general Australian population, which reports victimisation to police at rates of at least 75% (victims of break-in) (ABS, 2005a), with non-reporting rates of approximately 39% for personal crime (ABS, 2011).

It continues to be the case, though, that unique factors impact on whether or not GLBTI communities will report such violence (Vickers, 1996). First, GLBTI victims *fear the outcomes of reporting*. Specifically, they fear: police homophobia; the potential disclosure of GLBTI status; rejection from family/friends; and embarrassment about being victimised (Baird et al., 1994; Berman & Robinson, 2010; Kuehnle & Sullivan, 2001; Leonard et al., 2008; Merrill & Wolfe, 2000; Pattavina et al., 2007; St. Pierre & Senn, 2010). Second, they *make assumptions about the reporting process*, such as assuming that police will: minimise the seriousness of the incident; think it is a mutual fight as part of the dynamics of intimate partner violence; mistreat and further victimise them; fail to protect them; judge them as individually at fault; assess the incident as too trivial/not reportable; or suggest reporting is futile because the offender will not be located (Baird et al., 1994; Herek, Cogan & Gillis, 2002; Lilith, 2001; Pattavina et al., 2007). While some of these factors (such as the idea that the police will fail to protect them, or the embarrassment they feel about being a victim) are shared by those that have been victimised within heterosexual communities, there are some unique factors here that are likely to be only held by GLBTI communities. Thus, victimisation experienced by GLBTI communities is an ongoing and serious concern for the just operation of criminal justice. Low levels of reporting victimisation are of particular concern when police may be a key point of referral to other victims' services (e.g. counselling). In addition, reporting victimisation is a central form of knowledge used by police in investigating GLBTI victimisation, and is vital for police if they are to work towards prevention effectively.

Counterproductive police responses

There may be a variety of factors at play in causing violent victimisation to go underreported. A wider climate of discrimination, inequality, homophobia, and heteronormativity can function to normalise violence and negative treatment in the lives of GLBTI people. If violence is understood as unremarkable, then it can reinforce a view that victimisation will not be taken seriously or addressed. The necessity to 'come out' to liaison officers during the reporting process may also contribute to underreporting (Berman & Robinson, 2010, pp. 126-127). However, a key reason why GLBTI people do not report victimisation relates to unsupportive and unhelpful police responses, which is an important dynamic to understand if interactions between police and GLBTI communities are to be strengthened. Research demonstrates unhelpful police responses include: failing to arrest perpetrators; failing to intervene to protect GLBTI people; and not considering an offence a criminal issue unless it is particularly serious (Pattavina et al., 2007). Other unhelpful responses occur when police respond to specific crimes, such as intimate partner violence. In this context, some research suggests that police make assessments about who the perpetrator is by adopting gendered (and heteronormative) assumptions in their response. In particular, they often assume that the more 'masculine', 'butch', or physically larger partner is the perpetrator, and the more 'feminine', or smaller partner is the victim (whether or not this is the case, and whether or not such dynamics even explicitly exist in the relationship), regardless of the actual facts of the matter at hand (Hassouneh and Glass, 2008, p. 322).

Importantly, research demonstrates unsupportive police responses are reported at much higher rates in GLBTI communities than the general Australian population. For example, Queensland research shows 58% of respondents who sought police assistance felt supported by them (Berman & Robinson, 2010), in contrast with 75% of the general population being satisfied with police (AIC, 2007). The historical context of GLBTI-police relations is an important factor to consider in understanding such responses. Historically, relations between GLBTI communities and police have been strained by the criminalisation of homosexual sexual activity and the consequent discriminatory police practices attached to such legislation (Comstock, 1991). Discrimination and violence perpetrated by the police themselves have also contributed to these dynamics (Leonard et al., 2007; Victorian Gay and Lesbian Rights Lobby, 2000). While police have since worked hard to improve relationships with GLBTI communities (Tomsen, 2009), historical policing practices have left a legacy that continues to shape how GLBTI people report crime and access police support in a contemporary context (Berman & Robinson, 2010; Dalton, 2006; Willett, 2008; Cherney, 1999). Young people are reluctant to report to police (Dwyer 2011, 2009) based on their concerns about further discrimination from police, and service providers seeking to help victims are often reluctant to report to any police other than those known to GLBTI communities (Dwyer and Hotten, 2009). These issues may also be evidenced in international research suggesting that, when victimised, members of GLBTI communities are more likely to seek support from informal networks as opposed to formal ones such as the police (Farrell and Somali, 2006; Kuehnle and Sullivan, 2001; Leonard, et al., 2008; Merrill & Wolfe, 2000).

Understanding the role of GLBTI police liaisons

The high levels of victimisation, low levels of reporting, the societal contexts of inequality and discrimination facing GLBTI communities, and the historical context of policing and GLBTI communities are important dynamics to consider in understanding how to improve relationships between GLBTI communities and the police. However, it is necessary to reflect on the way that GLBTI liaison services are taken for granted as central to improving such relationships. The role of GLBTI liaison services must be explored, and the way in which such programs factor into these dynamics as well must be evaluated. However, there is very little empirical research on GLBTI police liaison services in Australia that would help in further explicating these dynamics.

We know that GLBTI police liaison programs were set up within general policing structures in the early to late 1990s as a form of support for GLBTI communities. We know they provide advice to GLBTI victims on how, or even if, to report victimisation to police (Berman & Robinson, 2010). Studies conducted on GLBTI victimisation in Queensland, New South Wales, and Victoria have included questions about police liaison work, but we know little else about other states and their programs. Research has documented tensions experienced by Australian “police auxiliaries” (Cherney & Chui, 2011, p. 1801; Cherney & Chui, 2010), including difficulties experienced by auxiliaries from an ethnic/racial group who had problematic historical relations with police. However, it remains to be explored whether this is an issue for GLBTI police liaison officers – an area of particular concern given the historically problematic relationships between GLBTI communities and police noted above (Comstock, 1991).

To date, no research has gathered data from GLBTI police liaison officers, and research conducted on these services has been done *within* studies of GLBTI victimisation (Berman & Robinson, 2010; Leonard et al., 2008). For example, Leonard et al. (2008) examined how many Victorian GLBTI victims reported to police, with a minor focus on their experiences of this process. They noted 26 out of 339 respondents reported victimisation to police (with some of these outcomes notably negative), and showed that only six of these respondents accessed a Gay and Lesbian Liaison Officer (GLLO) to report victimisation, with 75% of these people feeling very supported by GLLOs (Leonard et al., 2008). These issues demand elaboration, particularly as participants commented on their lack of satisfaction with general police. For example, one respondent in New South Wales was told not to access GLLOs because “it would have been more involved than necessary” (Attorney General’s Department of NSW, 2003, p. 50).

The most detailed data about GLBTI police liaison services comes from Berman and Robinson (2010). In the largest ever study (n = 1094) of homophobic and transphobic victimisation in Queensland, their study provided quantitative and qualitative data from GLBTI communities about reporting victimisation to police. This research demonstrated that “the GLBTIQ community engages even less with liaison officers” (Berman & Robinson, 2010, p. 144) than mainstream police. Only 12% of the 53% victimised sought assistance from police and of these only 4% sought assistance from GLBTI police liaison officers, with most noting the officers as supportive, although some stated they felt unsupported. These figures are remarkable, considering 52% of respondents

were aware of liaison officer's availability for support. GLBTI communities expressed problems with GLBTI police liaison services, including: high turnover and lack of availability of liaison officers; unrealistically large territories allocated to liaison officers; officers willing to take on liaison role but uninterested in advancing the program; and lack of effective training. While these limitations are not unique to GLBTI liaison services, but also experienced by police liaison services more broadly, and the Queensland Police Service has taken action to ameliorate these issues (such as implementing guidelines for appropriate police conduct with transgender people), there is more we need to know.

As GLBTI liaison officer programs have not constituted the focus of research in their own right, such targeted research would allow for an exploration of many of the issues that we still need to know. These include issues related to the confidence of GLBTI people to report to police such as:

- what strategies are employed by GLBTI police liaison services nationwide to encourage GLBTI people to report;
- how GLBTI perceptions of police influence confidence to report;
- how historical police homophobia (Baird et al., 1994; Cox, 1990, 1994) influences reporting;
- the factors influencing GLBTI young peoples' reports of victimisation to police;

In addition to these issues, we need to know a lot more about GLBTI police liaison programs and the officers who put these programs into action through specific strategies and processes. Such issues might include:

- how (mis)understandings about the nature of the police liaison role influences reporting;
- how previous experiences with liaison officers inform reporting; and
- the form of police support GLBTI communities would prefer if indeed they do not prefer support in the form of a GLBTI police liaison program.

The key point is that we do not yet have data to fully understand whether or not GLBTI police liaison services provide any additional benefit above general policing services. These issues demand further research attention, as we need to ensure GLBTI victims are not "receiving reduced support and a less valuable service" (Leonard et al., 2008, p. 42) than those seeking support from mainstream police, and to increase confidence to report to police amongst GLBTI communities.

There is a further issue that must be addressed in this context, and that is the critique, levelled by minority groups, against the way that police can and do serve their interests. Reforms to the law or organisational practices such as those of the police have been critiqued because of the way that the political aims of minority groups are often subsumed into the broader goals of the law or policing organisations. The costs of doing so can be quite high, and the critical and more radical goals of these groups can be lost or distorted in the process. This is an important dynamic to consider in the context of liaison programs – such programs do not work to address the broader structural and social changes that might be required in order to fully address violent victimisation in our society. Thus, we argue that it is important to take these tensions and complexities into account when we want to understand the potential limitations of reforming liaison programs to address the needs of GLBTI communities in this context (see for example Walklate, 2011, pp. 148-150; Baird, 1997; Johnson, 2012).

Conclusion

While police and government have worked to reduce violence against GLBTI people, as exemplified in initiatives like the NSW *Working Together Strategic Framework 2007-2012*, there is clearly more we need to know about how effective this has been. We do not yet have evidence as such that GLBTI police liaison programs are achieving the goals that they were developed to achieve, or doing so effectively. As such, data that demonstrates how, or even if, these programs are considered useful/effective by GLBTI people is needed. Even more important is gathering directly the perspectives of GLBTI police liaison officers themselves about how they experience their role as a liaison and the extent to which they think the programs are fulfilling their intended purpose. In addition to this, we have an apparent lack of information about the complex context in which GLBTI-police relations happen. For instance, we are yet to fully comprehend the role of perceptions of police amongst GLBTI people and how they influence how GLBTI people report victimisation to police. In

addition, we are not aware of the extent to which historical police-GLBTI relations impacts upon these perceptions in a contemporary context – has the historical criminalisation of sodomy left a legacy of mistrust of police amongst GLBTI people in contemporary times? We also know very little about the role of unsupportive police responses to GLBTI reports of victimisation. In all, there is much work to be done to better understand relations between GLBTI police liaison programs, GLBTI people, and reports of victimisation.

Further research must therefore aim to more fully account for relevant contextual and social factors, and in particular the role of police liaison services in this landscape. These forms of knowledge will be important for further strengthening police service provision and creating stronger partnerships between GLBTI communities and police. More importantly, we need to begin to ask challenging questions about GLBTI police liaison programs in order perhaps to interrogate (and possibly disturb) the taken-for-granted assumption that liaison programs are the best way to engage with GLBTI people. This is an area that is ripe for further theorisation, given the rich body of research in similar fields regarding victimisation in various forms.

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* The authors are currently undertaking such research in Queensland and New South Wales, Australia, with Dr Christine Bond, Dr Murray Lee, and Associate Professor Thomas Crofts. The project uses quantitative and qualitative tools, and encompasses the views of GLBTI communities and GLBTI police liaison officers themselves.

GLBTIQ young adults' experiences & perceptions of unwanted sexual attention in licensed venues: emerging themes and issues

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Clubs and pubs⁵ serve as a key site in the social lives of many young adults (Chatterton & Hollands, 2002; Hollands, 2002; Hunt, Moloney, & Evans, 2010; Northcote, 2006). They may hold particular significance for young adults who identify as gay, lesbian, bisexual, transgender/sexual, intersex or queer⁶ (GLBTIQ) through the provision of space where same-sex interaction (or other sexual configurations outside of heterosexuality) and/or 'alternative' forms of gender performance may be normative and acceptable behaviours. GLBTIQ friendly venue spaces can serve as a site of identity exploration and confirmation, allowing young adults to consolidate a sense of group membership or belonging in these communities. Yet, emerging research evidence suggests that licensed venues may also be a site that facilitates sexually harassing and sexually violent behaviours (Fileborn, forthcoming; Parks et al., 1998; Snow, Robinson, & McCall, 1991; Watson, 2000). However, the bulk of this research has been concerned with the experiences of heterosexual women. It is unclear if GLBTIQ young people also experience these sexually unwanted or violent behaviours, or, if they do, if these experiences differ from those of heterosexual women. Identifying whether GLBTIQ young people experience unwanted sexual attention and sexual violence in these venues, and the circumstances under which these experiences occur, is likely to be vital to informing appropriate responses and preventative action.

This paper presents findings from a doctoral research project exploring young adults' experiences and perceptions of unwanted sexual attention in licensed venues. Specifically, it presents on a subset of data based on the responses of participants who identified as GLBTIQ. Firstly, GLBTIQ participants' reasons for using licensed venues, and the particular significance of pubs and clubs for them, are considered. Participants viewed GLBTIQ friendly pubs and clubs as highly valuable social sites that fostered a sense of community, safety, and belonging based on shared gender identity and/or sexuality. However, this experience of GLBTIQ venue spaces was not universal. In particular, it was challenged by the occurrence of unwanted sexual attention and sexual violence in these spaces. Participants' perceptions and experiences of unwanted sexual attention are addressed in the second part of this paper. Finally, there were clear connections between unwanted sexual attention/sexual violence and heterosexist violence and abuse in some participants' narratives. The intersections between these forms of violence, and the implications they may have for how we conceptualise sexual, physical and heterosexist violence are considered here. It is argued that for some participants there was a blurring of these forms of violence, and current conceptual models that often view these forms of violence as distinct may be insufficient to adequately account for these experiences.

Literature review

Sexual violence & GLBTIQ communities: what do we know so far?

Currently, there is only a limited body of research documenting the experiences and prevalence of sexual violence in the GLBTIQ communities (Todahl et al., 2009). However, the current body of research suggests that GLBTIQ individuals experience sexual violence in a range of different contexts, and GLBTIQ sexual violence appears to occur at a similar rate as sexual violence within heterosexual relationships (Braun et al., 2009; Duke & Davidson, 2009; Girschick, 2002; Gold et al., 2009; Leonard et al., 2008; Turell & Hermann, 2008; Vickers, 1996). In relation to sexual violence occurring within gay, lesbian, bisexual and transsexual relationships, Leonard et al (2008, p.45) found that 25.8% of participants in their Victorian based survey had been in a

⁵ The terms 'clubs and pubs' and 'licensed venues' are used interchangeably throughout this paper.

⁶ The identity category of queer was included in this acronym as it is the term a number of participants used to refer to their gender identity and/or sexual orientation. It should also be noted that members of the GLBTIQ communities use a diverse array of terms to label their gender identity or sexual orientation that are not represented here.

sexually abusive relationship.⁷ Within the GLBTIQ communities, experiences of intimate partner violence may vary based on gender and sexuality identity. For instance, in the Private Lives survey female-identified participants and intersex male-identified participants were the most likely to report having experienced forced sex (Pitts et al., 2006).

GLBTIQ individuals may also experience sexual violence as a form of heterosexist violence (Mason 1993, p3; Leonard et al., 2008, p23), and women (or those read as 'woman') may also experience sexual violence in the form of 'ordinary' male violence against women (Mason 1993, p4). However, there is in general a dearth of information on GLBTIQ experiences of sexual violence, and, in particular the experiences of *young* members of the GLBTIQ community, though it has been suggested that young GLBTIQ individuals may be particularly vulnerable to sexual violence (Braun et al., 2009, p356; NSW Attorney General's Department 2003, p3). This study goes some way to beginning to address this gap by exploring GLBTIQ young adults' experiences of unwanted sexual attention within a specific social context.

Space, place and being GLBTIQ

Sexual identity can play a significant role in influencing the ways in which space is used and accessed. Members of GLBTIQ communities may experience violence and harassment in public spaces based on their identity. For instance, gay men and lesbian women may be the targets of heterosexist violence (physical or sexual) in public space as a result of challenging the heterosexual hegemony of public space (Leonard et al., 2008; Mason, 1993; NSW Attorney General's Department, 2003; Tomsen and Markwell, 2009). That is, sexual identities are policed in public spaces, with violence and other abusive behaviours used as a means to 'punish' or control those who fall outside of 'acceptable' sexual identities and practices (e.g., heterosexuality). Importantly, not all members of GLBTIQ communities need to directly experience heterosexist violence in order for it to impact their behaviour and feelings of belongingness and safety in public spaces, as 'a powerful message of hatred and intolerance is sent to all lesbians and gay men whenever someone is attacked because of their sexual preference' (Mason, 1993, p.2).

The experience or threat of heterosexist violence and harassment can profoundly influence the ways in which GLBTIQ individuals access and use public spaces, as well as how they express their sexuality or gender identity in public spaces. There is evidence to suggest that GLBTIQ individuals frequently conceal their sexual or gender identity in order to avoid violent or harassing encounters when occupying public spaces (Berman & Robinson, 2010; Leonard et al., 2008; Mason, 1993; NSW Attorney General's Department, 2003; Pitts et al., 2006; Tomsen & Markwell, 2009). Many GLBTIQ people, for example, aim to 'pass' as heterosexual in order to avoid harassment or violent encounters, at least within some specific social situations. Leonard et al's 2008 study of heterosexist and same-sex violence found that participants were most likely to conceal their gender or sexual identity in 'the public and semi-public spaces of the street, work, and social and community events' (2008, p.22). A range of other protective mechanisms may also be employed, such as continual observation of the space one is in and the people who inhabit it (Leonard et al., 2008; Mason, 1993; Tomsen & Markwell, 2009), not dissimilar from women's use of protective routines and strategies in public space.

The potential for homophobic/heterosexist responses from other venue patrons has serious implications for the ways in which GLBTIQ people can use and access licensed venues. Hutton (2006, p.99) found that 'women who do not identify as heterosexual are likely to be more careful in picking which club spaces to be involved in'. Likewise, given that the *appearance* of being a member of the GLBTIQ communities appears to play a role in exposure to heterosexist abuse, this suggests that GLBTIQ individuals may take steps to disguise their sexual or gender identity and 'pass' as heterosexual and/or cis-gendered.⁸ Indeed, as Chatterton and Hollands (2003, p.149) observe, 'gay men and lesbians generally only really experience dominant mainstream spaces as 'invisible gays''.

However, licensed venues can also play a positive role in GLBTIQ communities. GLBTIQ friendly venues provide a space for the exploration of personal identity, to engage in sexual interaction, and to make connections with GLBTIQ communities (Gruskin et al., 2006; Lugosi, 2009; Parks, 1999; Rooke, 2007). For participants in Parks' (1999) study on lesbian social drinkers, gay and lesbian friendly bars provided social spaces for women to explore their sexual identity and connect with the lesbian community (see also Gruskin et al., 2006). These licensed social spaces also provided participants with 'relatively rapid access to information about the values,

⁷ Breakdown of figures by gender and sexuality types not available.

⁸ Cis-gendered refers to individuals whose sex and gender identities are the same, eg., male sex and male gender identity. Refer to Fileborn (2012).

communication patterns, roles, and social supports available within the subculture of their local communities' (Parks, 1999, p.144), highlighting the capacity of licensed spaces to function as a site of support, connectedness, and belonging in GLBTIQ communities. Or, as Gruskin and colleagues suggest, the bar becomes 'a culturally agreed upon "staging area" for the fulfillment of social and psychological needs' (2006, p.116). Gay and lesbian friendly bars can also represent one of the few social sites where same-sex sexual interaction can be safely and openly engaged in, and both short and long-term intimate partners can be sought (Gruskin et al., 2006, p.112).

Methodology

This study sought to explore young adults' experiences and perceptions of unwanted sexual attention in licensed venues. As noted previously, this paper is concerned with a subset of participants from this research, specifically those participants who identified as being gay, lesbian, bisexual, intersex, transsexual/gender, queer (GLBTIQ), or otherwise non-heterosexual or of a diverse gender identity. Four questions underpinned this research:

1. What are the 'characteristics' of unwanted sexual attention in licensed venues?
2. What role do factors such as gender and sexuality play in influencing experiences and perceptions of unwanted sexual attention?
3. What role does the physical design of venues play in facilitating unwanted sexual attention?
4. What role does the culture of venues play in facilitating unwanted sexual attention?

A range of research methods was employed to explore these questions, and have been drawn on in the ensuing discussion and analysis. This included both quantitative and qualitative approaches, although the study was primarily qualitative in nature. The following methods were utilised in this research:

Online surveys: These were used as an avenue to gain broader insight into young adults' use of licensed venues, and as an initial exploration of the factors that might influence safety in licensed venues and perceptions of unwanted sexual attention. The results of the surveys were also used to inform the issues and themes covered in the focus group phase of the research.

Focus Groups: These functioned as an in-depth exploration of the topics covered in the online surveys, as discussed above. They investigated how young people understand, discuss, and contest unwanted sexual attention in licensed venue settings.

One on one interviews: These interviews were conducted with victim/survivors of sexual assault that occurred in a licensed venue setting. They were designed to allow participants to provide an in-depth account of their experience, with a particular focus on the role that the venue design and culture may have played in facilitating their experience.

Participants were recruited through a range of strategies, including online advertisements, university mailing lists, and sexual assault counselling centers. The surveys were also used to recruit focus group participants. Participants for the surveys were provided with a link to click through to the survey, while interview and focus group participants were requested to contact the researcher directly. Participants were self-selecting, with the exception that they were required to be aged between 18-30 in order to participate. Gay men and bisexual men and women made up the majority of this sample. Unfortunately, no transgender/sexual participants were recruited for this research. However, one interview participant had a transgender partner, and discussed some of the issues her partner faced when using licensed venues. Thus, the experiences of transgender/sexual people are still represented to a limited extent, albeit not in a first-hand manner. An overview of participants is included in Table 1.

Table 1: Overview of participants

Sexuality	Surveys	Focus Groups	Interviews	Total
Gay	34	2	0	36
Lesbian	9	0	0	9
Bisexual	21	2	1	24
Queer	6	0	0	6
Intersex	1	0	0	1
Transgender	0	0	0	0
Other*	2	0	0	2
Heterosexual**	157	12	3	172

*The 'other' category included a participant who didn't identify with any particular sexuality, but said he had more sex with boys than girls, and a participant who didn't elaborate any further on their sexuality beyond 'other'.

**Some results from heterosexual participants are used as a point of comparison in the results section.

The sample size for this group of GLBTIQ participants is small, and it should be noted here that the results of this research are not generalisable across the broader GLBTIQ communities. However, given the dearth of research on unwanted sexual attention and sexual violence in the GLBTIQ communities, I purport that it is important to start exploring, identifying, and discussing the issues that these communities may be facing.

Results & discussion

Use and significance of licensed venues for GLBTIQ young people

Within Melbourne, relatively speaking, only a very limited number of GLBTIQ specific venues are in operation. Further, some of these venues operate only as one-off GLBTIQ nights as opposed to functioning as dedicated venue spaces. This limited number of designated venue spaces constrained how and when GLBTIQ participants were able to utilise pub and clubs, although some 'heterosexual' or non-GLBTIQ specific venues were also discussed as being spaces that participants could freely and openly patronise (e.g., without having to pass as 'straight').⁹ Some participants commented that the lack of GLBTIQ specific spaces was a problem for them when they go out. The limited number of venue spaces available made it difficult for some participants to find places to go where they felt safe and welcome, as GLBTIQ specific venues were often, though not always, perceived as being safer and more inclusive than other types of venues.

It was also apparent in participants' discussions that there were fewer spaces available specifically for the use of lesbian women. As interview participant Clementine commented:

There's far more gay male establishments in Victoria than there are... establishments for gay women.

This suggests that access to GLBTIQ-specific venues may also vary according to gender and sexuality, and access to venues may be transitory or temporary. This was particularly the case for groups other than gay men, as there was no longer (at the time of writing) any dedicated lesbian venues open in Melbourne, and many of the established GLBTIQ venues were viewed by participants as being targeted more specifically towards gay males.

The most common reasons for going out to clubs and pubs for both survey and focus group participants were to spend time with friends, and to consume alcohol (ranging from 66-100% of GLBTIQ survey participants), although this finding was not unique to GLBTIQ participants. Virtually all participants (97.4% of all survey participants) used licensed venues to spend time with their friends. There were, however, some differences in uses of licensed venues compared to heterosexual participants. For instance, gay and lesbian participants used

⁹ It is not my intention here to suggest that GLBTIQ participants *only* attended or were *only* able to feel safe within GLBTIQ-specific venues. Many GLBTIQ participants also attended 'straight' venues on a regular basis.

venues to meet new people, with 44.1% and 44.4% respectively using venues in this way, in comparison to 28% of heterosexual participants. In saying this, it is my contention to illustrate that there appears to be some differences in the ways that clubs and pubs are used based on factors such as gender identity and sexuality.

However, it was in the qualitative phases of the study that the particular significance of licensed venues to GLBTIQ participants became apparent. GLBTIQ specific venues were important to participants as they were seen to foster a shared sense of identity and community based around gender identity and/or sexuality. They were mentioned as one of the few safe public spaces where GLBTIQ people could openly engage in sexual interaction and look for sexual partners. Focus group participant Alex, who identified as gay, placed great importance on these venues because of this, and saw them as highly valuable social spaces:

As a gay man, like, I feel that going to a gay venue is the place to meet other gay men. Unless you want to, you know, do it online, it really is one of the few places that you can go to meet new people... and you need those venues for that reason.

Participants also suggested that there was a sense of community and understanding created through the shared experience of homophobia and intolerance encountered in other spaces, and that this made GLBTIQ spaces more friendly and welcoming out of a wish to avoid perpetuating the discrimination faced elsewhere by these groups. Focus group participant Laura described the culture of these venues as being welcoming and based on tolerance:

It's just a more, more friendly, more open-minded sort of vibe in there, and you can get away with being a lot more eccentric.

Interview participant Clementine highlighted the particular importance of lesbian nights for her, which she experienced as being a safer space to socialise in:

Those nights and those events that I was talking about do, do have a safer feel about them. There's a sense that there's a mutual understanding, a shared experience of, of perhaps that intrusiveness or harassment that you get in other venues.

According to Clementine, this shared experience of harassment meant that there was in her experience less aggression in gay and lesbian venues, as everyone knows what it is like to be on the receiving end of such behaviour. While this sense of shared identity contributed towards the perception of safety in these venues, these spaces were not always experienced as safe. The perception of GLBTIQ venues as being safe was contested by the experiences of one queer female survey participant, who said she frequently encountered aggressive and sexually unwanted behaviour in queer venue spaces:

Queer venues and nights often feel just as uncomfortable for me as straight ones... I generally feel more unsafe around men, especially packs of straight men, but I have felt threatened by all kinds of people- queer women, straight women, gay men, straight men and all those in-between.

Further, these spaces were not always welcoming towards all gender and sexuality groups, with lesbian and bisexual women in particular feeling excluded from venue spaces that were often targeted towards gay males. Likewise, focus group participant Benjamin contested the idea that GLBTIQ venues were automatically welcoming, suggesting that how you felt in a venue was related more generally to the venue culture:

I'd probably feel less welcome in a gay venue, um, um, because, I don't know, I suppose it's not so much about sexuality as about culture and what kind of group and people you hang out with and stuff.

Venue culture in this context refers to the behavioural and attitudinal norms of a venue. It includes the type of sub cultural groups that use a venue, genres of music played, predominant or normative styles of dress, and the way that patrons interact with each other. Thus, in this instance Benjamin appears not to relate to the culture of gay and lesbian venues, and this influences his sense of belonging within these spaces. Similarly, Lugosi's (2009) study of gay and lesbian venue spaces found that not all gay and lesbian participants related to the cultural signifiers used in these venues (such as displaying the rainbow flag), and this tended to discourage these participants from accessing those spaces. This suggests that alternative readings of certain environmental cues or signifiers may disrupt attempts to create spaces that are 'inclusive' of certain groups or cultural practices.

These findings suggest that participants greatly valued the sense of community and shared identity of GLBTIQ venue spaces, and generally found or perceived these spaces as safer than other types of licensed venue space. However, whether participants felt safe or welcome in venues was a complex and nuanced phenomenon, and was dependent on a range of factors not only related to sexuality or gender identity. The perception of GLBTIQ

venues as constituting safe spaces was contested by some participants, and is also further challenged by the occurrence of unwanted sexual attention in these spaces, as the proceeding discussion will illustrate.

Experiences and perceptions of unwanted sexual attention in licensed venues

The ensuing discussion briefly outlines both participants' experiences and perceptions of unwanted sexual attention in licensed venues, and seeks to provide a brief overview of the ways in which participants discussed and contested unwanted sexual attention as a conceptual or investigatory construct. Participants in the survey component of this study overwhelmingly responded that unwanted sexual attention occurs in licensed venues (between 90-100% of GLBTIQ participants). Further, the majority thought that unwanted sexual attention is a common occurrence in venues (86.7% of GLBTIQ participants), although a smaller minority either contested (5.7%) or was unsure (8.6%) about this. While most survey participants saw unwanted sexual attention as mostly impacting women, a majority (61.8%) of the gay male participants identified it as something that happens to both men and women.

While participants thought that unwanted sexual attention was a common occurrence, many participants commented in the surveys and focus groups that they thought most of the unwanted sexual attention that happened would be in the more 'minor' end of the spectrum. As a queer male survey participant commented, "I feel that a lot of unwanted sexual attention is either fairly minor or covert". Some participants, particularly gay males, contested whether the occurrence of this behaviour was such a 'big deal', and a few participants suggested it was something they could easily handle. The following quote from a gay male survey participant encapsulates this viewpoint:

I really don't think the topic is an issue. We are all adults so if someone was to approach me with unwanted sexual attention I would just tell them to fuck off.

Further, some participants often went to venues seeking sexual attention (as noted earlier), and were willing to accept a certain level of unwanted sexual attention as par for the course as a result of this. That is, as participant Alex suggested, in order to be able to give sexual attention in a venue one had to accept being on the receiving end of sexual attention as well, even if this was occasionally unwanted.

Participants reported experiencing unwanted sexual attention in a range of venue types and contexts. This included instances of unwanted sexual attention occurring in gay and lesbian venues, and being perpetrated by individuals identified as members of the GLBTIQ communities by participants. For instance, interview participant Clementine shared her experience of being groped by a stranger, who she identified as a lesbian woman, in a venue that was hosting a gay and lesbian night. Experiences such as this challenge and disrupt the idea that gay and lesbian spaces are always experienced as safe and inclusive. Clementine's experience also challenges dominant understandings of sexual violence, which frame this violence as occurring almost exclusively within the context of heterosexuality¹⁰(Duke & Davidson, 2009; Girshick, 2002).

However, that is not to say that GLBTIQ participants only experienced unwanted sexual attention in gay and lesbian venues, or that gay and lesbian venues were more likely to have these behaviours occurring. Focus group participant Alex, who worked as a DJ in both gay and straight venues, indicated that he had witnessed this behaviour happening fairly equally in both types of venues, and had personally experienced unwanted sexual attention from both gay men and straight women.

This suggests that unwanted sexual attention occurs within a range of different venue contexts, and in a range of different victim/perpetrator configurations that extends beyond the predominant 'man as perpetrator/woman as victim' paradigm of sexual violence. Interestingly, gay and lesbian specific venues were discussed as being safe and inclusive, despite the occurrence of unwanted sexual attention in these venues. Safety, in this context, appears to refer to the ability to freely express one's gender identity or sexual orientation, rather than the absence of sexual or physical harm. While participants did not directly articulate the reasons for this, it is possible that these clubs and pubs were spoken of positively in an effort to avoid drawing negative attention to what was otherwise a highly valued social space, as well as avoiding drawing negative attention to GLBTIQ communities more generally (Girschick, 2002; Ristock, 2002; Todahl et al., 2009; Vickers, 1996). As Vickers (1996, para 31) notes in relation to gay and lesbian intimate partner violence, disclosing these experiences of violence 'is tantamount to adding to the already substantial arsenal of weapons

¹⁰ That is, that sexual violence is conceptualized as primarily occurring within heterosexual relationships, with men perpetrating the violence and women the victim/survivors of the violence.

employed by homophobes to oppress lesbian women and gay men'. This may also act as a barrier to disclosing, or acknowledging the extent of harm caused by unwanted sexual attention in GLBTIQ clubs and pubs.

These findings may also speak to the impact of heterosexism and heterosexist violence in the lives of GLBTIQ young people (see also Leonard et al., 2008, p.22). That is, it is possible that these negative experiences were downplayed because they were perceived or experienced as being of lesser harm than encountering heterosexist violence, or were tolerated in order to be in a space that was otherwise open and inclusive of diverse gender identity and sexualities.¹¹ That said, in general, participants tended to expect unwanted sexual attention in venues, and found *some* forms of unwanted sexual attention relatively 'harmless'. This may also go some way towards explaining why GLBTIQ venues were discussed as safe despite unwanted sexual attention occurring. Unfortunately many participants in this study discussed experiencing heterosexist violence when using clubs and pubs, and this clearly had a profound, negative impact on their access and use of venue spaces. The intersections of unwanted sexual attention and heterosexist violence will now be explored.

Intersections of violence: Unwanted sexual attention as a form of heterosexist abuse

It was also apparent from the comments made by participants in the qualitative phases of the study that heterosexist violence and abuse was an issue for them when using licensed venues. A number of participants drew links between the occurrence of unwanted sexual attention and heterosexist violence. That is, unwanted sexual attention and sexual violence were employed as, or intersected with, forms of heterosexist violence. Heterosexist violence is used in the context of this paper as an umbrella term to cover both homophobic and transphobic abuse, and other forms of violence and discrimination experienced based on gender identity or sexuality.¹²

Participants mentioned heterosexist violence and abuse as a factor that influences their general safety when out in venues. These experiences were discussed almost exclusively by female-identified participants, and suggest that experiencing unwanted sexual attention may intersect with both gender identity and sexuality. One lesbian survey participant described her experiences of being harassed by straight men in licensed venues. It was clear that this behaviour made her feel uncomfortable, and impacted her ability to feel safe and welcome in certain venue spaces:

As someone who identifies as lesbian, I particularly feel conscious when in a pub with lots of loud hetero males. It is almost impossible for me and my lesbian/gay male friends to be in this environment without some form of unwanted attention - usually indirect but still.

Several participants also experienced unwanted sexual attention and sexual violence overtly as a form of heterosexist violence. Clementine discussed her transgender partner's frequent experiences of transphobic violence, which included verbal and physical abuse, and sexualised violence. Her partner had a recurrent experience of having heterosexual men use the following method in an attempt to determine her sex/gender identity:

Because, to give you a sort of typical experience, and it's always with groups of men, they'll be curious as to whether she's male or female. And apparently one of the ways you can ascertain that is to pretend to trip and grab onto her breasts.

This experience clearly has a sexual element to it, and could be considered both sexual and heterosexist violence. The use of violence and abuse as a way of policing bodies that are not immediately readable as man/woman in venue spaces has also been documented elsewhere (Browne, 2004). Clementine also recounted her experience(s) of being sexually harassed by heterosexual men at venues hosting lesbian nights:

I would never be cracked onto by a woman, but I would attract every single straight man in the room without fail... and there's a wariness there and I think it's well founded... If you're at a lesbian venue and there's a group...of straight men... you have to be constantly aware of where they are in the room, whether one of them is approaching you, who they're approaching.

Although Clementine referred to these experiences as being a 'running joke', it was clear that the actions of these heterosexual men profoundly impacted her ability to feel safe and relaxed in venues that were trying to provide safe and inclusive spaces for lesbian women to socialise in. Her comment also speaks to the

¹¹ However, as noted elsewhere in this paper, this is not to suggest that GLBTIQ people are *never* safe in *any* 'straight' venues or public spaces.

¹² This definition is based on Leonard et al's description of heterosexism (2008:4).

threatening nature of these unwanted advances from men, as they result in her being constantly on guard and hyper-vigilant in a space that was, by her own account, supposed to be safe. This harassment can be seen as a form of heterosexism, as the actions of the men can be read as being based on the assumption that lesbian women engage in same-sex interaction for the pleasure of men, or that lesbian women can be turned 'straight', all they need is the 'right man'. Further, as Tomsen and Mason (2001, p.3) note by 'heterosexualising a woman who is known to be lesbian, the perpetrator is also able to temporarily feminise her', consequently reinforcing heterosexuality. Again, this form of harassment is also highly sexual in nature, and thus heterosexist harassment and unwanted sexual attention can be seen intersecting in this experience.

An intersex/queer survey participant also reported experiencing heterosexist sexual harassment:

Straight people use sexual attention and threats of sexual violence as a way to harass queer people sometimes and that's very upsetting and scary.

The comments from this survey participant suggest that sexual harassment and violence is being used intentionally and overtly as a form of heterosexist violence. In all of these examples, the actions of these men also prevent these lesbian, transgender, queer, and bisexual women from being able to safely and freely utilise GLBTIQ spaces. This is particularly problematic given the reliance of many of the GLBTIQ participants on these venues as a safe space to socialise and to engage in sexual interaction, as documented earlier in this paper. For instance, Clementine articulates how gay and lesbian venues are one of the only public spaces she can engage in open sexual interaction with her partner without encountering heterosexist harassment from other patrons, particularly heterosexual men:

Somewhere where I can, you know, sit on my partner's lap and kiss her openly and I don't have to worry that anyone's looking, and I don't have to worry that some, you know, dickhead guy over in the corner is going to be somewhat offended by that and come over and tell me that I should really be dating him.

The invasion of these spaces by heterosexual men removes the ability of these women to freely use these venues to openly socialise, interact, and explore their personal or sexual identity as lesbian women with the threat of heterosexist harassment, abuse, or violence removed. That Clementine locates lesbian venues as one of the *only* public/semi-public spaces she can engage in open sexual interaction with her partner speaks to the continued impact of heterosexism on the lives of GLBTIQ individuals. It highlights the ongoing need for GLBTIQ specific venue spaces, and for 'straight' venues to take steps to create safe and welcoming spaces for all patrons regardless of their sexuality or gender identity.

Conclusion

Throughout this paper I have argued that GLBTIQ venue spaces represent a significant, and largely positive, social space in the lives of the GLBTIQ participants in this study. However, this perception of safety and shared identity was contested by some participants, and in particular was challenged by the occurrence of unwanted sexual attention in these venues. Unwanted sexual attention was experienced in a range of venue contexts, and intersected with heterosexist violence for a number of participants. So what are the implications of these findings?

Firstly, these results highlight the social significance of gay and lesbian venues for young people in these communities, and the limited availability of spaces that are perceived as safe to socialise in. This suggests a need to consider the issues around safety in licensed venues and unwanted sexual attention in licensed venues holistically, and as connected with broader social issues such as heterosexism. It is not purely a problem with individual venues. It was unclear from these findings whether the culture of some venues actively contributes towards or encourages heterosexist abuse. This is an area that may warrant further exploration. That said, these findings suggest that some licensed venues could take steps to create safer spaces for GLBTIQ patrons, and reinforce the need for GLBTIQ specific or exclusive spaces.

It was clear from these findings that unwanted sexual attention was an issue for some GLBTIQ participants in GLBTIQ venues, despite these spaces being discussed as safe. It is unclear whether the reliance on these spaces as a relatively safe space to socialise acts as a barrier to recognising and talking about the unwanted experiences that do occur in these venues. These findings add to the growing body of knowledge that suggests that unwanted sexual attention and sexual violence is a problem faced by the GLBTIQ communities.

For several participants there was a clear intersection between unwanted sexual attention and heterosexist violence. This suggests a need to rethink understandings of sexual violence in a way that better accounts for

this. For instance, physical and sexual violence are often discussed as two separate forms of violence. They are also often discussed as highly gendered forms of violence, particularly in the context of the night-time economy, with physical violence seen as male-on-male and sexual violence male-on-female. The experiences of some GLBTIQ participants in this study indicate that the distinctions between physical violence, sexual violence, and heterosexist abuse are not necessarily well defined. That is, these types of abuse tended to blur together and co-occur. Existing theoretical concepts of these forms of violence may need to be re-thought in order to better account for these overlapping categories of violence.

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Children and Their Incarcerated Parents: Maintaining Connections – How Kids’ Days at Tasmania’s Risdon Prison Contribute to Imprisoned Parent-Child Relationships

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To many in our society, the impact of imprisonment on offenders and their families is a matter of little or no consequence. In the face of everyday issues such as meeting financial demands, finding a balance between work and family commitments, attempting to access services in a less than satisfactory healthcare scheme and worrying about the state of the education system for our children, the needs of the families of offenders is not an issue of concern for many members of the public. Furthermore, in a political climate where to be perceived as being ‘soft on crime’ can cause the loss of crucial votes, advocating on behalf of prisoners’ families is an unwise platform for any politician seeking office. Prisoners are often assumed to have ‘got what they deserved’ – such a notion is at the heart of the overly simplistic yet frequently used adage ‘If you do the crime, you do the time.’ This one-dimensional, retributive attitude towards punishment neither critically questions why we punish as we do, nor takes into account the wider, ‘ripple effect’ of imprisonment.

The Honourable Justice David Harper said:

If truth is the first victim of war, one of the first victims of crime is objectivity in the debate about punishment. No topic of general interest is tackled with less reason or reasonableness. No subject is more vulnerable to rank political opportunism, media irresponsibility or meanness of spirit. And it is the latter which particularly affects the families, including innocent children, of prisoners. They, too, are the victims of crime (cited Tudball 2000: Forward)

Parental incarceration affects a large and increasing number of children, many of whom face significant uncertainty in nearly every aspect of their lives. The Honourable Alastair Nicholson, in his endorsement of the Action Paper (Hannon, 2007) produced by the Victorian Association for the Care and Resettlement of Offenders (VACRO) expressed the opinion that Australia, as one of the principal protagonists of the United Nations Convention on the Rights of the Child (UNROC, 1989) has little cause to congratulate itself in upholding the tenets of that charter. It is his view that the cause of human rights in general, and children’s rights in particular, have suffered considerably over the last decade, particularly at Federal level, but also at State and Territory level. While attention is most often focused on the victims of crime (as ideals of a humanitarian approach would warrant), it is often forgotten that children of prisoners are also victims of crime and this too, should be acknowledged. Resources devoted to their needs and welfare will benefit not only the children themselves, but also the communities in which they live.

Children of Incarcerated Parents

What is it like to grow up with a parent in prison? What are the immediate and long term effects of parental incarceration on children? What it means to a child to lose a parent to prison depends on individual circumstance: whether that parent is a mother or a father; whether the child lived with that parent before arrest, and what the family’s circumstances were; why and for how long the parent will be incarcerated; who cares for the child in the parent’s absence, and what supports that child obtains (Bernstein, 2005).

There are an increasing number of studies nationally and internationally that examine the effects of imprisonment on children. In general, published research confirms that incarceration of a parent is a challenging and a potentially distressing event for children. The arrest and removal of a mother or father from a child’s life forces that child to confront emotional, social and economic consequences that may act as a catalyst for behavioural problems, poor educational outcomes, and a disruption or even severance of the relationship with the incarcerated parent that may persist even after the parent is released from prison.

Researchers acknowledge the challenge associated with disentangling the effects of parental incarceration on children from the effects of risk factors that may have preceded a parent’s imprisonment (Christian, 2009; Murray and Farrington, 2006). While incarceration is unlikely to mark the beginning of difficulties for children

(see Diagram1), it is often a continuation or exacerbation of an already challenging situation in lives marked by multiple disadvantage (Johnston, 1995; Dallaire, 2007; Goodwin, 2008; Kjellstrand and Eddy, 2011).

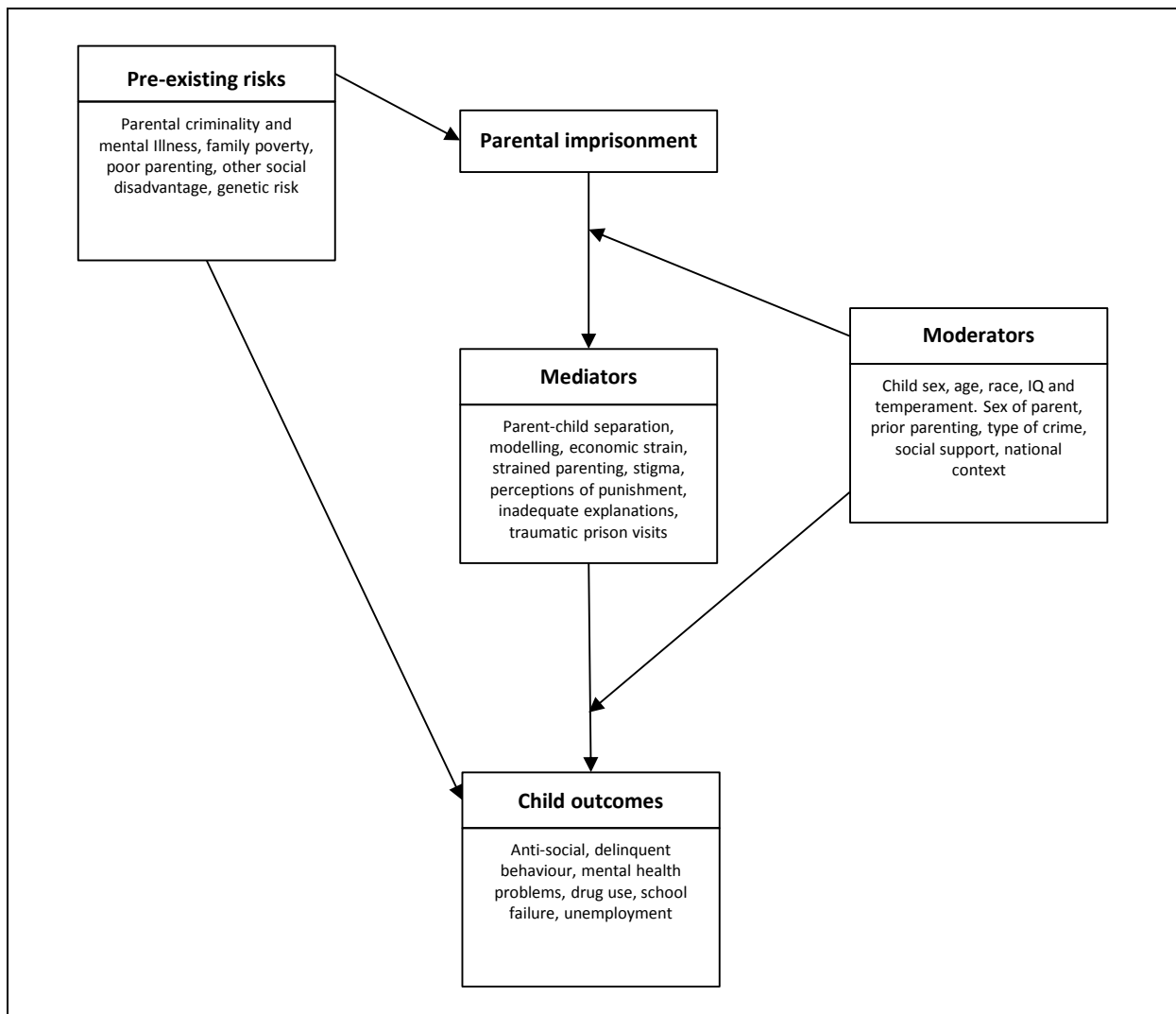


Diagram 1: Pre-existing risks and their impact

Source: Social Care Institute for Excellence (2008) *Children of Prisoners – maintaining family ties*. London: SCIE, p.20.

Current literature identifies problems associated with the nature of children's living arrangements which may be profoundly altered with temporary, informal situations that potentially separate children from their imprisoned parent, their family and friends (King, 2000; Loucks, 2004; Robinson, 2008). The expense and discomfort of prison visits that undoubtedly limit the contact between parent and child, restricting the maintenance of a relationship during incarceration, may also affect both children and their imprisoned parent (Brooks-Gordon and Bainham, 2001; Brooks-Gordon, 2004; Arditti, 2003; Arditti *et al.*, 2003; Christian, 2005; Codd, 2007; OARS, 2008; Robinson *et al.*, 2011). Parents who repeatedly cycle in and out of prison further contribute to the uncertainty and instability that children of incarcerated parents experience (Bales and Mears, 2008; Baldry, 2008).

Nationally and internationally, the families of prisoners tend to be among the poorest in society (Hownslow *et al.*, 1982; Naser and LaVigne, 2006; Baldry, 2008; 2003). In addition to the day-to-day burden of low incomes, many families experience dramatic reductions in parental revenue (Murray, 2007; Malone and Peacock, 2008). Resource-strained caregivers may experience significant financial hardship, impacting upon the children for whom they are caring (LaVigne *et al.*, 2008). Lost wages, prior debt, the cost (for some) of having to move house, and the additional outlay associated with maintaining and visiting the prisoner are issues consistently identified in the literature (Phillips *et al.*, 2006; Rosenberg, 2009; Light and Campbell, 2010). Furthermore, the expense for prisoners of making phone calls from the prison compounds the difficulty for inmates who do not

receive regular visits to maintain contact with their children (Cunningham, 2001; Phillips *et al.*, 2006; Christian, 2009).

Children typically exhibit short-term coping responses to deal with their loss, which can develop into long-term emotional and behavioural challenges, such as depression, problems at school, delinquency and drug-use (Johnston, 1995; Arditti *et al.*, 2003; Murray and Farrington, 2005; Kjellstrand and Eddy, 2011). The literature generally identifies three main health effects of parental incarceration upon children: physical health, emotional health and mental health/conduct disorders (Murray *et al.*, 2009; Murray and Farrington, 2008; Social Exclusion Unit, 2002). These health problems may change over time, with emotional upset, attachment and physical problems when the child is young; anger, violence and bed-wetting during middle childhood; and a range of at-risk behaviours involving drugs, sexualised behaviour and acting out once the child reaches adolescence (Johnston, 1995; Parke and Clarke-Stewart, 2001; Woodward, 2003; Trice and Brewster, 2004; Light and Campbell, 2010; Murray *et al.*, 2009).

Children of incarcerated parents are potentially exposed to considerable stigmatisation (Goffman, 1963; Cohen, 1995; Major and O'Brien, 2005; Brown and Bigler, 2005; NZ National Health Committee, 2009). While children who lose a parent for reasons other than incarceration will likely receive sympathy and care from others, children who lose a parent to incarceration risk being denied many of the necessary supports and normal social outlets for grieving a parent who has gone (LaVigne *et al.*, 2008; Condry, 2007; Murray and Farrington, 2006; Comfort, 2003; Cunningham, 2001).

Children may experience problems at school; various studies have documented low levels of numeracy and literacy, poor attendance and compromised peer and teacher interactions, often due to frequent changes of school (Murray and Farrington, 2008; Dallaire, 2007; Sheehan and Levine, 2004; Tudball, 2000). The international literature considers the link between educational success and staying out of prison to be a strong one, if not well-understood. There are a variety of elements to this which include raised self-esteem, increased likelihood of obtaining well-paid employment, and improved life-chances (Murray *et al.*, 2009; Social Exclusion Unit, 2002).

Additionally, the risk of intergenerational crime is increased, as children with parents in prison may be socialized to follow in their paths (Hagan and Dinivitzer, 1999; Dallaire, 2007; Glaze and Maruschak, 2008; Goodwin and Davis, 2011; Robinson, 2011). With repeated separations from parents because of incarceration, and being witness to criminal behaviour, children may develop a cognitive model that illegal activities are somewhat normative (Reed and Reed, 1997; Arditti *et al.* 2003; Pettit and Weston, 2004).

Childhood Trauma	Emotional Response	Reactive Behaviour	Coping Pattern	Criminal Activity
Physical abuse	Anger	Physical aggression	Fighting with peers	Assault
Parent-child separation	Sadness, grief	Withdrawal	Substance abuse	Drug possession
Witness to violence	Anxiety	Hypervigilance	Gang activity	Accessory to homicide
Parental substance abuse	Anger	Verbal aggression	Asocial behaviour (lying, stealing)	Fraud
Sexual molestation	Fear, anxiety	Sexualized behaviour	Promiscuity	Prostitution

Table 1: Intergenerational Behaviours, Crime and Incarceration

Source: D. Johnston (1995), 'Effects of Parental Incarceration', in K. Gabel and D. Johnston (eds) *Children of Incarcerated Parents*, New York: Lexington, p.81.

Imprisoned Parents

Prisons deny inmates many aspects of their 'outside' identities, seeking to substitute the identity of 'prisoner'. Applying Burke's (1996) strand of identity theory to incarcerated parents posits that imprisoned parents are often unable to enact pre-incarceration parental behaviours (also see Stryker and Burke, 2000; Arditti *et al.*, 2005; Dyer *et al.*, 2006). 'Prisonisation' refers to identity transformation resulting from the acculturation into the prison environment (Arditti *et al.*, 2005) whereby individuals come to mirror the norms and values of the prison setting. This situation is highly regulated and seeks to keep prisoners both controlled and contained. It is therefore reasonable to expect that the nature of incarcerated parenthood can only be understood in relation to the limits placed upon it by the prison environment.

Research indicates that female and male offenders feel the experience of imprisonment very differently. However, there are issues that have been pinpointed by both incarcerated mothers and fathers that share a common thread. Tudball's 2000 study, commissioned by VACRO, identifies the following as being of particular concern to imprisoned parents:

The prisoner's loss of parental authority over their children concerns

The prisoner's inability to protect their children

The physical separation of parent and child that contributes to emotional distancing in parent-child relationships

Severe constraints within the prison system that impact on a prisoner's capacity to participate in decision-making regarding their children

Losing day-to-day contact with their children, resulting in prisoner being out of touch with the details of their children's lives (pleasures, sport, difficulties, accomplishments and even developmental stages).

Mothers in Prison

Continuity of care for children is generally more disrupted by maternal rather than paternal incarceration, as female offenders are often sole parents (Kingi, 2000; Woodward, 2003; Gilham, 2012). Women prisoners have reported that their children are unprotected and vulnerable while the women are in prison (Healy *et al.*, 2001). For example, in Guransky *et al.*'s 1998 South Australian study, two of the 24 women participants reported their daughters being sexually assaulted since they [the women] had been in prison, and another believed that her children were being neglected and physically and emotionally abused but felt unable to protect them because they were in the custody of their father.

Incarcerated mothers differ from incarcerated fathers in that prior to imprisonment, they are more likely to have faced multiple threats from substance abuse, trauma due to sexual abuse, violence, and mental health disorders (Celinska and Seigel, 2010; Sharp and Marcus-Mendoza, 2001). Glaze and Maruschak's study (2008) found that between 60% and 73% of incarcerated mothers reported prior physical and sexual abuse. The fact that two-thirds of incarcerated mothers lived with their children prior to imprisonment means that many of the children may have been victim or witness to these same acts of abuse. 90% of female inmates interviewed by DeHart and Altshler (2009) had children of their own or cared for a partner's children. Over three quarters of these women mentioned the impact of abuse on their children prior to their incarceration.

Kauffman (2001) maintains that women suffer more than men from the stigma of incarceration with a societal tendency to view imprisoned women as unfit and indifferent mothers.

Fathers in Prison

Research identifies men's descriptions of incarcerated fatherhood centre around feelings of helplessness and difficulties in being a 'good father' (Arditti *et al.*, 2005). Clarke *et al.*'s 2005 UK study discovered uneasy and disjointed identities in respondent's evaluations of their role as fathers. Many of the men involved with the study viewed fathering as something that took place 'out there' and 'not inside' prison.

For men who have been the family's financial provider, it may be hard to relate to their children because their role has been altered (Boswell and Wedge, 2002; Hairston, 2001). Studies have indicated that men equate

being a good father not only with providing financially for their children, but also being physically in attendance to protect them. Being unable to govern their own day-to-day routines, to make commonplace decisions about their own lives or carry out traditional roles, can encourage imprisoned men to perceive themselves as ineffective, and can de-value their role as parents (Hairston, 1995; 2001). A prisoner's life involves child-like dependency, and their main responsibility is following rules (Arditti *et al.*, 2005). For many men, this discourages the behaviours required to be a responsible parent, or even a caring and compassionate adult (Hairston, 1995; 2001; Dyer *et al.*, 2004).

Characteristics of prison life and the wider criminal justice system are clearly factors that shape the experience of fatherhood behind bars (Clarke *et al.*, 2005). Prison culture has distinct norms of how the 'ideal man' should act, and ideas on masculinity which, if adopted, would most likely lead the incarcerated father away from an identity that supports his children's positive development (Dyer, 2005; Dyer *et al.*, 2004). For example, it may be less acceptable in a men's prison to admit to missing one's children and wanting to see them than it is in a women's prison. This can result in imprisoned fathers being more reluctant to make public demands for contact rights with their children, meaning that the necessity of child-father contact is more likely to be ignored (Arditti *et al.*, 2005).

These ideas, whilst useful, cannot be generalised to all imprisoned fathers, as every situation and establishment is distinct, and every inmate will react differently to imprisonment, as will their children. In some cases, a father's pre-prison lifestyle may have involved little contact with his children, in which case imprisonment may not impact upon contact levels. Conversely, in cases where fathers were very much involved with their children pre-prison, pride, hurt and grief may cause these fathers to disengage from their families (Hairston, 2001; Bedford Family Row Project, 2007).

Maintaining Child-Prisoner Contact

It is evident from the literature that children's coping and general adjustment is enhanced by promoting parent-child contact during imprisonment, to allow a child to see and communicate with his/her parent and to have their fears about prison allayed (Johnston, 1995; Block and Potthast, 1998; Trice and Brewster, 2004; Hairston and Addams, 2001). Indeed, maintaining contact with one's incarcerated parent appears to be one of the most effective ways to improve a child's emotional response to the incarceration, and reduce the incidence of problematic behaviour. Better outcomes with decreased disruptive and anxious behaviours have been identified for children who maintain contact with their parent during incarceration (LaVigne *et al.*, 2005; NZ National Health Committee, 2009).

In addition to these direct benefits to the child's emotional health and behaviour, maintaining contact helps the incarcerated parent. Direct correlations between child visitation and coping mechanisms of imprisoned parents have been reported (Tuerk and Loper, 2006; Sheehan and Levine, 2006; NZ National Health Committee, 2009). Frequent visiting has also been seen as lending support to family reunification (Martin, 1997; Bruns, 2006; LaVigne *et al.*, 2008). Studies suggest that child visitation contributes to lowered recidivism rates (Harrison, 1997; Klein *et al.*, 2002; Hairston, 2004; Codd, 2007; Bales and Mears, 2008). These improvements for the parent will indirectly benefit the child by adding a greater degree of stability to their life once the parent has left prison (Murray *et al.*, 2007).

Kids' Days at Tasmania's Risdon Prison

Kids' Days at Risdon Prison are organised by the prison's Child and Family Support Officer (as part of the Integrated Offender Management (IOM) Unit) in conjunction with Prison Fellowship, and utilising a strong volunteer base from the Christian Family Centre located next door to the prison. Kids' Days are based on the following principles:

- Children have a right to maintain contact with their imprisoned parent.
- Children affected by their parent's imprisonment are often socially excluded and vulnerable.
- Children have a right to be treated with understanding, compassion and respect.
- Good quality, child-friendly visits help support and nurture the child-parent relationship.

The concerns (as noted above) of prisoners who are parents are acknowledged and Kids' Days are viewed as an avenue for addressing these.

Kids' Days provide children with time to relax with their parent, enjoy 'normal' activities, feel reassured and have some positive memories of shared experiences. The days are for inmates and children only – children's primary carers are not present.

The program hosts Kids' Days in the following prisons:

- Risdon Prison Complex (RPC) Medium and Maximum security facilities
- Mary Hutchinson Women's Prison (MHWP)
- Ron Barwick Minimum Security Prison (RBMSP)

Kids' Days are held in each of the prisons four times a year, to coincide with school holidays (April, June, September and January).

Risdon's Child and Family Support Officer has responsibility for contacting inmates and children's primary care-givers well in advance of the projected Kids' Day. 60% of offenders housed at Risdon Prison reside outside of the metropolitan area (Breaking the Cycle, 2010). As such, offenders' children residing in other areas of the state who have long distances to travel need to have time for their primary carer to organise transportation to the prison, as well as accommodation.

Suitable and fun activities are planned by the Child and Family Support Officer and Family Church volunteers, and are usually thematically-based. For example, the Kids' Days held in each prison in June 2012 revolved around a 'princesses and pirate' theme, with inmates and children applying face-paint to each other reflective of the theme, painting 'Jolly Roger' flags, playing 'Pin the Patch on the Pirate', decorating biscuits using a variety of toppings, making pirate hats and princess tiaras, and additional activities such as play-dough, drawing, skittles and quoits.

The September 2012 Kids' Days saw a 'round-the-world' theme enacted; a highlight was cooking pizzas. The children were issued with a passport containing their photo, height and weight (measured on the day). They 'visited' Italy (pizza); Japan (face-painting with a Japanese theme) and a game where they picked jelly-beans out of a bowl with chop-sticks; Switzerland and Germany (soccer); Canada (memory game with photo cards of Canadian animals, blindfold 'feed the chipmunk' and a jigsaw puzzle map of Canada; Australia (biscuit decorating); as well as several craft tables where flags could be made, a globe of the world constructed, play-dough, finger painting and bubble blowing. Outdoor sports were played in RBMSP and MHWP.

Children are brought to the Visitors' Centre by their carer and given into the supervision of volunteers, who escort them to the Kids' Day venue. These days are keenly anticipated by children and parents alike, and provide an opportunity for prisoners to be 'just a mum' or 'just a dad' for two hours, rather than a prison number in a highly-regulated environment. For that comparatively short time, prisoners are able to be responsible parents, to make decisions about what activities will be done when, to ensure their children have food and something to drink, and to talk to them about what has been happening in their lives.

Food is prepared (usually something simple such as hotdogs or a barbeque), and children can share a meal with their mother or father. For some, this is the first meal they have had with their parent for many years.

Photos are taken and printed out immediately. Children can choose one or two pictures to take away with them; inmates are able to select and purchase photos later in the week. Without exception, these photos reflect immense happiness and are treasured by inmates and children alike. The number of photos ordered by the inmates of the four prisons after the June 2012 Kids' Day totalled 1300, and in September, 1900.

The dynamics of Kids' Days varies in each section of the prison. Days held in RPC are conducted in a large, quite well-lit room that has a concrete floor, with chairs and tables bolted to it. There is a small, fully-enclosed outdoor area under a pergola with outdoor seating, but with concrete underfoot – there is no lawn. A small, somewhat inadequate play area is available for young children inside the main room. Activities for Kids' Days are laid out on the tables, and parents and children move from one activity to another.

While the most is made of the available space, and the area brightened up with the colour of the various activities on offer, there is no opportunity for fathers and children to partake in any outdoor pursuits, such as kicking a football or soccer ball, or playing basketball. However, it is apparent that for most of these children,

they have not known anything different in terms of prison facilities, and seem not to care about the austere surroundings.

Conditions are rather different in the Ron Barwick Minimum Security Prison and the Mary Hutchinson Women’s Prison. A well-maintained lawn area is available in both, and children and parents are able to play outside in addition to the indoor activities provided. The age range of the children is also more diverse – the children visiting RPC tend to be younger than twelve, with some as young as two or less. Those visiting parents in MHWP and RBMSP are from a wider age range, with young teenagers (some of whom have been visiting their imprisoned parent since they were very young) a representative group (see table below).

	MHWP			RPC Maximum			RPC Medium			RBMSP		
	Apr	Jun	Sep	Apr	Jun	Sep	Apr	Jun	Sep	Apr	Jun	Sep
Inmates		7	14	1	3	8	4	7	7	10	6	13
Children		9	24	1	3	10	7	10	9	18	10	25
Age Range	n/a	4-13 yrs	1-15 yrs	n/a	20 mths - 6 yrs	20 mths - 12 yrs	n/a	2-12 yrs	16 mths - 12 yrs	n/a	4-14 yrs	2-15 yrs

Table 2 - Kids’ Days, April to September 20

In the Mary Hutchinson Women’s Prison, it is evident that many of the mothers are happy to be self-sufficient in terms of pursuing activities, and most require little or no assistance from volunteers. It is much the same in the Ron Barwick Minimum Security Prison, although the June 2012 Kids’ Day witnessed a father and his children participating for the first time, so the presence of volunteers to help initiate activities was welcomed.

The number of Kids’ Days participants has gradually increased over a 12 month period. Knowledge of the days was initially slow to permeate the prison (where communication can be notoriously difficult), but with the assistance of inmate mentors, supported by the Child and Family Support Officer and Prison Fellowship, more incarcerated parents are now aware of them (see chart below).

Kids’ Days also provide a forum in which prison staff (particularly Correctional Officers) are able to observe inmates in a caring role. This is juxtaposed with the normal prison environment where some inmates present as cold and occasionally hostile. The opportunity for staff to witness a different side to the prisoners in their charge has facilitated increased communication, and contributed to a more settled atmosphere.

Kids’ Days present an opportunity to reassure children about their parents’ circumstances. For children unable to visit their incarcerated parent on a regular basis, these days allow them to see that their parent is safe, and while housed in a place that is essentially ‘behind bars’, offers educational opportunities, a library, and various programs and courses aimed at helping their parent move beyond whatever situation resulted in their imprisonment.

One of the most important aspects of Kids’ Days is the chance for parents to talk to children, especially teenagers, about staying out of prison. Intergenerational offending is a noted problem by criminal justice agencies, governments and researchers, and if parents, through their own experience of incarceration, are able to guide children in a different direction, then Kids’ Days are essential. Equally, the children of incarcerated parents can be viewed as powerful motivators in encouraging their parent to desist from crime. The nature of Kids’ Days, with the emphasis on child-parent communication and bonding, is valuable in paving this ‘two-way street’.

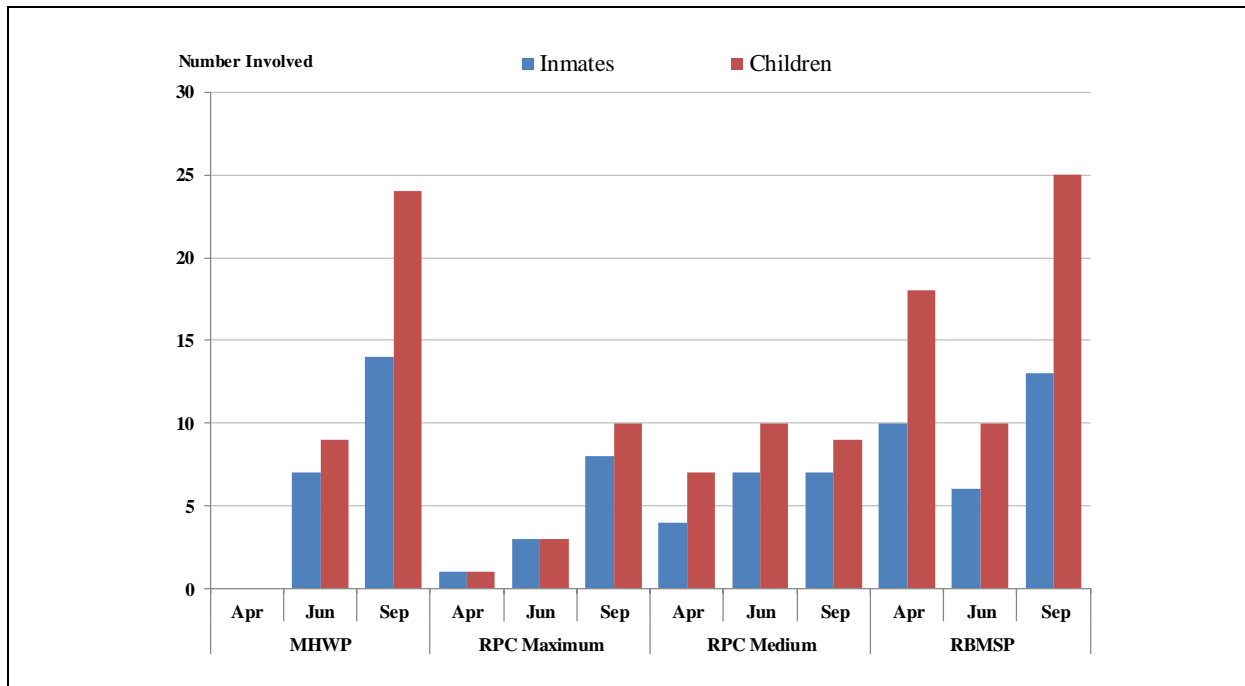


Figure 1 - Kids' Days Participants, April to September 2011

Conclusion

In the simplest human terms, prison places an indescribable burden on the relationships between imprisoned parents and their children. Incarcerated mothers and fathers must learn to cope with the loss of normal contact with their children, and lost opportunities to contribute to their children's development. Their children must come to terms with the reality of an absent parent, the stigma of parental imprisonment, and an altered support system that may include grandparents, non-familial arrangements or foster care. The potential for changed living conditions, as well as the possibility of being separated from siblings, may also threaten to further de-stabilize children's existence.

Within our neighbourhoods, within our communities, and particularly within our criminal justice system, children of prisoners remain in the shadows. Yet they are undeniably a recipient of the sentence handed down to their parent, a situation that warrants formal recognition. Children of incarcerated parents should not be labelled 'someone else's problem' – they are part of the future of our neighbourhoods, our communities. They should not be the future of our criminal justice system.

Ridson Prison's Kids' Days are instrumental in drawing prisoners' children out from the shadows, creating patches of sunshine by offering warmth, friendship, acceptance – and fun. Above all Kids' Days provide a forum in which to foster and maintain one of the most important bonds of all – that between a parent and child.

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Subject to Change: Identity, Culture and Change in the Alcohol and Other Drugs Sector in Tasmania

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Contemporary rehabilitation industries are increasingly being scrutinised by those in radical and critical scholarship, amid calls for more incisive critiques of the status quo and more emancipatory research agendas to address mounting inequalities (McLaughlin, 2011). Institutions and workforces involved in the rehabilitation of citizens deemed in need of reform are of interest to critical scholars because they form the coalface at which to observe the anticipated and unintended consequences of policies, discourses and practices of social control. Challenging official and mainstream assumptions about these institutions and systems often gives rise to vital opportunities for what Scraton (2002, 2007) aptly calls 'speaking truth to power.' There is a pressing need for frank and fearless truth-telling, especially in areas where nearly everything is government run or reliant on government funding, for example, the alcohol and other drugs sector and offender management sector in Australia and elsewhere. The former sector remains closely related to the work of the latter, given the history of Western drug policy (i.e. criminalisation), the advent of therapeutic jurisprudence and drug courts, and the burgeoning numbers that make up the shared 'client' group reflecting the complex but well documented links between drugs and crime (see Seddon, 2006; Hammersley, 2008). Extensive research by the Australian Institute of Criminology demonstrates that, for police detainees and for incarcerated offenders, substance use or misuse is implicated in approximately two thirds (66%) of all criminal offences (Payne & Gaffney, 2012). Empirical findings and large scale data about the drugs-crime nexus need to be situated and analysed in their social, political, legal, economic and cultural context. Valuable insights have been gained, for example, from critical perspectives on the policy agendas, structural implications and real world failings of the War on Drugs and punitive responses to people who use illicit drugs, including appraisal of the human and economic costs and benefits of years of prohibitionist populism (see Welch, 1997; Jiggins, 2005; Douglas & McDonald, 2012).

Most analyses and commentaries arising from the critical school of thought (broad church that it is) focus on the rights and prospects of individuals or groups of individuals who are subject to intervention. The findings of critical research projects often result in calls for systemic reform and sweeping change, informed by the experiences, rights and needs of these individuals and groups. Indeed, there are ample moral and intellectual arguments to be made for this to continue. However, while by no means mutually exclusive, the argument and focus here turn to the impact of structural issues and inequalities on *practitioners* and *workforces*, and the need to speak truth about issues of power and control in how rehabilitation industries function. Such concerns are important in their own right, as well as for how they directly impact on the quality and quantity of services on offer to individuals in the care and control of these systems.

Firstly, a caveat. The following discussions need to be prefaced with acknowledgement that there is no one 'culture' or 'identity' that can define the practitioners, workforces and organisations that make up the alcohol and other drugs sector in Tasmania or across Australia. Nor is there a singular reform or change process at work. Likewise, it is erroneous to suggest there is one unified monolith known as 'government' with a clear policy agenda or attitudinal bias to the workforces and sectors it governs and funds. As observed by Garland (2006), it has been too easy for sociologists and criminologists to discuss the cultural as an analytical dimension of social relations that exists somewhere between structure and agency, which often leads to speaking of culture in ways that imply collective entity, or as a variable that can be manipulated by senior managers or governments to enhance effectiveness or productivity (McNeill, Burnett & McCulloch, 2010). Understanding culture cannot simply be a means to an end or, if it is, resultant attempts at reform are likely to fail because they are predicated on morally and conceptually flawed grounds.

Culture is not just an influence on what we do and a factor in working out how we can do it better; it is about who we are and how we construct our identities... Neglecting questions of the relationships between culture, identity and morality lies at the heart of many failed attempts to change or reform practices. (McNeill *et al.*, 2010: 7)

Understanding culture requires engaging with complexity and diversity, values and value tensions, and considering multiple meanings in their situated contexts. The focus of this paper centres on the nature and impact of culture and change in the alcohol and other drugs (AOD) sector in Tasmania, with reflections that

bear some relevance to the wider Australian stage. The discussions that ensue represent *emerging* insights (rather than polished findings) from the field and the author's critical reflections from the standpoint of a researcher and a worker, albeit offered with an eye to the literature.

Trends and Tensions in the Alcohol and Other Drugs Sector

Over the last 20 years, the Australian alcohol and other drugs sector has 'experienced unprecedented changes that have major implications for the development of a responsive and sustainable workforce' (Roche, 2009: 194). With changing patterns and trends in substance use and misuse have come significant amounts of change and development in the sector. Since the late 1980s, drug researchers have consistently concentrated on advancing addictions treatment, evidence based practice and knowledge of 'what works' in order to improve the productivity and effectiveness of service delivery. Following this, the sector has been flooded with new and promising tools, programmes and clinical standards and guidelines, as well as reinventions of longstanding approaches. Advances have ranged from improved medical treatments (e.g. pharmacotherapies, detoxification and withdrawal management) through to improved psychosocial interventions (e.g. brief interventions, cognitive behavioural therapy, motivational interviewing, mindfulness techniques), new screening and assessment tools (e.g. comorbidity screening tools like PsyCheck), more forums and support options (e.g. specialised therapeutic communities, online interventions, SMART Recovery groups), and new evidence about overlapping complex needs (e.g. links between post-traumatic stress disorder and substance misuse). These new tools and options have flooded the sector in the same two decades where broader macro processes of neoliberalism, economic rationalism and associated business-like quality improvement regulation and reporting structures have come to dominate understandings of 'success' in intervention and service provision. Practitioner and organisational performance is monitored and surveilled with accountability and reporting mechanisms perhaps more than ever before, changing notions of what constitutes 'quality' and 'improvement' and raising questions of according to whom?

Subsequently and perhaps unsurprisingly, in order to effectively upskill practitioners to keep pace with increasing professionalisation pressures, workforce development efforts over this period have largely relied on two main approaches:

1. *education and training* of practitioners in the uptake and implementation of 'what works' in evidence based practices; and
2. *capacity building* projects and initiatives at the sectoral level (usually through peak bodies) and the organisational level.

It seems that these two approaches will retain favour as key drivers of improvement and reform, if the *National Drug Strategy 2010-2015* is anything to go by (Ministerial Council on Drug Strategy [MCDS], 2011). In the Strategy, the AOD workforce is conceptualised almost purely in terms of their qualifications and skills, with 'an appropriately skilled and qualified workforce' measured by their ability to 'function with maximum effectiveness' headlining the workforce priorities for the next few years (MCDS, 2011: 20). Nine of the eleven workforce development priorities are explicitly about training and education and/or capacity building, with the remaining two identifying the need to support worker wellbeing and to address issues of workforce turnover (MCDS, 2011: 21). Paradoxically, while the National Strategy repetitively states the necessity of a 'systematic approach', nearly all of the workforce strategies and priorities target practitioners (not organisations or broader governance and funding structures, nor the conditions, politics and cultures that exist therein) to improve and expand their capacity.

Cash strapped organisations and their workers may be happy and willing recipients of fresh rounds of training and professional development, for the intellectual stimulation as well as (understandably) a welcome "day off" from the coalface of one of the hardest working sectors in health. However worthwhile, the focus on building the agency and skills of individuals belies deeper issues at the heart of why training and capacity building seem to be the only approaches finding favour with funding bodies. Another more radical and controversial reading of the situation calls into question the agendas behind the push by governments for change and improvement of what are predominantly meagrely funded community sectors. Critics of such trends cast training and capacity building as technologies of neoliberal governance and as illustrative of processes of responsabilisation of practitioners under pressure to professionalise and perform to survive in the competitive marketplace of health and human services (Phillips & Ilcan, 2004; Connell, Fawcett, & Meagher, 2009). The value judgment implicit in this is that practitioners are valued by their capacity to accomplish improved service delivery and

client outcomes – outcomes which are, in reality, influenced by many more factors than the résumé and skills of any given worker, no matter how burnished their credentials.

A narrow focus on surface level solutions and embracing ‘the new’ in the hope of moving beyond the current impasse has distracted from fully understanding the depth and extent of the issues in ‘the now.’ If local and national AOD workforces are to become more responsive and sustainable, more needs to be known about the context, conditions and culture in which practice and reform take place. Little if any Australian research and scholarship has been devoted to analysing issues of identity and culture in the alcohol and other drugs sector, and few studies have been conducted into the nature and impact of change and capacity building on the sector’s workforce (for an example of one recent sectoral study, see Craze & Mendoza, 2011).

Ameliorating such gaps and silences in existing knowledge becomes of increasing urgency when considered in light of current and anticipated workforce turnover. Practitioners are leaving, at alarming rates. A recent Tasmanian AOD workforce survey by the peak body, the Alcohol, Tobacco and other Drugs Council of Tasmania [ATDC] (ATDC, 2011: 68) involving respondents from 18 organisations reveals some concerning prospects and trends:

- 75% of respondents have worked in their organisation for five years or less (with 21.5% of these having worked in their organisation for less than 12 months);
- At an organisational level, 75% of respondents do not intend to stay with their current employer beyond the next five years;
- At a sectoral level, a 50% workforce turnover can be anticipated within 3 years, with minimal differences observed between managers and staff in their intentions to leave the sector.

Other surveys suggest similar trends and prospects at a national level, with five years being the median length of service in the AOD sector (Roche & Pidd, 2010). A National Centre for Education and Training on Addiction (NCETA) survey found that 54% of workers had thought about leaving their job, and 31% of workers planned to look for a new job over the next 12 months (Duraisingam, Pidd, Roche & O’Connor, 2006). Interestingly, along with poor remuneration which is a commonly cited problem (Duraisingam *et al.*, 2009), the lack of respect and stigma associated with working in the AOD sector was specifically identified in the survey findings as one of the barriers negatively affecting staff retention (Duraisingam *et al.*, 2006).

A perpetual cycle of education, training and capacity building initiatives can continue to be invested into the alcohol and other drugs sector and its workforce in any given jurisdiction in Australia or indeed nationwide, however, the practice wisdom and experience will be lost if the mass exodus continues. That is why workforce and organisational development urgently need to extend beyond education and training initiatives to encompass professional, organisational, structural and cultural factors in order to better understand what helps and what hinders effective development being realised (Allsop & Stevens, 2009). It is to some of these factors to which we now turn, with revelations from a Tasmanian study suggesting the AOD sector may indeed be facing deeper issues than have been previously identified.

The Study: Emerging Reflections on Identity, Culture and Change

The research presented here originally started by looking at how alcohol and other drugs practitioners work with people with complex needs, with a restricted focus on effectiveness and best practice interventions. It quickly transposed into a more complex, and ultimately more interesting, exercise in seeking to understand a sector grappling with its own complex needs in the midst of change. The author conducted in-depth interviews with 30 practitioners working in the alcohol and other drugs sector and related stakeholders in criminal justice in Tasmania. Interviews took place at various locations around the state over a two year period from May 2010 to May 2012. Sampling and recruitment of participants was intentionally broad to reflect the diverse stakeholder perspectives within the AOD sector, with the occupation and work role of participants ranging from different types of frontline practitioners (e.g. counsellors, doctors, social workers) through to different types of senior and strategic workers (e.g. managers, consultants, advocates, sectoral leaders). Data from this study is also complemented by the findings of a recent Tasmanian alcohol and other drugs workforce survey (see ATDC, 2011). While there is not enough space to canvass the depth and breadth of the research findings here, much of the data from practitioners is hopeful and inspiring, demonstrating how much they care about what they do and that they are good at what they do, despite the challenges. Yet their concerns tend to converge on issues of culture and sustainability as well as a desire to *be the change*, to be actively engaged in

advocacy and reform processes, instead of being subject to change, passively responsible for coping with the changing goal posts as governments stop and start funding cycles, projects and constantly alter reporting templates.

It is becoming increasingly clear that practitioner understandings of the identity and legitimacy of the alcohol and other drugs sector are mediated by the context and conditions in which they find themselves working in. The impact of structural pressures and inequalities has not gone unnoticed at the coalface:

“I think the nature of being under-resourced and stretched and competitive is that you get in this survival mode, and feel undervalued and stick with what your core business is... It is desperate, compartmentalised, and that is added to by the way services are geographically located. There are multiple layers and reasons that have stopped us moving forward... We need more of that sharing of professional practice wisdom – we have very limited opportunities. That is the climate and culture that has been created from having diminished resources – survival mode.” [senior practitioner]

“Workers in the sector actually feel like they don’t have a good name. It’s not a good place to work; the pay’s not great; the conditions aren’t fantastic. You have massive caseloads and you’re overworked and underpaid and underappreciated.” [frontline practitioner]

These factors are not unique to Tasmania and are reflected in the wider Australian workforce development literature identifying factors affecting retention (Duraisingam, 2005; Spooner & Dadich, 2009, 2010). Importantly, such under-resourcing amid growing caseloads is illustrative of moves towards more generic ‘broker’ models of service provision. This type of case management helps to cater for the masses within the given fiscal constraints, ensuring alcohol and other drugs services continue to achieve excellent outcomes on a shoestring budget. It may also detrimentally affect existing retention and future recruitment, by negatively impacting practitioner perceptions of their work. Seasoned practitioners who have been in the system for a long time may see their best work (working with the ‘whole’ person over time, building trust) as increasingly devalued or sidelined in exchange for taking on more surface level screening, assessment, referral and group facilitation, not to mention keeping up with bureaucratic demands of more paperwork, risk management and evaluation requirements (White & Graham, 2010). Paradoxically, practitioners are there to help (tasked with helping to reduce harms, risks, costs etc) and yet they are not necessarily afforded the chance to truly engage in the depth of the work of a helping professional, nor offered satisfactory levels of help and support themselves.

Building on these sentiments are even more direct acknowledgements from different practitioners that the sector struggles with fundamental issues of identity and legitimacy which, for many, contribute to a lack of pride and feelings of insecurity about the work and the sector. While these topics were not actually part of the line of questioning in interviews, many practitioners’ conversations naturally turned to such issues:

“There’s a lack of pride about what we’re doing and who we are and why we’re doing it and all that sort of thing. I don’t think we’ve got a strong enough identity of being who we need to be as a sector... It’s about having a grown up sector too. I think that’s a bit about the maturity, or lack of, of the sector in the sense of being able to say “I’m really proud of what I do”” [senior practitioner]

“I think pride and identity are the two things I would tackle... No wonder AOD people, government and community sector, feel insecure at the moment.” [capacity building practitioner]

“We don’t do a lot of that self promotion and celebration. We celebrate our client outcomes but we don’t celebrate ourselves as a service.” [senior practitioner]

“One of the challenges I feel is this: alcohol and drug services don’t have, at this point, the level of respect or identity across the broader health sector. Rightly or wrongly, that’s the reality. I’m not saying “because we’re bad people” or anything like that. The reality is that I don’t think other areas of the health sector believe we are a real player – at this point in time.” [senior practitioner]

Vivid comments from one passionate practitioner went so far as to acknowledge the reciprocal links between a lack of a cohesive identity and esteem amongst AOD practitioners and the sector’s workforce and the ways in which they are perceived and treated by those in power.

“There’s a lack of pride in the ATOD sector. There is a real sense of disengagement... I don’t know how exactly to describe it, except to say it kind of feels like ATOD workers are urchins. In the Dickensian sense, they’re the Oliver Twists, they’re kind of outcasts and they’re very separated, and nobody really knows who each other are until you get them into a room. I was in an [ATOD sectoral consultation group] recently, and one of the questions that was asked was “would you recommend working in the ATOD sector to people that

weren't in it? Would you actively recruit?" The people around my table said no they wouldn't because first of all they don't know how to define the sector, they don't know who to send it to, or who to send them to and secondly they don't see that it's a very good sector to work in. I think that that is terribly problematic because if there isn't a sense of collegiality, if there isn't a sense of pride in their work and a sense of importance in what they're doing, then how are we going to ever convince policy makers and government heads that they're worthy of consulting with and collaborating with? If they don't see any value in themselves, how the bloody hell is everybody else going to?" [practitioner]

Several participants in the study expressed interest in wanting change and making the sector and its development more sustainable, but were circumspect about how and by whom this might be achieved. Top down strategies alone seemed to raise the ire of the change weary and change wary practitioners who had already seen so many economically and/or electorally driven reforms. Even senior practitioners did not express much faith in the ability of key government funding bodies such as the Commonwealth Department of Health & Ageing (DoHA) or the Tasmanian Department of Health & Human Services (DHHS) to inspire and lead positive change, while meaningfully engaging with clients, practitioners and organisations in the process. In any case, these organisations are not without their own challenges in workforce turnover and managing organisational change.

Changing the Way We Think About Change

While concerted efforts to update practice and change professional and organisational cultures in the alcohol and other drugs sector have been driven, for the most part, by good intentions, they have yielded mixed results and mixed feelings. At one level, intense concentration on aligning interventions with the evidence base of 'what works', thereby emphasising the instrumentality of practitioners (what they do and how they do it) has yielded well documented returns in streamlining service delivery. For many, the roll-out of tools, programmes and standards across the different occupations and organisational contexts that make up the AOD sector represent positive steps in the right direction.

At another level, such efforts have distracted from the need to understand the context, culture and conditions in which such practices and proposed changes take place. Concentration on the tools and technologies of practice and their standardisation has surpassed and, arguably, neglected attention being given to issues that remain important to practitioners – identity, values, legitimacy and future purpose (who they are and why they do what they do). Ironically, such widespread standardisation of practice may represent a form of 'professional marginalisation', by displacing the centrality of practitioners as agents of change and imposing tools and procedures that are not sensitive enough to the multifaceted nature of the cultures, practices and practitioners that they seek to change (see McNeill, Burnett & McCulloch, 2010). Instead of displacing practitioners and ignoring the influence of organisational factors, building a stronger identity and greater capacity in the sector needs to start with 'changing the structures, and expected outcomes of these structures, in which people work, not just encouraging a few to use new ways of working in spite of the system' (Allsop & Stevens, 2009: 541).

Re-thinking the reform agenda involves changing the way we think about change. Systemic advocacy in the interests of mobilising context and culture sensitive change takes time. It also necessitates change champions staying in the sector for long enough to see dreams and principles realised in practice. In doing so, there is a pressing need to build the capacity of organisations and indeed the sector to foster and manage change in the face of uncertainty, as well as to improve and expand the means by which this is done. Culture change needs to be approached as a multi-level and long term systems endeavour which cuts across the individual, organisational and sectoral levels (Skinner *et al.*, 2009). Such a process is pivotal on the inclusion of those it affects, therefore it needs to pursue inclusion of clients and practitioners, at all levels, well and truly beyond narrow programme or project evaluations or siloed committees with little political wherewithal. Its success is also dependent on the extent to which (and longevity of which) it is planned, funded, staffed and resourced.

One of the challenges is that those who may seek to 'speak truth to power' (Scruton, 2002, 2007) are themselves often restricted by how their job roles are funded and governed. Nearly all alcohol and other drugs peak bodies, advocacy organisations, and community sector organisations in Australia are reliant on securing relatively short term competitive government funding. Health Workforce Australia (2012), tasked with developing a national coordinated approach to fostering 'change, collaboration and innovation' for a more sustainable health workforce in Australia, is itself a federal government initiative. These stakeholders will continue to be engaged for a narrow set of purposes, such as developing new competency frameworks or consultation on workforce minimum qualifications – i.e. things that target practitioners, not structures or

cultures. Even some alcohol and other drugs researchers have expressed concerns about the potential for regulation and subtle forms of control by funding bodies (Miller, Moore & Strang, 2006), as links are being drawn between 'he who pays the piper' and the research agenda and its tune.

Critical scholars are presented with a prime opportunity to engage in more research, analysis and critique of the potential prospects and stark realities inherent in the current state of the play in the alcohol and other drugs sector – analysis that may, in turn, inform advocacy and progressive policy development. True consensus and co-production are unlikely to be achieved between key stakeholders, especially practitioners and people who use drugs, as long as the disjuncture between the rhetoric and reality of working together towards change exists. Returning to the argument of McNeill *et al.* (2010), neglecting questions of the relationships between culture, identity and morality (including values) lies at the heart of many failed attempts to change or reform practices. A lot of good quality empirical 'evidence' already exists, but the sector needs to be careful to avoid naïve idealism in assuming that careful training and implementation of the evidence will be the key to sustainable change, especially when so much practice wisdom is being lost with workforce turnover each year. The alcohol and other drugs sector deserves to be better understood and more cogently represented than *solely* by those engaged and funded to do short term research projects for a narrow set of evaluative purposes, attached to a specific initiative, funding round or type of service provider and often tied into decisions on whether these things should continue or not. Critical analytical ethnographic and ethnomethodological methods, as well as advocacy oriented research methods led by practitioners and peak bodies are needed, to contrast and complement existing research which is predominantly conducted by a small group of accomplished Australian AOD researchers, many of whom are successful in receiving government funding to conduct the aforementioned plethora of evaluations and consultancies to design the next set of standards and tools. Policies and reforms are shaped by research, as well as by values, cultures, structural pressures and inequalities, and political, fiscal and relational dynamics. The people most affected by policy and reform are those at the centre of the system, individuals with complex needs and the practitioners who support them. For practitioners, what they want, how they feel about their work and those they work with matters; it can explicitly and implicitly affect pride, identity, legitimacy and commitment. More independent research and public intellectual debate is needed on these things to better understand what is really happening at the coalface, as is a greater capacity for diverse voices to speak truth on issues of power and control in rehabilitation industries and workforces. What we don't understand, we are unlikely to be able to sustainably change.

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Bail and Vulnerability: do we know enough to help inform policy?

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Many consider that the work of police ends the moment an alleged offender is released into the hands of the courts, and that this person becomes the 'subject' of magistrates, lawyers and correctional services from that point. Although there is an element of truth in this, it is not always the case, and police officers often re-establish contact with defendants post-court. This is especially the case when, upon a defendant's release on bail, bail conditions (curfews, non-association with peers, etc.) need to be checked by police. Police are not, however, the sole agents involved in monitoring bail and in the provision of bail support for defendants. Many government agencies, non-government agencies and associations are involved in this process. Through an analysis of law and policy at a national level, the authors examine the extent to which research has successfully documented the determination and monitoring of bail conditions for vulnerable offenders. We consider the lack of evidence and documentation on the topic of intervention programs specifically tailored for vulnerable groups of offenders such as young people, people with substance use disorders, people without a home, and people living with a mental illness. We also identify the absence of qualitative and quantitative data and analyses that can assist magistrates and policy makers to consider how the practice of bail targeting vulnerable groups can be improved.

Bail and Vulnerable People: a picture of the Australian situation

Vulnerable people have become a key focus of policy in recent years (Bartkowiak-Théron & Corbo Crehan, 2010; Bartkowiak-Théron & Asquith, 2012; New South Wales Law Reform Commission, 2012), and the need to take into account their special circumstances is now acknowledged in all levels of government nationally and internationally on grounds of equity and anti-discrimination principles (International Covenant on Civil and Political Rights, 1976). For policing and justice organisations, this attention to special needs has resulted in efforts to divert vulnerable people from the criminal justice system to avoid the negative impact (particularly that of incarceration) of the system on those people. As a result, many programs have been proposed and some have been incorporated into the justice system: the most well known are probably diversion lists of diverse nature, which essentially stem from principles of therapeutic justice. Other programs include restorative conferencing protocols and court mandated programs. Literature on these topics has also consequently flourished.

Among all practices, bail is one of the most prominent in the processing of vulnerable alleged offenders. However, there is a crucial lack of research about how bail conditions are determined and monitored in the case of vulnerable people. Associated with this lack of research is an absence of evidence surrounding the efficacy of bail for vulnerable people who are alleged offenders. This is particularly problematic from a policy point of view. Although a breach of bail is technically not an offence in itself (Stubbs, 2010), any breach brings a vulnerable person back to the attention of police and, therefore, of the criminal justice system (NSWLRC, 2012). Whilst efforts have been made recently to address this research gap with, for example, the submission of a large report on bail by the NSW Law Reform Commission (NSWLRC, 2012), research in relation to how bail applies to vulnerable people remains patchy and policy makers are in need of *consolidated* research on bail, bail practice and effectiveness.

For example, much research focuses on specific types of vulnerability (mental illness, aboriginality, age, etc.) and offending, but does not consider to the same extent how separate vulnerability factors can overlap and the implications of any overlap for those who provide support to defendants or offenders. Indeed, most research deals with only limited levels of cross-sectional vulnerability, usually two (for example: young aboriginal offenders or issues of comorbidity; see Davnet et al., 2005). Little has been done to date on the topic of multiple vulnerabilities, principally where issues of dual diagnosis may be compounded by combinations such as drug use *and* homelessness *and* age *and* sexual preference. The possible combinations of multiple

vulnerability factors are extensive. The NSW Law Reform Commission (NSWLRC) for example, looks only at cultural practices for Aboriginal and Torres Strait Islanders, but not for other culturally and linguistically different groups (NSWLRC, 2012, 181, 185), only indicating 'other special types of vulnerability' (p.186). The lack of empirical research has some impact on resourcing and practice, which are not currently grounded in evidence-based knowledge.

The report of the NSWLRC further crystallises the magnitude of this problem by indicating that, in relation to vulnerable defendants, while specific sections of the legislation insist that decision makers consider 'the interest of the person when making a determination regarding bail ..., submissions and other evidence before this review indicate that despite [these requirements], decision makers do not appropriately take into account the particular circumstances of these defendants' (NSWLRC, 2012, 168)).

This results in a legitimate questioning of unmet needs for vulnerable defendants who require support (Forsythe & Gaffnet, 2012). Monitoring vulnerable alleged offenders who are placed on bail is a challenge for both police and the courts (Raine & Willson, 1995; Brown, 1998; Snowball, 2011), and while the presumption of innocence is a fundamental principle of criminal responsibility, the management of offenders placed on bail and released into the community can be a major concern and challenge for police (Robinson, 2012). Statistical patterns for the last five years reveal that individuals on bail account for a significant number of offences, including that of motor vehicle theft (Smith, 2012). The NSWLRC report goes on to indicate that whilst vulnerable people should be 'treated differently (2012, 14), it is particularly difficult for police and support services to determine, administer and monitor bail conditions for vulnerable people, due to the specific circumstances of the latter'. This may result in an 'increase in arrest rates, short term period in custody, bail revocation' (NSWLRC, 2012, 54).

The literature review conducted by the authors in the lead up to the 2012 Critical Criminology Conference was broad and involved looking at material about bail generally, with a focus on Australian literature going back more than twenty years (see, for example: Doherty & East, 1985; Devine, 1989; Raine & Willson, 1995; Sherman et al., 1999).¹³ The materials reviewed provide a fairly detailed overview of the development of bail legislation in Australian jurisdictions¹⁴ (particularly in light of the 2012 release of the NSWLRC report on bail) and various bail related issues (Venables & Rutledge, 2003; King et al., 2006, 2008, 2009; Steel, 2009).

Our review of the literature revealed significant gaps in the understanding and documentation of: bail conditions; the bail decision-making process; and how bail applies to vulnerable people. The shift from the traditional purpose of bail (i.e., to ensure a defendant's appearance in court) to inclusion of the protection of the public and, more recently, to the use of bail conditions for other purposes such as therapeutic jurisprudence for vulnerable groups (i.e., to assist defendants to participate in treatment or other programs) has not been the subject of a comprehensive study to date. However, there is a clear delineation of bail decision being made according to either a model of 'unacceptable risk' or 'justification' (NSWLRC, 2012, 145). Interestingly, though, some practitioners consulted for the purpose of setting up this project indicated that bail is also considered as a pathway and associated with diversionary mechanisms to reconnect some vulnerable defendants with medical treatment (Bartkowiak-Théron & Fleming, 2011).

In a recent review of studies relating to bail for young people, Julie Stubbs (2010) indicated that 'we still need detailed research into bail decision making'. In her view, many studies pointed to 'the importance of organisational and cultural factors that shape the interpretation and implementation given to law reforms' (Stubbs, 2010, 500). Furthermore, to develop criminological knowledge that can help practitioners and policy makers, 'we need to extend our analysis beyond the texts of law and policy' (Stubbs, 2010, 500). The following issues documented in the literature support her point.

Issue one: High rates of remand as a problem

In recent years, the trend in the Australian criminal justice system, and internationally, has been for the number of remand prisoners to grow. In a study conducted for the AIC, Sarre, King et al. (2006) noted the percentage of people on remand had grown from 12 to 20% between 1964 and 2004. The most recent report

¹³ The Australian material included reports, articles and conference papers, principally covering the 1980s to present. International material was sourced more narrowly.

¹⁴ Tasmania has been included in some reports/articles but has not been the focus of a bail study. Certain developments within the Tasmanian magistrates courts, such as the Mental Health Division List, have been evaluated with little attention to the role or implications of bail in the process.

from the AIC and the NSWLRC inquiry show that this situation has not changed in overall terms. This is similar to the figures internationally. Governments, while sometimes responding to populist pressures to restrict bail, are generally unhappy about this increase. Remanding a significant proportion of defendants in custody contributes to a growing prisons crisis (Colvin, 2009). Many studies have also demonstrated that a large proportion of those on remand are subsequently acquitted or receive a lower sentence of imprisonment than the time already spent in custody (Morgan & Henderson, 1998; Hucklesby, 2009). In the interests of justice, as well as the fiduciary duty of using public money effectively, governments around the world are interested in ways of reducing the numbers of remand prisoners.

Issue two: Explaining the rise in the remand population: 'court culture'?

Although bail researchers tend to avoid general explanations, it seems likely that changes in judicial and community attitudes towards bail are influenced by what has been called the 'new punitiveness' (Booth & Townsley, 2009). David Garland (2001) has argued that we are in a new neo-liberal epoch of crime control in which there is more emphasis on punishment and addressing the needs of victims. Empirical studies have, however, demonstrated that the situation may be more complex than initially thought. Following a long tradition of criminologists being interested in variations and apparent inconsistency between courts and different regions, King et al. (2006, 2008, 2009) were interested in how magistrates in Victoria and South Australia made bail decisions. Far fewer defendants were granted bail in South Australia. After conducting a study in these two jurisdictions, they concluded that a rise in the remand population could partly be explained by a rise in certain types of offences. However, the procedures employed in the two states differed, even though this was not always related to the law or policy objectives. There was, for example, more time given to the consideration of bail in Victoria. Magistrates were more likely to ask for information, and the police through various 'feedback mechanisms', were more accountable. Like many criminological studies, this raised more questions than answers since it was not possible to measure every variable to enable a comprehensive comparison. One additional issue facing courts is that delay (caused by poor resourcing) is responsible for time spent on remand. The length of time on remand was lower in South Australia, even though fewer defendants were granted bail. Nevertheless, the researchers were most impressed by the difference in "court cultures" between the two states.

Issue three: Policy initiatives to reduce the remand population

Countries that have been successful in reducing remands have employed a variety of methods including requiring defendants (usually from middle class backgrounds) to wear electronic tags (Davnet et al., 2005). However, specifically designed aspects of bail were at the forefront of these policy initiatives. The following are relevant to this project:

Bail information schemes

The Manhattan Project in the USA (Ares et al., 1963) demonstrated that obtaining good information about defendants could reduce the number remanded in custody without this creating problems relating to fresh offences or failure to appear in court. One difficulty with obtaining information about defendants, however, is that doing so is expensive. For this reason, no Australian states or territories have gone beyond pilot schemes (Denning-Cotter, 2008). There are, however, other measures that can be taken to improve the quality of decision making. At its simplest, decision makers could receive more training, or courts could encourage defence lawyers to collect more information while preparing bail applications (*ibid.*; Venables & Rutledge 2003).

Bail conditions

Another way to keep defendants out of custody is to set tough bail conditions. These can involve reporting to a police station daily or submitting to a curfew (Doherty & East, 1985; Hucklesby, 1997; Fitzgerald & Marshall, 1999; Robinson, 2012). Critics see this as 'net widening' (Venables & Rutledge, 2003; Robinson, 2012), especially if the number of defendants refused bail is still rising. Another issue is the extent to which tough conditions cause breaches of bail, and what happens when bail is breached. Tough conditions and their subsequent monitoring by police can be particularly problematic for vulnerable defendants if enforcement impedes their welfare and well-being, for example in the case of curfews for young offenders (Robinson, 2012). Nightly curfew compliance checks 'may be excessive, oppressive and a questionable use of police resources' (Raine & Wilson, 1996 as cited in Stubbs, 2010: 497; see also Robinson, 2013)

Supervised programs

Supervised programs go further in seeking to monitor and assist defendants on bail. The same considerations of cost apply as for bail schemes: Does the initiative save money? Supervision can sometimes be achieved by using existing bail conditions. However, most schemes require the assistance of the probation or correctional services. Difficulties have been reported in practitioners refusing to assist first time defendants awaiting sentencing, even though they are happy to work with regular offenders (Henderson, 2008; Mather, 2008). More generally, there is a philosophical problem that can divide magistrates and other practitioners. Arie Freiberg (2004) has argued that assisting defendants awaiting sentencing is a form of "net-widening". According to him, it would be preferable to give bail without conditions. In support of Freiberg's (2004) view is the fact that other forms of well-intentioned assistance, such as diversionary practices, have also resulted in net-widening (see Prichard, 2010). Moreover, assistance provided for defendants is nonetheless an increase in criminal justice intervention in people's lives – what Austin and Krisberg (1981, 165) might have termed a 'wider' and 'different' net.

Bail accommodation and hostels

Occasionally, courts assist defendants by providing accommodation in hostels. This is particularly significant for bail because some defendants are either homeless (Ayres et al, 2010) or their living conditions do not cater for their well-being (nor ensure their appearance at court), and other defendants might have chronic social problems (such as homelessness and co-morbidity). Although the provision of accommodation has been evaluated in some states, apart from a study by Wincup (1997) there have not as yet been any in-depth, independent studies on bail accommodation programs. One would expect a debate within the agencies providing accommodation on the extent to which they should be exercising control.

Bail, vulnerable groups and therapeutic jurisprudence

In their study of bail decisions, drawing on court records from Victoria, King et al. (2006, 2008, 2009) found that indigenous defendants and younger people were over-represented in the remand population. There was also some evidence that more remandees were unemployed, had a drug problem or suffered from mental illness than were those who were sentenced. This could be predicted since bail is granted to those with social ties. Some have argued that this is unintentionally punitive and that the criminal justice system, in partnership with other agencies, should be providing programs and services that address the particular needs of such vulnerable populations. The specific issue of vulnerable populations going through the criminal justice system is a newly emerging topic, and literature on the topic is still scarce. The most recent publications on the topic in Australia are those of Bartkowiak-Théron & Corbo-Crehan (2010), Henning (2011), Bartels (2011), Bartkowiak-Théron & Asquith (2012), and Hannah-Moffat et al. (2012). The new judicial and procedural developments for vulnerable populations are developed in a number of consolidated and non-consolidated legal documents, but research on protocols and on the logistics of judicial processing still remains to be developed. The therapeutic justice movement, particularly in the area of vulnerable populations, is slowly progressing in many Australian courts with regard to the way sentencing takes place, even if this is not visible in legislation or policy documents. Like many other states and territories, Tasmania has, for example, established a mental health diversion list and a Court Mandated Diversion for offenders living with an addiction to drugs. Practitioners committed to this new way of working are also likely to pursue a different approach in bail decisions, and attempt to establish programs that can achieve results before sentence.

The need for evidence-based research

Although there is a relatively large literature on policy issues and the analysis of bail legislation, there has not been a review of initiatives aimed at vulnerable populations. Nor has there been much empirical research either in Australia or internationally on how magistrates make decisions about vulnerable offenders (the complexity of needs makes processes quite intricate to study, especially in the case of co-morbidity), how vulnerable offenders on bail are managed, and overall, whether there are sufficient mechanisms in place to support offenders placed on bail. Given the growing interest about therapeutic justice in many courts, it seems timely to focus research on two states that are pursuing innovative programs.

A proposed research program on bail and vulnerability

The authors propose that a national research agenda be developed, building on work done in the late 1990s by Australian researchers and practitioners, among them Rick Sarre, Tim Prenzler and Julie Stubbs, and on recent Australian publications on the topic (Forsythe & Gaffney, 2012; NSWLR, 2012). The originality of this research agenda lies in its specific focus on 1- the vulnerability of alleged offenders and 2- the coexistence of vulnerability factors for alleged offenders. Whilst point 1 would represent ground-breaking research in itself, point 2 makes our research unique. Indeed, many criminology projects have explored the prevalence of one or two vulnerability factors for offenders in the criminal justice system. There is therefore a large breadth of literature on offenders with a mental illness, Aboriginal offenders, etc. Very little research focuses on the existence of multiple cross-sectional vulnerabilities and the extent of its prevalence (Hannah-Moffat et al., 2012). Our proposed research not only starts mapping the extent of these complex needs and their impact (if any) on bail practices in two states, it also offers the opportunity to design strong and innovative methodological pathways to investigate complex needs offenders, without limiting a research exercise to normative theoretical labelling.

The states of Tasmania and South Australia constitute a good platform for initial research for several reasons. First, they are stable in relation to bail legislation: of all Australian states and territories, they have the least amended bail provisions and legislation in the past 25 years (Steel, 2009). This would significantly lower the chances of various legislative and policy change impacting on the measurement of variables. Second, both states have demonstrated their innovative stance in designing initiatives meant to cater for offenders' needs pre- and post-trial. In Tasmania, the Magistrates Court has established specific drugs court, a mental health diversion list and a dedicated children's court to cater for the situation of particular groups. In South Australia, there exists a state-wide program for addressing defendants with mental health problems and drugs issues (King, 2001). Also, while bail and its related decision-making process is fascinating in itself, the emergence of diversion programs for vulnerable defendants in Australia also warrants attention.

Research for a national research agenda could stem from the following questions:

- What factors influence bail decision-making for vulnerable people?
- Which factors impact on the monitoring of bail conditions for vulnerable people?
- Are vulnerability factors considered consistently throughout the process? If yes, is this a form of 'good quality process'? If not, what are the deficiencies in practice, legislation and policy?
- Are resources in place to ensure that bail conditions are met throughout the whole duration of bail?

In particular, Australian researchers should bear in mind the goal of carefully mapping or evaluating the various factors that impact on bail decisions and monitoring, and therefore obtain a clear overview of bail administration needs and resources for vulnerable groups. This would identify the variable/factors at stake in bail decision-making, administration and monitoring processes. Since little research has been conducted on the matter of bail as it applies to vulnerable populations, we should seek to obtain a broad, descriptive and analytical overview of processes and outcomes.

We have recently demonstrated that it is possible to generate some measurable impact factors that can be analysed quantitatively by way of survey using 5-point Likert scales (via a multiple analysis of variables and secondly, specifically through exploratory and confirmatory factor analysis). In some cases, there are possible correlations to make between these factors. It is therefore possible to survey all stakeholders in each state (with specific control groups) to see what factors impact (or should impact) the decision-making processes at various stages, and whether there is consistency in respondents' views.

The third aim of this research agenda is to estimate how well bail is working for vulnerable offenders, particularly those with complex needs. This should consist of an analysis of information provided by the courts and community corrections, rather than, for example, attempting to measure inputs and outcomes systematically, or comparing defendants on particular programs with those given "ordinary" bail conditions (Weiss, 1999). This project will link information about bail and offending with the views of practitioners about what impacts on bail at various points of the process. It will also consider the programs and the issue of bail for vulnerable defendants in the context of the broader movement in therapeutic jurisprudence and problem-solving courts. One objective is the identification of possible efficacy measures and benchmarks. To give one example, a traditional measure of success or impact has been the extent to which defendants commit further offences on bail, and the nature of any post-bail offending (e.g., escalation or reduction in the gravity of the

offence). For a therapeutic program, one measure of positive impact might be the extent to which, despite post-bail offending, vulnerable offenders are kept out of prison. Using the same tool as above, this section of the evaluation would focus on support programs and resourcing.

Some existing recommendations about Bail, vulnerable people in the criminal justice system, and research: the need to create change

Many recommendations have been recently brought to the fore in relation to strengthening definitions, protocols and guidelines relating to bail applied to vulnerable people (NSWLRC, 2012). We would like to support calls for further clarity and guidelines, and encourage researchers to generate empirical research in these areas. In particular, there needs to be specific research that aims to indicate or 'map out' the bail decision-making process and the current mechanisms that support defendants when they leave the courtroom and go back to the community.

Future research is needed to examine a number of issues that potentially impact on bail decision-making by magistrates and the monitoring of bail conditions by a number of stakeholders (police, professional carers, case workers, etc.). Such research should aim to refine the statistical picture of bail as obtained by previous studies (for example, Sarre et al., 2006), and devise workable risk management solutions acceptable for all stakeholders (police, courts, juvenile justice and community members). Currently, risk management tools neither allow for the assessment of vulnerability, nor are they conducive to inquire about existing support mechanisms for vulnerable offenders.

The aim of our proposed research is to provide an analytical account of bail-related programs and systems, and what they aim to achieve (reducing the numbers on remand, complying with medical treatment, reducing/preventing post-bail offending etc.). It seeks to describe the processes involved in making bail decisions within the various programs targeted at vulnerable groups, with a view to identifying best practice.

Any related outcome will offer practical assistance to magistrates courts across Australia by identifying best practice on programs that manage bail for vulnerable offenders. We will present our descriptive and evaluative findings in a way that will be useful to practitioners, while acknowledging the complexity of the issues. Programs aimed at particular vulnerable groups are an important step towards reducing the number of people remanded in custody. This project offers a consolidated analysis of such programs, decision-making processes, gaps and redundancies from policy, and legislative and resourcing points of view.

Conclusion on the significance of a national bail policy research: thinking of new ways to create change

Whilst bail is traditionally used as a diversionary tool to prevent vulnerable offenders from having further contact with criminogenic environments and to facilitate therapeutic problem-solving, there is little consolidated evidence about how bail works for vulnerable alleged offenders, and whether bail conditions for vulnerable people are 1- effective, 2- appropriately monitored, and 3- determined with sufficient consideration of complex needs and existing support programs.

The scarcity of academic research, literature and documentation (worldwide) on bail decision-making, resourcing and conditions as they apply to vulnerable populations requires that we look deeper at how policies develop and contrast in different jurisdictions. The research agenda suggested here aims to fill a significant gap in our understanding of policy-making, resourcing and implementation in this area, and is meant to inform key stakeholders on evidence-based practice. Because of the emergence of vulnerable populations as a relatively new phenomenon that concerns policy makers, criminological and socio-legal research is even more relevant and timely for. It will add to the generic picture of bail practice throughout Australia and will provide relevant policy-oriented evidence to all actors in the criminal justice system.

Any research on the topic of bail as it applies to vulnerable populations has national significance for three reasons. First, rising rates of remand are an issue of national concern (Forsythe & Gaffney, 2012). Second, human rights are an emerging issue on the national agenda which is of particular significance in relation to vulnerable groups. The bail process engages two important human rights, namely the right to liberty and the right to be presumed innocent until proven guilty. Third, the project engages with therapeutic jurisprudence, a new criminal justice perspective that offers a promising way forward to deal with vulnerable offenders such as

young people, people with a mental illness and people with a drug addiction. It strongly impacts on issues of justice reinvestment (Lanning, Loader & Muir, 2011), with careful consideration of costs, offender management and overall justice and police budgets. The findings of such research would be of benefit to all law-enforcement and justice stakeholders concerned with the cost-effective, fair and equitable treatment of individuals who are charged with criminal offences in Australia.

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PART TWO – SOCIAL DIVISIONS

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The Injuries of Hidden Class: Neoliberalism and the Crimes of Inequality

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A reviewer of this paper has asked, "But where is the criminology?" It is true that statute crime, which has occupied most of the attention of criminologists and all the attention of the criminal 'justice' system, is not discussed in this paper. Rather, it is concerned with the 'original crime', which I suggest was not the 'eating from the tree of knowledge', but the unequal accumulation of property that began with the shift from hunting and gathering to herding and farming (Draper, 1975). I contend that the growing inequality of income, wealth and opportunity over the recent decades since the 'neoliberal' turn, which reversed an earlier trend towards greater equality, stands alongside environmental destruction as the most harmful of contemporary crimes. The concept of 'crime' as 'harm' or 'social harm' is of course familiar with critical criminologists (Hillyard and Tombs, 1007). However, I will complete this defence with an example of the growth of inequality in the administration of a statute crime which has particular relevance to my study community. In 2004/5 Centrelink did 3.8M reviews of social security payments that produced \$390M in debts, while the Tax office did less than 2M reviews that produced \$800M in debts, despite having a much larger client population. While Centrelink was able to gain \$1.94 for every \$1 spent on reviews, the Tax Office was able to gain \$7.53 for every dollar spent. From the graph of a different data set: from 1990 to 2003, Centrelink prosecutions rose from approximately 1000 to 6000 per annum, while over the same period, Tax Office prosecutions varied only slightly between approximately 100 and 300 per annum (Marston, 2007).

I'll begin this paper with two accounts, of situations forty years and 2000 miles apart. The first is from my own experience in the work force in 1971, aged 18:

My principal job was, with another young bloke, to lift the crates of bottled soft drink from the conveyor belt and stack them on a pallet, which was fork-lifted away when full. This was quite monotonous, and we'd take turns going to the toilet for a smoke between the formal breaks. One day we were sent to remove the screw-caps from returned bottles so they could be put through the bottle washer. This was a favourite jaunt as we were hidden among stacks of crates and out of sight of the bosses, so we had a good time yarning and joking while screwing off the caps. This time the foreman came along and tried to speed us up, quoting the number of caps we were supposed to remove per hour. Seeing the futility of this pep talk, he sent us back to the conveyor belt. Later he bailed me up over this and other slights to the work ethic and said if I didn't 'smarten up my act' I'd be sacked. To this I responded, looking at him levelly, "That's alright, I'll finish up this afternoon". The satisfaction of seeing his jaw drop (literally!) remains with me to this day, forty years on. The next morning I picked up another job at a furniture factory in the same area, helping deliver and install furniture in customers' homes.

[Set in a Schweppes factory, in a light industrial area in the Shire of Belmont near Perth, Western Australia. The adjacent residential development was primarily Housing Commission built in the 40s, mostly purchased early from the Commission on affordable terms, rather than rented. Unemployment in 1971 stood as it had since the 40s, at about 2% of the work force].

The second account is from one of my research respondents, 2012:

Like I was saying, I've bowed down to Centrelink, staying within their hours [of allowed work], knocking back shifts. It's the same with Housing. I've paid back that money now, I'm being a very good girl and towing the line, basically... I still feel I was in the right, but it's too hard to fight them. They've got all these stupid rules, then they shove you off to all these different levels, where you've got to tell the story again and again and it's just too bloody exhausting. [Dave: They wear you down?]. Yair – it's easy just to give up... I wish I could tell them to stick it up their arse, and work when I could. It'd be alright if you could put a bit away – a couple of grand – and you could save that for the lean times of work [without having the pension docked]. I can see why people don't want to go to work though. I'm not much more ahead. I lose my pension, my rent goes up... They're taking straight off me what I was earning... and then you cop all this shit. Instead of being treated with a bit of respect for trying, they just, you know treat you like shit... I was feeling quite proud of myself, after all these years, you know, getting a decent job, then just to be treated like crap. And then I had a couple of bad shifts at work. Some of those nurses are just so up themselves, they treat you like scum sometimes, like you're a piece of shit... Most of them won't let me do anything – it's not as if

we're untrained – some of them don't want us to take the patient to the toilet, or help a man use the bottle. [Dave: Usually I don't have trouble...] Only because you're a man... I just feel so bad sometimes.

[Set in a public housing area on the fringe of Hobart, with no adjacent industry and little more further afield. Unemployment in southern Tasmania stands at about 6% of the work force, to which should be added an estimated 6% underemployed¹⁵ workers and up to 7% "discouraged job seekers" (ABS, 2012a; ABS 2012b). Underemployment in 1978 (when figures were first collected) was 2% (Loundes, 1997)].

These accounts provide two very different snapshots from the poorer end of the Australian working class over a span of 40 years. Because my methods include an auto-biographical element alongside respondent biographies and local and Australian history (after Mills, 1959), the comparison must also span the continent. My purpose with this approach is to provide the physical and emotional immediacy needed to comprehend, to *encompass*, the enormous changes that have taken place in working class life over the last forty years, and particularly in the condition of the poorest segment of the collective – the long term unemployed and the underemployed, the 'unskilled' or 'unqualified', the non-academic kids and the 50+ adults, the mentally or physically 'disabled', the drug users and the boozers. Many of these citizens would have found niches in the old labour market, but in this brave new world they face a stigmatised dependent status in an inadequate and punitive welfare state – ameliorated only by their efforts at resistance. This grouping has attracted the title of 'precariat', the European term derived from 'precarious' and 'proletariat', for let us "refer not to an underclass but to a recently, and – one must for the time being presume – temporarily, *displaced segment of the working class*, consisting overwhelmingly of people who have only their labour to sell but who find themselves [in the 'post-industrial', neoliberal labour market] unable to secure a wage in the present or for the foreseeable future." (Scambler and Higgs, 1999, p.285)

Class and the 'inequality hypothesis'

In academic discourse and in political activism, 'inequality' has largely replaced 'class' as the banner of resistance to the resurgent domination of capital that we call 'neoliberalism'. Arguments against 'class' as a useful analytic concept, as a useful descriptor of social relations in 'post industrial' societies, or even as a useful rhetorical tool for the activist Left (Pakulski and Waters, 1996) are persuasive to some yet given these volatile times – politically, economically and environmentally – I wonder whether the critics of 'class' are speaking too soon from a brief window of 'post-industrial' affluence in the West. Be that as it may, the persistence of class, however named, is indicated by socioeconomic and cultural evidence and remains important to many writers and citizens (see for example McGregor, 2001; Skeggs, 2004; Bennet et al, 2001; Bennett et al, 2009). The shift away from 'class', and its defence, are at least as much ideological as empirically reasoned. Navarro (1997) quotes journal editors describing the term 'working class' as "excessively ideological" and encouraging him to use "the less value laden term socioeconomic status". Navarro writes, "They did not seem to realise that such a change was more than a mere semantic modification" (Navarro, 1997, p.391). As a son of proudly working class parents, and as one who came of age at the height of labour radicalism in the decade around 1970, I have had no difficulty in maintaining class consciousness amid the subjectivities of the class debate and the complexities of late modern life.

The focus on 'inequality' owes itself not only to the massive increase in the 'gap between the rich and the poor'¹⁶ since the neoliberal turn, but also to a growing body of epidemiological research into a causal relationship between increased income inequality and reduced health and wellbeing of populations in the rich, 'developed' world (Wilkinson and Pickett, 2009a, 2009b). The international and cross-cultural reach of the research has presented difficulties in validation, though it appears to have achieved broad acceptance as the data has accumulated, with provisos regarding the need for political-economic analysis, the pitfalls of methodological individualism and insufficient examination of 'generative mechanisms' (see for example: Coburn, 2004; De Maio, 2011; Layte, 2012; Muntaner, 2003; Navarro and Shi, 2001; Nguyen and Peschard, 2003; Scambler, 2001; Subramanian and Kawachi, 2004). However, the results do mirror those of the Whitehall studies, whose relatively homogenous population – the British Civil Service – provided in effect a

¹⁵ 'Underemployment' refers to part time workers who want more hours. In 2012 underemployed workers wanted an average of 14 more hours per week. 56% wanted full time work (ABS, 2012a).

¹⁶ Expressed as the difference between the earnings of the top and bottom deciles or quintiles of the population. Or: "In 1974 the average income of a chief executive officer was 34 times greater than that of a worker, but by 1994 it was 179 times greater!" (Navarro, 1997, p.404)

'natural experiment' which was able to show more clearly the strong effects of stratification on health and wellbeing, *acting across all levels of the hierarchy*, most of which would hardly be described as 'disadvantaged' (Marmot, 2004). Since all levels of a society are harmed by increasing inequality, albeit to a reducing degree as we climb up the ladder, we can appeal to the self-interests of the power élite (Mills, 1956) itself to help reduce inequality. This, at least, is the hope of the Equality Trust – the social action arm of Wilkinson's and Pickett's work. Should that fall on Dickensian ears, there remains hope in the very large 'middle class' which has been found to be less than beguiled by the neoliberal cornucopia (Pusey, 2003).

A Marxist theory of inequality

Peet (1975) provides a succinct yet wide-ranging Marxist analysis of inequality and poverty¹⁷. To the Marxist principle that inequality and poverty are inevitably produced by capitalist societies, he adds the "social-geographic idea that inequality may be passed on from one generation to the next by the environment of opportunities and services into which each individual is implanted at birth" (p.564). Under capitalism, human labour is a mere commodity, bought for a variable price (wage) that depends on the levels of education and skill required for the different types of labour. Stratification of workers evolves from the inequality of access to skills acquisition occasioned by the hierarchy of skills and wages – "Inequalities of income and opportunity within the class of wage and salary earners are thus built into the wages system" (p.565). Capital (defined as "historical labour power accumulated by the capitalist class because it has been able to pay labour a sum less than the value of the goods produced by the workers") accumulates, and interclass inequalities grow. The worker may experience an improved *material* position, but at the expense of his or her *relative social position*. The social inequality that this produces functions as an incentive to greater effort of wage and salary earners. New trends in consumption are introduced initially into the upper levels of the hierarchy before being sold down the social strata by an increasingly efficient marketing machine. The great majority of citizens are thus "caught in a never-ending struggle to earn sufficient income to allow them to consume in a style or volume similar to the pacesetters of the consumption group above them" (p.566). Inequality is 'functional' as long as citizens believe it is possible to achieve some semblance of the consumption of the upper classes, but is a source of alienation for citizens who no longer believe in this chance, "and the social problems which result from such feelings represent one of the most fundamental contradictions of advanced capitalism" (p.566). Mechanisation produces more exploitable surplus and therefore capital available to invest in more machinery, leading to a fall in relative demand for labour. This leads to an increase in a surplus of labour (unemployment) which can be postponed by rapid economic development, "such as was made possible by the expansion of the North American frontier... or the period of suburbanisation and mass purchase of consumer goods that immediately followed WWII" (p.566), but these conditions cannot persist.

The normal operation of the capitalist economic system produces a set of social classes which have different functions and are unequal with regard to income, power, and status. Each class, even each stratum within a class, is allowed to reproduce itself using a portion of the income of the present generation to raise, educate, and train the generation of future participants in the system of production. The adult generation invests in the social resource environment used by the growing generation, and as the amount of money allocated to each class varies, so the amount which may be invested in social resources varies, producing unequal environments which perpetuate the class system (Peet, 1975, p.569).

Peet says more about the conditions under which these patterns of capitalist development are either ameliorated or worsened, but space prohibits a full review of the paper. For the purposes of the focus of my paper I want to reiterate one idea from the above and use it as a springboard into a theme that has repeatedly thrust itself into my attention during my community inquiry. Peet's idea was that *inequality is functional as long as citizens believe it is possible to achieve some semblance of the consumption of the upper classes, but is a source of alienation for citizens who no longer believe in this chance, "and the social problems which result from such feelings represent one of the most fundamental contradictions of advanced capitalism"*. That is, it is in the injured feeling or emotions of citizens of a class society that we need to inquire, if we are to find the key to its most pressing social problems.

¹⁷ Peet's 1975 synthesis remains remarkably relevant, and is predictive of current conditions. Indeed Peet presented himself at a University of Tasmania public lecture in January 2012 as an unrepentant Marxist whose convictions have only been confirmed by more recent developments.

The hidden injuries of class

Sennett and Cobb's (1972) *The Hidden Injuries of Class* remains a peerless study of the emotional assaults upon citizens of class society and related work place hierarchy, and of the ways their working class respondents resist or deflect these assaults in order to manage their psychological survival.

Class society takes away from all the people within it the feeling of secure dignity in the eyes of others and of themselves. It does so in two ways: first, by the images it projects of why people belong to high or low classes – class presented as the ultimate outcome of personal ability; second, by the definition the society makes of the actions to be taken by people of any class to validate their dignity – legitimizations of self which do not, cannot work and so reinforce the original anxiety.

The result of this, we believe, is that the activities which keep people moving in a class society, which make them seek more money, more possessions, higher status jobs, do not originate in a materialistic desire, or even sensuous appreciation, of things, but out of an attempt to restore a psychological deprivation that the class structure has affected in their lives. In other words, **the psychological motivation instilled by a class society is to heal a doubt about the self rather than create more power over things and other persons in the outer world** (pp.170-171, original emphasis).

Dignity is not accorded equally as a matter of course between citizens, but as reward for *performance*. A factory worker may be promoted to foreman position, but what of the worth of his peers who were not so singled out? What will he (and they) make of his desertion? Avoidance of performance that could *stand out* (and lead to promotion) can appear on the surface as a lack of enterprise. Class society “imposes the necessity for defensiveness: in a hierarchical organization... getting by day to day is at least something one can trust” (p.202). Pay might rise, but self respect will not come from acceptance of the reward because the real person within does not accept the class definitions of worth. “Fragmentation and divisions in the self are the arrangements consciousness makes in response to an environment where respect is not forthcoming as a matter of course” (p.214).

The divided self is like most other kinds of conscious defences human beings erect for themselves; it stills pain in the short run, but does not remove the conditions that made a defence necessary in the first place... Despite an extraordinarily subtle rebalancing of their feelings they cannot escape the influence of a destructive social order (Sennett and Cobb, 1972, p.219).

Pride and shame

The first story at the beginning of this paper tells of the resistance of young process workers to the potential humiliations of power in a hierarchic factory situation, a resistance that was largely enabled by the high level of employment at the time. The second account illustrates the relative disempowerment and humiliation of a member of the greatly expanded category, the underemployed or unemployed precariat, forty years later. The language I want to use to explore a common *meaning* in these accounts appears throughout *The Hidden Injuries of Class*, either directly (as in the case of ‘shame’, ‘embarrassment’ and ‘humiliation’) or more usually in the form of various ‘marker’ words and phrases¹⁸, including ‘injured dignity’, ‘self doubt’, ‘feelings of powerlessness’, ‘feelings of inadequacy’, ‘deference’, ‘losing face’, ‘fear of standing out (or exposure)’, ‘feeling rejected’, ‘seeking approval’, ‘humbling’ and ‘feeling like an imposter’. The language of ‘pride’ is more restricted (perhaps because the book is concerned with the *injuries* of class), and includes ‘dignity’, ‘secure dignity’, ‘self worth’, ‘self respect’ and ‘integrity’. Although many of these terms suggest wider emotional and cognitive complexes, at their core is the ‘ring master’ social-emotional process which has been placed under the umbrella term ‘shame’, with its variants shame/humility, shame/embarrassment and shame/humiliation (Scheff and Retzinger, 1991; Webb 2003), but which here will be more usefully understood as the dialectical gestalt ‘*pride and shame*’ (Webb, 2003). I will explain this by applying the shame/pride lens to my opening accounts.

¹⁸ See Retzinger (1995) and Webb (2003) for discussions of the ‘shame family’ of emotions and their verbal and visual signifiers.



Figure 1 - The shame and pride mandala.

To be authentic, 'Pride' needs to be tinged with shame-humility if it is not to be seen as 'shameless': the overbearing, vaunting pride or hubris that leads to our downfall. But equally authentic 'Shame' also needs a tinge of its 'shadow' – that measure of quiet self-esteem, self-respect, indeed dignity (Webb, 2003).

The Schweppes factory account is a story of pride drawn from shame. A day or so before the incident, during 'smoko' with the lads, I was sitting at the wide factory entrance having a smoke, when the chemist approached. Instead of reminding me there and then that smoking 'inside' the factory was prohibited for safety reasons, he motioned me to accompany him to his office. Because I was uncertain of his intentions, I ground my fag underfoot and followed him the thirty or so metres to his office, where he talked to me about safety (patronisingly, I felt), and when he indicated he had finished, and I walked back to the group. As I recount this apparently minor incident I feel an uncomfortable tension in my chest (the pain of shame), and 'relive' that ambivalent walk, at the behest of the white-coated 'superior', before the eyes of my workmates. I felt humiliated by the chemist's socio-emotionally inept handling of the incident, but in those days I was insufficiently self-aware to understand that, and could only feel it, and would have automatically attempted to mask it (Wurmser, 1981). I imagine now that the chemist too was constrained by the class tension of the situation as he approached the watching eyes of our group, and that his resultant shame-defensiveness could have blunted his social acuity. What is most remarkable here is the depth of emotion that is relived – or mirrored in the mind/body, in the present – in the recounting of this little incident that happened 41 years ago. It is also cogent that it was remembered¹⁹ during the writing of my account of the Schweppes factory at the beginning of this paper, which is a story of 'pride', the implication being that the pride that is contained in the shame and shame that is contained in the pride roll on like the yin-yang wheel, one peeling from the other, and like Odysseus casting off the rags of the beggar, I rise in pride to confront the foreman (the bosses, the humiliating hierarchy) on level terms, as equal arbiter of my employment: his jaw drops, but saying nothing, he walks away. I've always been aware that this action was enabled by the fact I did not need this job – that there were others just around the corner.

In the second account, Clare tells of her emotional battles with the welfare agencies' 'policies of poverty' and with being undervalued in her casual job of sitting with high-needs hospital patients. Clare's account is shot with shame/humiliation markers: I'm being a good girl and towing the line... they treat you like scum sometimes, like you're a piece of shit... I just feel so bad sometimes. And with angry yearnings for release from the bonds of shame into expressions of pride: I wish I could tell them to stick it up their arse... Instead of being treated with a bit of respect for trying, they just treat you like shit... I was feeling quite proud of myself, then just to be treated like crap. Clare, who has raised three children successfully through an earlier abusive marriage and later through the death of the one good man in her life – this tigress in the care and defence of her children – has had to struggle to maintain her self-respect amid the structural disrespect of this 'neoliberal' political economy and the patriarchal culture that underlies it. "I wish I could tell them to stick it up their arse" is the prayer of many a victim of the 'poverty trap' set by a punitive welfare system and an insecure, increasingly part time labour market with a total real under- and unemployment of 18%. Yet from the series of 'narrative' conversations we had, another theme emerged, rather shouldered itself into plain view: in fact Clare had 'stuck it up their arse' (had resisted oppression), often and successfully, sometimes against all odds,

¹⁹ I have purposely used the passive form here, as the active form – 'I remembered it' – gives an incorrect impression of agency in the recall.

and from an early age. One cannot survive an abusive society without suffering deep shame/humiliation, yet always there is the other half of the gestalt, the authentic pride that awaits the release of shame, when that shame is fully experienced and not avoided through various displacement activities. From Webb (2003), the Compass of Shame (avoidance):

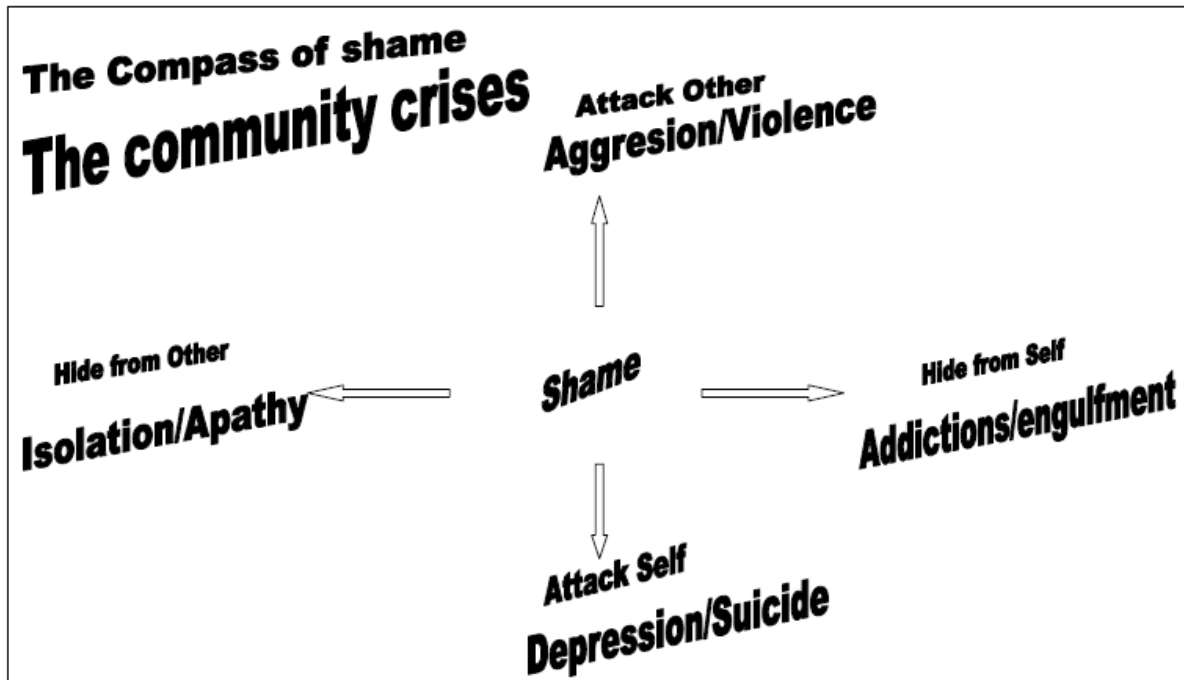


Figure 2 - Webb's Compass of Shame

Structure and agency

The conversations between Clare and I provided an emotionally safe environment in which shame was 'named'²⁰ and sources of pride were identified. This led to a "turn around" for Clare in that she is now less likely to let potentially humiliating interactions "get to" her and more likely to stand up for herself successfully in oppressive situations. Webb's 'Compass of Shame' summarises the patterns of behaviour we use to try to protect ourselves from the pain of shame and humiliation. However, these attempts to avoid shame are likely to lead us to further shame or humiliation, as for example in the 'shame/rage spiral' (Scheff and Retzinger, 1991), unless by chance or design we step into our shame from the avoidance spaces we have been occupying and by accepting and healing our unresolved shame, discover our authentic pride. Sennett and Cobb's words quoted earlier echo here: *Despite an extraordinarily subtle rebalancing of their feelings they cannot escape the influence of a destructive social order.* Yet in the last resort it is the *emotional* resilience of individuals and groups in doggedly resisting crushing forces of contemporary structure that has been powerfully formative in the history of democracy and labour.

The Compass of Shame points beyond the 'micro' of individual harm to the bigger question of *how* socio-political-economic structure affects agency, particularly in relation to the apparent harms of inequality. This suggests to me that macro inequality²¹ interacts with local social harms through the mechanism of the social dynamics of pride and shame, alternatively named dignity and injured dignity (Sennett and Cobb, 1972; Fuller, 2006) or respect and humiliation (Gilligan, 2001). Shaming structures (lack of well paid, fulltime or appropriate work, punitive welfare policies, exclusion from mainstream consumption) interact with shaming biographies (child abuse or neglect, family abuse, workplace abuse, welfare or criminal justice institutional abuse) to produce individual and social harms, which in turn help to replicate poverty and inequality and reduce socio-

²⁰ See for example Webb (2003), Morrison (1996) and Kaufman (1996) for discussion of the therapeutic value of 'naming' shame, including *the use of the word 'shame'* rather than one of its many 'code' terms. The *acceptance* of one's shame that is produced by this and other means triggers, in a supportive social environment, the emergence of 'authentic pride' – pride tempered by a healthy shame/humility (Webb, 2003).

²¹ More than one writer has suggested it is not 'inequality' per se that is the mover, but that it acts a marker for related political-economic forces (Coburn, 2004; Navarro and Shi, 2001, Muntaner, 2003). Perhaps it is both a marker and a mover.

economic mobility, and so reinforce class division. The oft-stated difficulty with conceiving the practical relationship between structure and agency lies in the language we use at the outset, which separates an indivisible whole, or draws lines through a continuum. What is needed is still perhaps best expressed by Mills (1959) as “the capacity to *range* from the most impersonal and remote transformations to the most intimate features of the human self – and to see the relations between the two” (p.7, my emphasis).

The injuries of hidden class

The purpose of my work is foremost *pragmatic* and *critical*. Fundamentally, I am exploring the injuries of the dominated in an increasingly unequal society and the relationship between personal and political resistance and liberation. Consciousness of class, race, ethnicity or gender have been instrumental in the struggles for empowerment and improvement in the conditions of these social groups. At all levels of organisation from family, school, workplace, neighbourhood to nation, some sort of collective consciousness has been fundamental to, not only social and political change, but to psychological survival of the individual through the respect of one’s peers. Consciousness of ‘class’ (whether or not so named) has of course never been universal among its ‘members’, or we would not have witnessed the ‘neoliberal’ claw-back over the last thirty years of so much of labour’s earlier gains. Yet there is little doubt that class identification has receded with the shifting emphasis from production to consumption and the shrinkage of traditional ‘working class’ employment. Sennett and Cobb’s injuries of class blur into injuries of exclusion from undifferentiated consumerism. We can (as I have done throughout my working life) resist the humiliations of class and hierarchic workplace organisation through pride in our productive power and in our collective identification, but there is nothing “that one can do to resist the stigma and shame of being an inadequate consumer, even within the ghetto of similarly deficient consumers²²” (Bauman, 2005, p.40). This can be explained by the Compass of Shame, where compulsive consumerism lies with the other addictions on the East point of the Compass. As the pleasurable gloss of the new object wears off (more quickly in the case of the models available to the poor) the shame of position threatens to reassert itself, and we will feel impelled to buy anew, or otherwise divert ourselves from our growing discomfort. We are unlikely to recover our authentic pride while we are desperately seeking to avoid our shame²³.

Skeggs and Loveday (2012), in a welcome confirmation of the general thrust of this paper from precariat working class Britain, describe the resistance of their respondents to the ‘derision and contempt’ displayed towards them in the popular media and in Government ‘anti-social behaviour’ policy. Their respondents knew they were being judged for their ‘accident of birth’ in precariat Britain. What Skeggs and Loveday call ‘affects’ and which I will call ‘shame’, are useful in understanding power only when connected to a cause or source, at which point “suffering is made understandable as a social problem” (p.483).

The people that populate this paper all had access to the language of class, even after thirty years of attempts to rhetorically eradicate the concept in Britain. The concept of class enabled them to understand the structural conditions by which they are positioned, and made it possible to deflect interpretations of structural injustice as their own responsibility and faulty psychology (p.487).

Skeggs and Loveday ask what happens when ‘the affects of anger and anxiety’ (for which I substitute *shame/humiliation*) produced by injustice (inequality and stigmatisation) are not attached to their proper object, particularly as conditions continue to worsen?

I suggest that ‘what happens’ has long been visible in our social problems (whatever the changes over time to the language of ‘class’) as citizen’s understandings of the ‘proper object’ of their suffering is often incomplete, from the psychological to the political levels. This in effect has been a central question in the community collaborative inquiry. There are a number of reasons for my limited success with engaging participants to the depth this question requires. However, one major obstacle to the citizen inquiry in my local ‘precariat’ working class community relates directly to the question itself. This is the difficulty the community inquirers have had with crossing the same threshold of shame/embarrassment that all social inquirers must cross when first

²² Unless one refuses to ‘buy’ consumerism. As a member of the ‘counter-culture’ from the 70s (my other important identification), I can attest that this is possible, but dependent upon luck of association.

²³ I don’t deny that much of this belongs to the ‘general human condition’. However, my thesis requires biography *and* structural history to be weighed together – one in each hand, so to speak – at all times. In any case, the ‘general human condition’ *is* now hierarchic.

entering the field, but which university inquirers usually overcome. The difference might best be understood as one of the 'injuries of class'.

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Can prisons be supportive of victim/survivors' needs? Considering the role of prison culture and alternative responses

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What capacity does the prison environment have to be supportive of the needs of sexual assault victim/survivors? Further, if the current operational and cultural environment of women's prisons is unable to adequately support victim/survivors' needs, are there viable alternatives available in the punishment of women? It has been well documented that the rates of women in prison have increased dramatically over the past few decades. According to the Australian Bureau of Statistics (ABS) from between 2001 and 2011 the total numbers of female prisoners in Australia increased by 35% (ABS, 2011).²⁴ The majority of these women were imprisoned for drug offences (17%) and acts intended to cause injury (14%). This sits in comparison to their male counterparts for whom the most common offences were acts intended to cause injury and sexual assault (ABS, 2011). Women also disproportionately committed offences such as fraud and theft, and on the whole this reinforces the notion that women in prison are typically not violent offenders (see also Covington & Bloom, 2006). That there are increasingly higher numbers of non-violent women offenders in prison suggests a need to be increasingly concerned about the impact of the prison environment on these women. This is particularly so given the high levels of abuse and trauma experienced by these women, and this point highlights the pertinence of the questions posed at the beginning of this paper.

In this paper we will consider whether the prison as an institution can be supportive of the needs of women who are sexual assault victim/survivors. It should be acknowledged here that sections of this paper are based on a previous publication by Clark & Fileborn (2011), and a forthcoming publication by Stathopoulos. Firstly, we seek to establish that female offenders experience sexual violence at rates higher than the general population. This sexual assault victimisation is experienced alongside a range of other complex social and health issues, and these complex needs must be considered in conjunction with sexual assault trauma. Secondly, the nature of prison culture, and the standard operational practices that occur within the prison, are identified and discussed. It is argued here that while aspects of the prison environment and operational practices can be modified to better accommodate the needs of victim/survivors', ultimately prisons are unable to adequately support victim/survivors' needs and are likely to function as a re-traumatising and counterproductive environment. The final section of this paper is concerned with identifying and exploring alternatives to women's imprisonment, with drug courts used as a key paradigm. There is a presentation of what is known about the effectiveness of drug diversion programs and what shifts may need to occur in order that they may better serve the needs of female offenders with sexual abuse histories.

Who are women in prison? Considering women prisoners' sexual assault histories and complex needs

In discussing the need for, and ability of, the prison environment to support women's sexual assault related (and other forms of) trauma, it is first necessary to establish the nature and extent of this populations' experiences of abuse and disadvantage. In comparison to women in the general community, female offenders experience much higher rates of sexual assault and abuse. This includes sexual violence that occurred in both adulthood and childhood.

The ABS Personal Safety Survey (PSS) indicates that for women in the general population, around 1 in 4 believe they are the victims of child sexual abuse, and 1 in 6 believe they have experienced sexual assault as adults (ABS, 2006). As with all statistics on sexual violence, these figures are likely to underestimate the true extent of sexual violence in the community. In contrast, Richters et al's study of 199 female prisoners in NSW found that 59% had been forced or frightened into doing something sexually that they did not want to in their lifetime (Richters et al, 2008). Justice Action Australia (2010) estimated that some 85% of women in prison in NSW have experienced sexual assault. Further, Sisters Inside QLD based study found that 89% of the 100 women they surveyed had experienced sexual abuse, and most of these participants experienced this abuse as children

24 Prisoner numbers increased from 1505 to 2028 (ABS, 2011).

(Kilroy, 2000).²⁵ While these studies draw on different methodologies and sampling methods, and as such comparison of these rates should be made with caution, they nonetheless suggest that on the whole women in prison appear to experience considerably higher rates of sexual violence than women in the general community.

As well as experiencing higher levels of sexual victimisation, women in prison tend to experience a complex range of social disadvantages. According to Justice Action Australia, of all women in prison in NSW: 70% have experienced physical violence as an adult; between 70-90% have drug abuse problems; 73% have been admitted to psychiatric or mental health units, and; 30% in metropolitan prisons come from the three most disadvantaged suburbs in Sydney (Justice Action Australia, 2010).

Together these findings indicate that these women's victimisation histories start early in life, are chronic in nature, and impact their life course trajectory, including their propensity to engage in offending behavior (Bloom, Owen & Covington, 2003, p.53; Duley, 2006, p.86; Messina, Burdon & Prendergast, 2003; Pollack & Brezina, 2006, p.120). Women in prison are, generally speaking, a high-needs population and are likely to experience a range of complex and inter-related social and health issues that may require therapeutic or other interventions (Bloom, Owen & Covington, 2003; Clark & Power, 2005; Moloney & Moller, 2009). These issues, as Covington and Bloom (2006, p.14) argue, 'have a major impact on both women's programming needs and successful reentry' into society, and are likely to impact women's experiences within the prison environment (Dirks, 2004). Thus, there is a need to ensure that the prison environment is able to offer women support and avoid further re-traumatisation, in order to facilitate reintegration into the community and to foster (eventual) desistance from offending. In doing so, it is imperative that steps are 'taken to ensure that the criminal justice setting does not recreate the abusive environment that many women offenders have experienced in their lives' (Covington & Bloom, 2006, p.13). The question then arises as to whether prisons have the capacity to operate in such a manner. It is this question to which we now turn.

Can the prison culture and environment be supportive of victim/survivors' needs?

While we have so far established that women in prisons experience a range of complex and inter-related trauma, health and social needs, and do so at considerably higher rates than women in the general population, it is so far unclear why it is problematic for these women to reside within a prison setting. It is our contention that the prison environment is largely inappropriate and re-traumatising for women with sexual assault histories, and may prevent effective therapeutic intervention. That is, being in prison may amplify the trauma experienced by these women, or at the very least may hinder efforts to recover from trauma. In this section we consider the nature of prison culture, and the types of operational practices that are likely to be re-traumatising or harmful for women with sexual assault histories and other forms of complex trauma. While it is acknowledged that there are avenues for reducing the impact of the prison environment on women, it is ultimately argued that it is preferable to remove women from prison settings and utilise alternative forms of punishment where possible.

The prison culture and operating environment is premised upon surveillance, power and control (Bloom, Owen & Covington, 2003; Clark & Fileborn, 2011; Severance, 2005). It is, according to Severance (2005, p.343), 'bleak and oppressive – a total institution where control is the goal and persistent surveillance, a stringent schedule, and suppressed individuality are the means to achieve it'. Prisons have generally been designed with the needs and risks of male prisoners in mind, and many of the standard procedures of prison are based on the actions and risks of male prisoners (Moloney, van den Bergh & Moller, 2009; van den Bergh, Moller & Hayton, 2010; Moloney & Moller, 2009). Yet, as established earlier in this paper, women prisoners are generally less violent, pose less of a risk to safety, and are have higher needs compared to male prisoners (Bloom, Owen & Covington, 2003; Covington & Bloom, 2006; Salomone, 2004). Because of this, we need to question whether the aforementioned cultural tropes and operating principles are appropriate in women's prisons.

Many current operating principles of prisons are in direct conflict with the needs of victim/survivors of sexual assault (that is, they are likely to be re-traumatising), as well as being in conflict with women's broader health, well-being and treatment needs (Bloom, Owen & Covington, 2003; Clark & Fileborn, 2011; Covington & Bloom, 2006; Moloney, van den Bergh & Moller, 2009). For example, regaining a sense control over one's life is

²⁵ It is unclear from this publication as to how many of these participants experienced sexual abuse as children or adults.

considered fundamental to healing from sexual abuse trauma within dominant therapeutic frameworks (Herman, 1992, p.134). However, prisons function to reduce women's autonomy and can act to recreate the dynamics of abusive relationships (Dirks, 2004). Likewise, the creation of a safe, respectful and dignified environment has been identified as key to recovery from trauma (Bloom, Owen & Covington, 2003; Covington & Bloom, 2006; Covington, Burke, Keaton & Norcott, 2008). Yet, the current operational environment and culture of prisons may prevent women from healing from sexual abuse histories and other forms of trauma. Many of the operational practices in prisons may be re-traumatising for women with sexual abuse histories (Clark & Fileborn, 2011; Dirks, 2004; Moloney, van den Bergh & Moller, 2009). Examples of these procedures include strip searches (Sisters Inside, 2004), pat searches (Moloney et al, 2009), and surveillance by male staff (Pollack & Brezina, 2006). Strip-searching will be used here as a key paradigm of re-traumatising practices in prison.

Strip-searching: A re-traumatising practice

Easteal (2001) argued that practices such as strip-searching of women, particularly by male staff, can be intrinsically sexually abusive, and re-traumatising for victim/survivors of sexual assault (see also Covington & Bloom, 2006; Kilroy, 2002; Jennings, 1994). This practice undermines women's autonomy, deprives them of control over their bodies and may jeopardise women's physical and emotional safety (Clark & Fileborn, 2011). It reproduces the dynamics of abuse as the person conducting the search is in a position of power over the prisoner (Pollack & Brezina, 2006), the woman has no or limited control over whether the search is conducted or not, and the search involves examination of the woman's genital and breast regions (Easteal, 2001), and is consequently sexual in nature. The re-traumatising nature of strip-searches is succinctly encapsulated by a female prisoner and sexual assault victim/survivor cited in Pereira (2001, p.188), who described her experience of prison strip-searches 'as similar to sexual assault. I felt the same helplessness, the same abuse by a male in authority, the same sense of degradation and lack of escape'. Easteal (2001) suggests that victim/survivors 'may totally shut down and become immobile' during a strip-search, and this response is often interpreted by staff as a form of resistance and may lead to the woman being reprimanded. This arguably has the potential to amplify the re-traumatising nature of the strip-search process.

Additionally, strip-searches are largely unsuccessful at uncovering contraband. For instance, of the 41,728 strip-searches undertaken in Brisbane Women's prison from August 1999 to August 2002, two of these searches uncovered significant contraband (Sisters Inside, 2005). However, drugs are still widely available within women's prisons, suggesting that these searches also have a limited deterrent effect (Easteal, 2001; Kilroy, 2000). That strip-searches are both unsuccessful in their purpose (to identify contraband) and re-traumatising for victim/survivors marks them as a primary target as an operational practice that should be ceased or heavily modified in women's prison. To do so may go some way towards creating an operational environment and culture that is mindful of women's trauma (Dirks, 2004).

Given the extensive trauma histories of women in prison, this suggests a need to remove or permanently modify such practices and to embed a trauma-informed approach into the operational environment and culture of women's corrective services, rather than simply changing practices for individual women who are identified as victim/survivors (Clark & Fileborn, 2011). While practices such as strip-searching can be stopped or modified to reduce the potential of the prison environment to re-traumatise victim/survivors, some commentators have argued that prison simply cannot be a therapeutic setting, as the aims of punishment and therapy are irreconcilably at odds with one another (Pollack & Brezina, 2006). Indeed, Baldry (2008, p.9) argues that prison:

'is not and cannot be, a therapeutic community; it cannot serve both punishment and therapeutic purposes because they are antithetical and prison's primary focus is security not therapy. Prison by its very nature, excludes normal society, promotes prison living skills and actively erodes community living skills.'

If, as Baldry suggests, it is not possible to engage women in prison in meaningful therapeutic work, this raises the issue of whether prison is the most appropriate setting for non-violent and low-risk women offenders with sexual assault histories and other forms of complex trauma. However, others have challenged this notion, arguing that at the very least prison can (at least in some circumstances) provide *temporary* respite and stability in the lives of these women, and present an opportunity to engage these women in some form of therapeutic intervention (Tongerren & Klebe, 2010). At the very least, the evidence presented throughout this paper supports the notion that the prison environment is far from ideal for victim/survivors. This begs the

question of whether appropriate and viable alternatives to women's imprisonment exist for low-risk high need female offenders. The remainder of this paper seeks to explore one such avenue in the form of drug diversion courts.

Alternatives to women's imprisonment: Community sentences

Incarceration as punishment is the remit of prisons. However, they also provide corrective programs with the aim of reducing recidivism. Corrective programs run in women's prisons are rarely evaluated, and consequently the success or otherwise of these programs is largely unknown (Bartels & Gaffney, 2011). However, statistics reveal that recidivism rates are high for female offenders (ABS, 2011). The Australian Bureau of Statistics found that 45% of the 2,028 female prisoners surveyed, had a prior imprisonment (ABS, 2011). Given the rates of women's prior imprisonment, their sexual abuse trauma, substance addiction and substance related offending, alternatives to prison sentences arguably require consideration.

There are clear economic and social arguments supporting the use of community sentences over custodial sentences (Corston, 2007; Jacobs, 2004; Smart Justice, 2011) for women who have committed non-violent crimes (Corston, 2007). For instance, from an economic perspective the cost of incarceration per day is \$247, while a community sentence is on average \$21 per day (Productivity Commission, 2011). Australian and overseas research suggests that community sentencing of non-violent female offenders may result in reduced recidivism, and provide greater opportunity to address the underlying causes of women's offending (Barnes, 2011; Corston, 2007). A large percentage of women in prison are primary carers for dependents. A community sentence allows women to remain close to their children and maintain family connections – which can be lost during a term of imprisonment (Townshend, 2006). Further, and importantly in the context of this paper, the use of community-based corrections may reduce the negative impact of punishment on high-needs women by avoiding the re-traumatising prison environment (Corston, 2007).

It must be noted however, that the system of community corrections must be designed to attend to the underlying causes of offending and to trauma issues in order to effectively reduce recidivism (Malloch & Mclvor, 2011). For instance, Malloch and Mclvor suggest that although community sentencing options were used in Scotland to sentence female offenders “the broader political, social and ideological factors surrounding the criminalization and punishment of women were not addressed” (Malloch & Mclvor, 2011, p. 326). Thus, in order to be effective the community corrections system needs to attend to the reality of female offenders lives by taking into account their gendered and trauma-related pathways into offending. In the absence of proper attention to the specific gendered needs of female offenders who are victim/survivors, community corrections may function as yet another site of re-victimisation for these women (Malloch & Mclvor, 2011).

A broad range of factors may require consideration in ensuring that community based corrections are cognisant of women's needs, and the realities of many of these women's lives. For example, the ‘chaotic’ nature of female offenders lives often means they will breach orders that result in a custodial sentence. Women who are in abusive relationships may be prevented (by their abusive partner) from complying with their sentence/treatment orders that are designed to keep them out of prison (Malloch & Mclvor, 2011). An example of this may be an abusive partner not allowing a woman to check in with her parole officer, or coercing her into using drugs. This suggests that for these women community based corrections or treatment orders need to coincide with relationship counselling, and a recognition of the impact that abusive relationships may have on the ability of these women to meet sentencing or treatment requirements. It is imperative that women are not further punished for the outcomes of abusive relationships.

The centrality of the supervisory relationship and the need for women to just talk to someone is also highlighted in the literature. This means having well trained community supervisors who are aware of how trauma impacts on women's ability to meet sentencing conditions (Malloch & Mclvor, 2011). However, in discussing and recognising women's needs, it is important to keep in mind that female offenders are not a homogeneous group. While there are, of course, similar experiences and needs faced by women offenders as a whole, there is also great diversity. The intersections of gender, race, class and sexuality all lead to a diversity of needs. Considerations around language, culture and religion, for example, will lead to very different practices in the provision of services (Bartels 2010; Alliment & Ostapiej-Piatkowski, 2011).

Drug diversion courts as a key paradigm

The use of drug diversion programs present as one such avenue for ‘doing’ community corrections with women offenders²⁶. While, as was established earlier, women in prison often experience multiple and complex social, health and other needs, drug-abuse problems are particularly prevalent in this demographic of women. It is for this reason we have elected to focus on this issue, though a focus on a range of other needs would also have merit. Further, drug abuse and sexual assault trauma commonly coincide, and drugs may be used as a coping mechanism to deal with this trauma (Herman, 1992). There is a strong connection between female offenders’ drug use and criminality (Corston, 2007; Johnson, 2006; Loxley & Adams, 2009). Female offenders are more likely to be arrested for drug related crimes (ABS, 2011). For these women a community sentence with treatment orders for drug counselling or pre-sentence drug diversion programs may be a more appropriate option than imprisonment – however it should be noted that victim/survivors of child abuse should not be forced into therapeutic options such as drug diversion programs against their will as this would only serve to reproduce the coercive elements of abusive relationships. Under this punishment pathway, the offender receives drug counselling and is treated in a familiar environment. This also alleviates the need for transitional services that are usually required for women leaving prison and integrating back into their communities (Kittayark, 2005).

Drug diversion courts and programs have been piloted in New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. The aim(s) of such programs include: to break the cycle of drugs and crime; to involve offenders in treatment and rehabilitation programs; and to provide alternative pathways to offenders (Success Works, 2008). Most of these programs have had successful outcomes with the diversion of low to moderate level offenders in two domains. Firstly, drug use was reduced for those who completed programs. Secondly, reoffending rates were reduced by completion of programs.²⁷ While these are good measures of success, further criteria for measuring success may establish the notion that drug diversion, and drug use cessation, are long-term prospects. For instance feelings of self-efficacy, confidence, better physical and mental health, steady housing, reduced debt and improved wellbeing may also be valid criteria for indicating successful participation in drug rehabilitation programs²⁸. Most importantly, more research is required into female offenders with victimization histories and how beneficial drug diversion programs actually are in the long term. Changes in the way female offenders are sentenced should be based on the evaluated and actual benefits associated with such programs rather than just the perceived benefits.

A review of international and Australian drug diversion programs found that although drug diversion was successful in its aims – a reduction in drug use - this was more so the case for men than for women. The reasons identified for this included women’s needs for child-care, housing assistance, and assistance with transport (Bull, 2003). It was noted that although many women were accepted into drug diversion rehabilitation programs, many did not have the necessary resources to attend. Further the stigma associated with a woman using drugs, particularly for women who are mothers, incited shame and became a barrier for women’s participation. Consequently, Bull (2003) argues that women may require a female only/specific space in which to maintain safety – particularly as the majority of female offenders with drug abuse issues have a history of sexual victimisation – and greater support to attend drug diversion programs (Bull, 2003). As with the prison itself, drug diversion programs have typically been designed around male needs and risk, and male patterns of drug use. Programs designed in this manner are unlikely to adequately address the diverse needs of women who abuse drugs (Bull, 2003).

The recommendation for gender-specific service provision also finds support from Canadian researchers, Covington and Bloom (2004; 2006). Covington and Bloom advocate the need for particular services for women based on their specific needs, such as those related to sexual abuse histories, and co-occurring substance dependency and mental health issues. They state that “collaborative, community based programs that offer a multidisciplinary approach foster successful outcomes among women” (Covington & Bloom, 2004, p. 9). A caveat is that gender specific services may enforce gender normative behaviour and this could prove

²⁶ It must be noted that female offenders’ trauma needs mean that forced participation in drug diversion program would only serve to reproduce the coercive nature of abuse.

²⁷ First time offenders were still being sentenced to imprisonment – hence the increasing rate of women in prison, however women who went through the drug programs were not reoffending at previous high rates.

²⁸ This point was made by Liz Moore during her presentation “ Drug Courts around the World” in the Alcohol and Other Drugs Workshop at the Critical Criminology Conference, UTAS, 2012.

oppressive to women who do not fit into this mould. Hannah-Moffat (2010) warns that any such gender specific programming must remain cognisant of women's heterogeneity.

Conclusion

Throughout this paper we have argued that women in prison present as a high-needs, low-risk population. In particular, these women are survivors of sexual assault at a much higher rate than women in the general population. Thus, the impact that sexual assault trauma has on these women's experience of prison must be acknowledged and responded to in terms of evolving the cultural and operational environment of prison to reduce the likelihood that prison will serve as a site of re-traumatisation for these women. It is argued that while the prison culture and environment can be adjusted to better accommodate the needs of victim/survivors, the available evidence would suggest that it is preferable to shift low-risk, high-needs women offenders out of prison and into a community based setting.

It has been suggested that the use of drug diversion programs may serve as a viable alternative to the imprisonment of women. However, this is only the case if these programs are able to accommodate for the specific (but diverse) needs of women, and to recognise and address the impact of sexual assault trauma in many of these women's lives. To this end, more quantitative and qualitative research is required to further our understanding of the therapeutic benefits of drug programs for female offenders with trauma. It should not be assumed that alternative pathways are not coercive – systems and processes that seek to support female offenders with victimization histories require careful planning based on empirical knowledge of what works.

In concluding this paper, we wish to raise a series of questions that need to be addressed in considering the potential for drug diversion programs to function as an alternative to women's imprisonment:

- Can drug courts be more effective if they consider trauma as an important aspect of women's drug use and subsequent drug treatment?
- Can drug courts offer gender specific sentence conditions that take into account women's therapeutic needs and the chaotic lifestyles of many female offenders with a sexual abuse history?
- Can drug programs offer women a safe space (non-coercive, non-abusive) in which to work on their substance abuse issues, but also on their trauma?

Ultimately, we ask if it is possible, in light of women's victimisation histories, to recalibrate the balance between corrective and therapeutic aims that may result in better outcomes such as: reduced recidivism; better well-being; pro-social life skills, and; community safety, amongst many others. As the female offender population in Australia is still relatively small compared to male offenders, it may be possible to stem the rise of female offending, if the underlying causes of offending can be addressed.

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Making sense of “riot”: the fragile legitimacy of police powers and public order offences in an Intervention

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This paper is written in the context of doctoral research. My thesis concerns the use of evidence of ‘culture’ in the criminal justice system in the Northern Territory, specifically in courts of summary jurisdiction in selected remote and regional centres in Central Australia.

I presented a paper at the 2012 Australian and New Zealand Critical Criminology Conference that concerned court processes (Spiers Williams, 2011), specifically sentencing, and examined how flawed understandings of culture by legislators and practitioners were supported by and contributed to a ‘zeitgeist’ of Intervention.²⁹ One effect of this was to de-politicise what was in fact anti-Indigenity as the law’s misconceptions of culture were enlisted in sentencing processes to pathologise Aboriginality and negate opportunities for community involvement in justice processes. This paper takes the same case study to explore the impacts of misconceptions of ‘culture’ at the ‘front end’ of the process, that is, to examine how Warlpiri people have been criminalised through the use of public order offences and how culture is misconstrued to legitimise the exercise of police powers against them in this context. It examines the failure of justice agents to acknowledge the cultural construction of public order offences, and the failure of justice agencies to incorporate the ways of knowing of those against whom allegations of public disorder are alleged.

This paper considers a case study concerning two events that were found to constitute public disorder. Many writers have exposed the deficiency of the components in public order offences (Brown et al., 2011, p83f; 752ff,) the tendency of police to target suspect populations including Indigenous people (Johnston, et al, 1990-1991; Kitchener, 1992; McConville et al, 1991), the central role of police in the prosecution of public order offences and the ease with which evidence can be constructed by police (Brown et al., 2011; Cunneen, 2001; Egger & Findlay, 1988), the use of public order offences to depoliticise and criminalise expressions of political resistance (Cunneen, 2001), and the injustice of criminalising the use of public space for those to whom private spaces are unavailable (Brown et al., 2011, p746ff). While the case study is a good vehicle to demonstrate the above issues, that is not the purpose of this paper.

The purpose of the paper is to consider how concepts underpinning ‘public order offences’ are culturally constructed, and how these can negatively affect the way that the criminal justice system’s agents understand events that occur in ‘public space’, in particular influencing discretionary decisions. This paper endeavours to provide another perspective - the perspective of some Warlpiri people - on an event that police constructed as ‘riot’, and to expose the instability of this from a socio legal perspective.

Firstly I briefly outline the case study about that is, events between September and November 2010 when there was an attempted Aboriginal dispute resolution process that police determined amounted to riot in Yuendumu in.

I then discuss briefly some of the assumptions embedded in western concepts of public order offences. These culturally constructed assumptions influenced the discretionary decisions of police, prosecutors, lawyers and magistrates and may explain how they legitimized the way that they constructed these events (the decision whether to charge, charge selection, the determination of guilt and sentencing). Comfortable assumptions about the ‘common sense’ of criminalising this conduct are destabilised when one analyses this from a Yapa³⁰ perspective. I discuss three examples of words, objects, space and actions. The first example challenges the interpretation of ‘public place’, inviting the reader to recognise that the term ‘public place’ should be considered not only in conventional or ‘common sense’ western (henceforth ‘kardiya’³¹) terms, but also in

²⁹For a discussion about what I mean by ‘Intervention’, which is different from the ‘Northern Territory Emergency Response’ or ‘Stronger Futures’ see Spiers Williams (2011).

³⁰‘Yapa’ is the Warlpiri word for Warlpiri person/people, Aboriginal person or person belonging to the country, depending on the context. It is cognate with Pitjantjatjara’s ‘anangu’.

³¹‘Kardiya’ is a Gurindji word adopted by the Warlpiri that can mean ‘whitefella’, western European, or non-Aboriginal, depending on the context. My use of the term in this paper is complex, as it suggests a dichotomous relationship between the kardiya and the yapa, with respect to whom the kardiya lack insight and specifically do not understand *kuruwarri* and

terms that are understood by those against whom the law is enforced, specifically the Warlpiri. The second example examines 'offensiveness' by discussing the meaning of two objects that were constructed as 'offensive weapons'. The third example invites the reader to reconsider conventional kardiya understandings of 'disorder' and to understand (even if one cannot not agree with this) that for many yapa it is rational.

The last part of the paper questions the purpose of the criminalisation of Aboriginal dispute resolution processes, as the effect of criminalisation has apparently contributed to an escalation in public disorder – or lawlessness, as the Yapa call it - in central Australia, rather than a suppression of it.

I conclude with some reflections about 'culture', local customs and 'shaping the rules that people carry in the heads'.

Disturbing the peace? Public order offences arising from Aboriginal dispute resolution practices

On September 9 or 10, 2010, a young man died from a stab wound he'd received in a fight in the Warlpiri town camp, on the northern outskirts of Alice Springs. After the young man died, community members had spoken with police about the traditional punishment that needed to be meted out. It is not clear what the police response was. In the recent past police practice with respect to traditional punishment have been inconsistent, in that they have either 'turned a blind eye' (submissions by legal representative Russell Goldflam for Dickenson and his co-offenders on 30 November 2010: *Police v Dickenson & Ors*, 2010; Svikhart, 2012; Tilbrook, 2011) or more often facilitated it the process to varying degrees, but Police had not until this time laid charges in connection to a traditional punishment or a fight overseen by Elders in order to resolve a dispute. This is not to say that police had not laid charges for riot or similar offences against Aboriginal people from this community previously. Such charges had been laid, but generally speaking they were for conduct that did not amount to an Aboriginal dispute resolution process that had been sanctioned by senior and respected members of Aboriginal people.

Before any formal agreements could be reached about the process, on September 15 2010 a group of the deceased's family arrived from Nyrripi. There are some reports that they were drunk, and attempted to fight with the ones held responsible. Police intervened. Subsequently the violence was out of control – police reported five cars were damaged, and a house was ransacked. Violence like this is not normally associated with 'traditional' punishment. Arising from this police laid charges of going armed in public (*Criminal Code Act 1983*, section 69), serious charges of riot (*Criminal Code Act 1983*, section 66(1)) and assault (*Criminal Code Act 1983*, section 188.). Some were bail refused.

Emotions ran high over successive days, and indeed months. The media, excited by police media releases, descended on Yuendumu. With the Northern Territory National Emergency Response ('NTNER'), there was no longer any inhibition of their access, the permits system having been suspended³² and the PAW Media prohibition on still and video footage having no effect. The family, perhaps naively, gave unprecedented access to journalists, photographers and video cameramen. They demanded their payback to the nation (ABC News Online, 2010b; F. Baarda, 2010; Coggan, 2010; Editorial, 2010; Neill, 2010a, 2010b; Robinson & Neill, 2010). There were failed attempts to mediate. There was an agreement signed where a dozen people from the 'side' held responsible agreed to leave the community. Then suddenly between 90 and 130 people were 'evacuated' to Adelaide (ABC News Online, 2010a, 2010b; Coggan, 2010; Neill, 2010b).

The issue of payback was intertwined with a keen sense of disempowerment and disenfranchisement, experienced since the NTNER started and the NT Government centralised local community governance (the Shires). The Warlpiri have a keen sense that their law had effectively been outlawed by both NT and

are therefore "homeless in their home", but in the expectation that all kardiya can become yapa, that is can be in relationship with country, and can "find their home" (Pawu-Kurlpurlurnu, 2012).

³² Originally it was unilaterally suspended by Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth), Schedule IV modifies the existing permit system for Aboriginal land in the Northern Territory set out by the Aboriginal Land Rights Act 1976 (Cth) by giving the Northern Territory Legislative Assembly the power to make laws authorising entry onto Aboriginal land. Now the permit system has been partially restored; government workers and journalists retain unfettered access to Aboriginal Lands.

Commonwealth legislation, and were disturbed by the police repression of their customary dispute resolution practices.

There continued to be sporadic fighting interspersed with an oppressive quiet in the normally vibrant community. There was public disobedience: despite repeated police raids of homes to seizing weapons, the yapa continued to make more nullanulla and boomerang. Everyone was aware that there was unresolved business.

After the funeral of Kwementjaye Watson, a little over a week after, the other family returned from Adelaide and elsewhere. Two days later, on November 20, 2012, a large scale organised fight occurred between the two groups. This time, the process was different. That morning at about ten, a senior and highly respected man from the Watson family stood outside the shop, brandishing a boomerang and called upon the families to sort out their trouble now, their way.

Then a large fight took place. There were false reports (Bout, 2010) that this senior man had attempted to spear one of those accused of the homicide of the deceased, Alastair Turner, but correct reports that the senior man had a black headed spear during the fight and that the deceased's parents had struck with nullanulla the heads of the parents of one of the accused men (submissions by Goldflam in *Police v Dickenson & Ors*, 2010). Police used video cameras to record the incident and occasionally directly people to desist and move on. The purpose of the 'proclamation' was so that the police could later charge those who failed to comply with the order then with the serious riot offence, attracting a maximum penalty of 14 years imprisonment. No other direct intervention occurred at this time.

In the days subsequent to this, police gradually laid charges against most participants, many of whom were refused bail. The charges that police originally laid were withdrawn by the prosecuting sergeant in the hearing of the matters and most were substituted with charges with similar elements but lower maximum penalties. In the coming weeks, those charged would plead guilty to riot and going armed in public. Most received prison terms, including those with negligible criminal histories (*Police v Dickenson & Ors*, 2010; Spiers Williams, 2011).

Making a different 'sense' of the charges against the Yapa

Law is culturally contingent; it is not an apolitical or simple application of rules. The cultural contingency of law can never be overcome, however if lawmakers and law practitioners wish to continue to strive for a system that is 'just', to aspire to the values of the 'rule of law', then this requires constant vigilance, reinvigoration of ideas and the constant deconstruction of culturally defined cognitive inhibitors, in order to better approximate a system of justice, rather than merely a system of laws.

Law, like any other 'culture' or 'field', is capable of flexibility and change. Law however is peculiar from other spheres of human interaction because of its dogged resistance to the acceptance of this reality. This is probably due to the rigidity of its ideological framework, reflected in much traditional legal jurisprudence that perpetuates a fantasy of certainty, stability, unchangeability, predictability, boundedness and control (Bourdieu, 1986). This would be a gross misrepresentation of any knowledge system or culture, but the Law uses knowledge of the subject body to influence and effect the subject and more efficiently effect domination of the subject (Foucault, 1979). The Law, in both 'occidental' and colonial contexts, has been demonstrated to serve the ends of power of those who can control the legal sphere and its discourse (for example, Foucault, 1975; Hay, 1975; Garland, 1990; Said, 1978; Merry, 1999).

In order to understand the social field in which the charges were laid, it is also helpful to consider Wacquant's (following Bourdieu) ideas about 'territorial stigmatisation' (Wacquant, 2007). The Federal Government initiated the 'stigmatization' of Yuendumu in 2007 when it and other settlements were defined as a 'prescribed area' under NTNER legislation. A cognitive effect of the denigrated space is that it is not only a site of dysfunction but also populated by the stigmatised. This then justifies the 'response' (albeit it happened simultaneously) by the State in launching the NTNER, either rescuing "normalising" (Bhabha, 1984) the residents or eliminating the site usually through relocation of residents (Wacquant, 2008), but in any case disrupting the residents' social capital. Criminalising, especially imprisonment, are most effective means of achieving the latter (Foucault, 1979; Garland, 1990; Wacquant, 2009).

Wacquant's extrapolation of Bourdieu's "bureaucratic field" and development of the "political field" (Wacquant, 2010) explains how the higher level groups (that is, those with influence or power/wealth) in the social space are affected by and/or involved in the construction of such territorial stigmatisation. The

bureaucratic field, for example, is not whole or coherent but splintered into groups that typically engage in a 'battle' for power, especially with respect to symbolic capital. These groups can be identified in our case study. The 'Right hand' of the Federal Executive Government first stigmatised the place, and this was supported in the data and policy of the 'Left hand' of Government, that is, the social or welfare functions of the Government. The media consumed and reproduced the symbolic degradation of the 'prescribed areas'. It appears in this case that not only the police and the magistrate reproduce that construction; the legal representative apparently struggles to escape this construction, even where there is a 'cognitive dissonance' (Fanon, [1967] 1970) about interpretation and legislative use of the term 'culture' (Spiers Williams, 2011). While not all of those who have influence in the bureaucratic field have been seduced by this construction (e.g. Altman & Hinkson, 2010),³³ what is curious about the effect of territorial stigmatisation is the absence of the 'battle' that typically characterises the 'bureaucratic' and 'political' fields. The zeitgeist of anti-Indigeneity appears to have reduced these to skirmishes about detail.

Let us turn now to examine in more detail some small aspects of the criminalisation of those who took part in the fight, and specifically consider how the concepts underpinning public order offences are deployed to facilitate stigmatisation and intervention. I wish to explore how (or whether) the construction of these events as offences against public order makes sense from a *kardiya* point of view, and then from a Warlpiri point of view. I don't wish to present these as dichotomies however, rather invite the reader to consider whether the Warlpiri point of view can be considered in the construction of these events as 'criminal', particularly bearing in mind discretion that police and magistrates, especially have, and the potential that can occur in 'contact zones' (Merry, 1999 following Pratt, 1992) or rather 'interstitial spaces' (Bhabha, 1994), in other words: the possibilities for positive and constructive engagement between groups recognising the dynamic fluidity of the phenomenon of 'culture'.

I deal firstly with the notions of 'public place', then 'offensiveness' and finally 'disorder'.

In a 'public place'?

None of the offences with which Dickenson and others were charged has an element of 'being in a public place', but the legitimacy of these offences is fundamentally connected with notions of the 'public place', and that this fight took place in a 'public place'. Rarely are offences for riot or possession of an offensive weapon brought that are said to have occurred in a 'private space'. Having noted this, in everyday policing and court practice, what is a public space *vis a vis* a private space tends not to be examined closely. Despite the fundamental requirement to properly interpret and define terms, the term 'public place' is only explored where it is an element that has to be proved and there is a suggestion in the case that the event may have taken place in a 'private place'. There is never an inquiry into whether a space that is not a 'private space' is also *not* a public space - that it may instead be something else.

The concept of public space is not relevant only where it is an element of an offence. The concept of public space (and related expectations) influences, emboldens and legitimises the discretionary decisions that criminal justice agents make about whether to criminalise conduct (and the actor) and to what degree to criminalise. In the context of this case study, this concept works together closely with a zeitgeist of Intervention to legitimise intolerance of Aboriginal practices, unprecedented in modern Australia.

The concept of public space is not 'obvious' or 'simple'. It is a construct of the western European 'culture' or 'world view', a world in which land and other property interests can be owned privately or even constrained by one individual. The concept of 'public space' can only be understood in the context of the belief and practices surrounding the phenomenon of 'private property'. But, public space is more than what is left over after we extract private space: public space is not merely the negative of private space - it is not the 'contrary' of private space. For example, public space is not owned by all, cannot be freely used by all however each likes. When a *kardiya* moves around in a public space she or he has expectations about how to behave and how others will behave. There are rules, and where we are prepared to enforce rules by recourse to law - in particular using police as State's agents - this means that (some) westerners effectively exercise dominion over that space against others who are in that space. In other words, those who exercise dominion are those who are able to assert their views on how the space should be used, and they are supported in that by the State's agents, the

³³ I leave aside in this paper the role of the scholars, who have little 'power' but often much 'influence' in the construction of dysfunction/stigma; cf Altman and Hinkson(2010).

police. The expectations of those who have access to a private space take precedence over those who do not. Brown and others have challenged the justness of criminalising people for behaviour that would be lawful if the space were a 'private space' and note the unfairness of such policing where the targets of public order offences have no access to such private spaces. The classic example of this is homeless people, and analogous conclusions can be made about the policing public order offences against young people. The criminalisation of homeless or young people for using 'public space' thus becomes problematic (Brown et al., 2011, p746ff).

It is easy to suggest the criminalisation of Indigenous people's use of public space is unjust for the same reason, by suggesting that Indigenous people use 'public space' differently, as "some groups, such as Indigenous communities, have a cultural preference for communal, public [sic] activities" (Brown et al., 2011, 747). This analysis, with respect, is flawed, as it remains captive to the assumed 'naturalness' of the categories of 'public' and 'private', perpetuating the idea that there are only the contraries of public space and private space. For Warlpiri people, the concept of 'public space' is an alien one, albeit that notions such as this are gradually being assimilated and adjusted in the constant shift, response, accommodation and negotiation that is typical in the phenomenon of 'culture'.

Understanding place as *ngurra*

For Warlpiri, it is not "a different 'use' of 'public space'", but rather a different concept of 'space' as *ngurra*.

Simply analogising Warlpiri people with 'homeless' people or understanding their situation in terms of poverty does not make sense of use of public order offences against them, nor does it explain their experience of *kardiya* law. Such analogies obfuscate their experience, lifestyle, values and sentiment, and obscure a key political issue that enervates many *yapa*: their right to continue to live in the desert as Warlpiri people. For many *yapa*, the idea of 'public place' is not meaningful. I'll attempt to explain this by way of discussing the word *ngurra*.³⁴

Ngurra has multiple, intersecting and merging meanings (Myers, 1991).³⁵ *Ngurra* means 'home'; it can also mean burrow or nest. It means 'shelter'. It can be a place where one habitually sleeps (Musharbash, 2009, 34.). *Ngurra* is a 'camp'. If a camp is 'home', then anywhere can be home. Warlpiri people thus understand themselves as belonging 'everywhere' in their 'home' but only because they have experienced or can experience it in relation to other people, through kinship. It also reflects a perspective that they are in relationship with country.

Ngurra-jinta means the *group of people* in the camp, that is: close kin. Its meaning is not only a description of the physical group but also social connection, expressing sentiment regarding relationship with other people (Musharbash, 2009, 34.). Interestingly *Ngurra-jinta* is the same term used to describe one's countryman. *Ngurra* simultaneously extends beyond the 'continuous present' of the camp, to places associated with other times: conception, a mother's quickening, birth, ceremony, ancestry, ritual obligation.

Ngurrarais country. It does not evoke just the surface of the land, but everything in it and associated with it: "the people, the animals, the plants, as well as the ancestral beings and spiritual powers contained within the land, the moving clouds, the winds, the stars, the passing of time and so forth" (Musharbash, 2009, 35.).

Ngurra, then is the 'world' - and more than that really, as it embraces a cosmology, helping us to see *tjukurrpaas* ontology.³⁶

³⁴The following discussion is based on my discussions of *ngurra* with many Warlpiri people in the communities of Lajamanu, Yuendumu and Ali Curung. I'm especially grateful for the patience and careful insightful sharing of Marjorie Limbiardi, Gwen Brown and Nancy 'Savannah' Long (who passed away; when spoken of, she should be called 'Kwementyaye') from Ali Curung; the Lajamanu Kurdiji Committee (a law and justice committee) of Lajamanu including Jerry Jangala Patrick, Steve Wanta Patrick, Lynette Napangardi Tasman and Robyn Naparrurla Lawson from Lajamanu; and the Yuendumu Justice Mediation Group, and Tommy Jangala Rice, Otto Sims, Ned Jambajimba Hargreaves and Judith Napangardi Hargreaves, Madeleine Dixon of Yuendumu. There are also others who requested not to be identified. Many of these discussions included discussing the works of Musharbash (2009); Myers (1991); and Steve Wanta Patrick's work with Miles Holmes, especially Pawu-Kurlpurlurnu, Holmes, & Box (2008). *Ngurra* is a Warlpiri word, but it is also used in Aboriginal languages, including Pintubi.

³⁵Pintubi share a similar world view. See Myer's discussion: 1991, 54-57, esp. but see general Chapter 2: The Dreaming Time and Space", p47ff.

³⁶Myers' discussion of this with respect to Pintubi is helpful (1991, 48).

In attempting to explain a Warlpiri world view, Pawu-Kurlpurlurnu shared the concept of *ngurra-kurlu*, which his father, Jerry Jangala Patrick helped him to realise. *Ngurra*, *walya* (country), *kuruwarri* (the Law), *juju/manyuwana* (ceremony), *jaru* (language) and *warlalja-yapa* (family or skin name),

[a]ll these things govern yapa lives; this is *ngurra-kurlu*. Everyone in their own way in Australia, in this land, has this. Everybody. These five things. Yapa have all of these. Lines joining circles: All of these are connected to each other. If the skin name is not strong, if we don't use it according to our marriage system law, marrying to the wrong skin group, these others will not be strong as well. Even our language; if it is not strong the other four principles will not function well too. This one too, the law; if we become lawless, both the country and yapa will become sick. And this one as well, ceremony; if we don't respect our ceremonies and the rituals that belong to skin groups we will become sick and the country will become sick as well. If we disrespect the land we will forget what the land is trying to say.

We will disappear as Warlpiri people. (Pawu-Kurlpurlurnu et al., 2008)

Ngurra is not severable from language, relationships, ceremony, land or law.

What then does it mean to assert that some behaviour is not allowed to happen in a particular place because it is what *kardiya* call 'public', even though that same behaviour is permitted in another place that *kardiya* call 'private'? What does it mean for Warlpiri - with their intimate connection to the place, to *ngurra* - to have it rendered a 'public place' in which other people's different expectations have pre-eminence? In the place where you have customarily engaged in a process of considerable importance to you, what does it mean when it is denied you because that place is reconstructed as a 'public place'? What does it mean when this idea of public place is the excuse used by others who are alien to that space – that is, disconnected from country, 'lawless', 'homeless' – try to stop you from carrying out one's accustomed practices?

The issue of ownership: politics of land, country and 'public space' or: *ngurra* and the importance of asking'

Warlpiri people are determinedly autonomous and respect that in others. One person does not exercise 'rights' in order to exclude people from country, a Warlpiri person only has responsibility for that country. This should not be misunderstood to mean that Warlpiri do not have concepts of respect for others' resources. One should respect the camp of another, and if one is in another country one should announce oneself with fire and wait until one is invited to share the resources of that camp or country (Myers, 1991 95 ff, 156 ff; Pawu-Kurlpurlurnu, 2011; J. Patrick 2011).³⁷ Myers stresses the "importance of asking". That Aboriginal people do not exercise domain over land in the same way that *kardiya* do, does not mean that people not indigenous to the place are entitled to do whatever they like there, all the more so if they are uninitiated and young.

If we can accept that Warlpiri people have been accustomed for generations to conduct an activity in a 'public place' because it is their country / their home, can we imagine what they feel about the policing of those spaces? - what they feel about the prevention of Warlpiri people from behaving in accustomed ways? Can we imagine what it means to suddenly be removed from that land and placed in prison because we have behaved as "the law (*juju, kuruwarri*) requires"? It is a serious interference with their expectations of how they can behave on their own land, and it does not engender respect from Warlpiri people for *kardiya* law.

The term 'public place' masks what in fact it really is: it is land over which *kardiya* exert control and power, through the enforcement of dominant cultural norms and to interfere with Aboriginal people using their country as they want to. Public order offences, more than any other form of criminal law, are perceived by many Warlpiri people as a drastic interference with their political rights arising from their status as Indigenous people.

Most analyses by criminologists are concerned with police targeting Aboriginal people for public order offences (Kitchener 1988; Cunneen 2001). In central Australia this has not been the case with respect to Aboriginal dispute resolution practices, and until now Aboriginal people have been left to conduct ceremonies and relationships undisturbed by police as a matter of policy and practice (Tilbrook, 2011; Goldflam submissions in

³⁷ This relates to demand sharing, but beyond the scope of this discussions. Demand sharing is in the new Intervention vernacular is a perversely translated to 'humbag' with negative connotations. On demand sharing, in general see Peterson, 1993 and on the abuse of concepts of demand sharing in relation to the Intervention specifically, see Altman, 2011.

Police v Dickenson & Ors, 2010; Svihart, 2012). Why, then, didn't the police leave the Warlpiri to practice their law this time?

A key reason relates to the zeitgeist of Intervention and related attitude shifts. The NTNER brought with it an environment of intolerance for Aboriginal customary practices, and an increasing attribution of dysfunction in Aboriginal communities to Aboriginal "culture", mimicking the discourse of international human rights discourses about 'harmful traditional practices'. The Warlpiri are politically active and have for some time now been resisting the changes to the kardiya law, and arguing for the recognition of tribal law (Anthony & Chapman, 2008; Loy, 2010; Ryan & Antoun, 2001). Yuendumu is one of the communities that have most strenuously opposed the NTNER (F. Baarda, 2010; Gosford, 2007, 2010, 2011; Lee, 2007; Murdoch, 2007).

The NTNER originally drew its legitimacy from claims of endemic child sexual abuse in Aboriginal communities. The NTNER failed to expose such widespread child sexual abuse by adults and there has been no notable increase in prosecutions. The discourse around the NTNER however has mutated into one that is now concerned with harmful conduct generally, especially gender violence; the discourse mimics that of some commentators who discuss 'harmful traditional practice'. Increasingly the harm has been represented as arising from dysfunctional Aboriginal culture. Gender violence and harm against children knows no boundaries of 'culture' and are found in all human societies, and its underlying causes can be found across societies (Merry, 2006a; 2009). International human rights commentators have been dismayed that a phenomenon such as, have been simplistically attributed to 'culture' (Merry, 2006b). The reasons for the continuance of Aboriginal dispute resolution practices are complex, yet it now appears that it too has been categorised as a 'harmful traditional practice'. One can only imagine that it is only a matter of time before other Aboriginal practices that do not mimic mainstream modern practices will shortly be subject to the same repression.

A further reason may be that the NTNER has occurred in the midst of an information technology revolution. This and the suspension of the permit system mean that tribal practices are no longer out of sight and out of mind: remoteness is changing. This means that where police fail to act in support of official policy with respect to Aboriginal dispute resolution practices, it will be noticed. It also means that Aboriginal people in remote areas who have been calling for recognition of tribal laws are able to access the new technologies and media to promote their interests (e.g. Lajamanu, 2008).

In this context the act of customary dispute resolution on 20 November 2010 can also be understood as deliberate political resistance by the Warlpiri, and also in turn deliberate suppression by the State of the Warlpiri. But it is a mistake to understand it only as that. From a Warlpiri point of view, it is a practice that the law (*juju, kuruwarri*) demands, and it is this that takes precedence over the western law's public order offences. Specifically it is not done in order to offend those in charge, but simply to carry on their business as they must in order to achieve *mala mala*, that is, reconciliation and harmony between yapa.

For courts and police to insist that their role is neutral and apolitical in this context is disingenuous (Post, 2003).

Claims by the courts that they protect the vulnerable against harmful traditional practices are highly problematic. To suggest that anything that takes place once a harm has already occurred is protecting anyone is sophistry, and misrepresents the purpose and capabilities of the criminal justice system. As has been oft repeated, the criminal justice system is a crude instrument for effecting long term and constructive social change (*cf* Fitzgerald P in *Daniel* at 530). If Aboriginal dispute resolution practices are no longer an appropriate or effective response to transgression, then processes must be found that give Aboriginal people the opportunity to make those choices and adjust. A long view must be taken. The alternative, suppression, of practices, as I will discuss shortly, can be demonstrated to have exacerbated the 'problem' it seeks to 'cure'.

I turn now to consider 'offensiveness' in the context of objects.

Offensiveness

In the 'public space', *kardiya* impose rules. Norms, expectations, customs, 'standards', 'morals' are all culturally constructed. Within a culture one is expected to abide by these norms or meet various forms of censure. If the breach of the norms is so egregious that it takes it outside the realm of everyday behaviour, then we may even label it a 'crime' and having labelled it a crime we are mandated to take a certain form of action which is radically different to other forms of regulation: it requires the elimination of the crime (Cohen, 2008,256-258).

Courts have recently considered what is 'offensive' in the context of language. Despite only comprehending the 'public' fundamentally homogenous, courts have nonetheless recognised the concept's instability over time (DPP v Carr; Police v Butler; Police v Dunn). Some judicial officers have attempted to find that offensiveness has to be understood in its broader social, historical and legal context, although the NSW Supreme Court has limited the context to the immediate surrounding circumstances (Connors v Craigie). The fight in which Dickenson and others were involved arguably arose from immediately surrounding circumstances. Many participants in field research did not consider the fight to be 'offensive' (F. Baarda, 2010; various participants, 2010-2011). This is difficult for those who hold modern sensibilities to accept; to outsiders that fight would seem simply chaotic and violent. I do not attempt to shy away from the reality of this violence. In this paper, though, I wish to problematise the effectiveness of criminal justicerresponses to such violence, particularly given the short period of contact Warlpiri have had with modern society.

Arising from these events, many participants were prosecuted with the charge of "offensive weapon". The charge derives its legitimacy from this concept of 'offensiveness', but again the elements of the offence do not require proof of offensiveness: the "offensive weapon" is an article "that is intended to cause injury or fear of injury to a person". Having established this, the prosecution only need to prove that the person possessed it to prove the offence (*Weapons Control Act 2001* (NT), Section 8(1)). The person is not guilty of the offence if they are in "(a) the pursuit of a lawful employment or lawful duty", (b) "participat[ing] in a lawful sport, lawful recreation, lawful entertainment or lawful activity" or engaged in a " (c) the legitimate collection, legitimate display or legitimate exhibition of weapons", but it cannot be possessed for the purpose of self-defence (*Weapons Control Act 2001* (NT), section 8(3)). The yapa involved that had turned their mind to it believed that what they were doing was a 'lawful duty' and that it was 'legitimate', but it is likely that their lawyer would have anticipated a narrow interpretation of these terms, that is, understanding 'law' only in terms of *kardiya* law.

The weapons that were alleged to be offensive were mainly *nullanulla*³⁸ and iron bars. Tommy Watson, the elder who called the families out was charged with riot and possession of an offensive weapon, being a boomerang and a "shovel-headed spear", also known as a black headed spear. I want to discuss now briefly the meaning of the black headed spear and the boomerang.

The black headed spear is used in various contexts. When asking participants about the meaning of this spear, several senior and respected people explained it by reference to the *jardiwarnpaceremony* for which there persists considerable sentiment in Warlpiri communities.³⁹ In the *jardiwarnpaceremony*, there are several objects that have important meanings associated with them. Their meaning is expressed in *tjukurrpa* (the constant state of creation that we are in), in the use of the objects in everyday ways, in the ceremonial use of the object, and in the enforcement of the law. Different skin groups have different responsibilities with respect to these objects. The four objects are: the spear meaning justice, the boomerang meaning respect (a 'number 7' boomerang is honour), the knife meaning discipline and the stone axe meaning responsibility. The *jardiwarnpaceremony* is a reconciliation ceremony, that means

sleep, deep sleep – to put to sleep the bad feelings. It is a fire ceremony, that's held in the hot season. Fire makes you clean. The women talk to you about your path through the milky way, and you go straight so

³⁸ A *nulla nulla* is heavy thick stick, about a meter long, that is pointed at the end and used for digging, and also for traditional fighting, especially by women, for example to resolve a jealous fight. It is also used for digging, especially bush potatoes and witchetty.

³⁹ The following is drawn from field notes and observations conducted in field research in the communities of Lajamanu and Ali Curung, and in particular: G. Brown (2010-2012); Limbiardi (2010-2012); Patrick (2011); Pawu-Kurlpurlurnu (2011; 2012). For ethnographical accounts of the *jardiwanpa* and cognate ceremonies, see: Gillen & Spencer (1904, 375–92); Gillen (1968); and Gabrys & Vaarzon Morel (2009), and Morton (2011). See also the documentaries of Sandall, Peterson, & McKenzie (1977) and Lander, Langton, & Perkins (1993). The *jardiwarnpa* ceremony inspired the Milpirri festival of 2005: <http://tracksdance.com.au/milpirri-05-jarda-warnpa>; see also: McEwen (2007).

that you can achieve your 'crown' – the southern cross –the stars of which each represent law, language, ceremony, skingroup and land. (Pawu-Kurlpurlurnu, 2012)

The milky way makes its journey across the sky, and at the time that the Southern Cross disappears under the horizon, becomes part of the land, the pointers are vertical to the horizon. The pointers are a digging stick. They point the way to food: it is the time that they bush yam are ready to be dug up and eaten. At the same time, it is time for ceremony: to feed yourself spiritually with ceremony and tjukurpa. This is the time where the *jardiwarnpais* performed.

The black headed spear is potent and powerful symbol used by law men. It is this spear that is used in the traditional punishment, but the tjukurpa which tells of its potency does not relate it being used in that way.

A spotted quoll hears that a *kadaitchaman*⁴⁰ is about and he travels all around the country to warn everyone that about this *kadaitchaman* coming. When he gets home, he drives his black headed spear into the ground near the opening of his *ngurrato* warn the *kadaitchaman* that justice is done here and he better not come there.(Cooke, 2011)⁴¹

The story is not about using the spear, rather it is about its symbolism and reflects the reality today that it is rarely used for punishment,⁴² but always used in ceremony and to threaten punishment. It is used only for this purpose; it is not used for hunting, for example, like other spears. This spear should only be wielded by senior men. Using the boomerang to call people to ceremony declares that this is to be done the 'proper way': in accordance with the law, with respect, and that this is to be taken seriously.

Many Warlpiri believe that the spear must be used where there is a blockage, where there is 'illness'. The man who wields the spear it is to "push the blood so that it can flow again, so that the sickness can be pushed out"(Pawu-Kurlpurlurnu 2012). The spear is meant to shed blood so that it flows. This is so metaphorically even that is where the spear is not used. The person who wields the spear is the one who is responsible for 'pushing the blood', responsible for taking the steps necessary to establish reconciliation, which traditionally has meant spearing the leg or causing other wounds, but does not necessarily require that. At this event, Tommy Watson did not use the spear against another person. His carrying the spear in the midst of the fight signifies that the fight was to release the bad feelings between the respective groups, and is understood to be the catalyst to let the blood flow between the families again metaphorically (or spiritually) but also in this case physically – not with a spear but with *nullanulla*. This should not be misinterpreted to diminish the threat of spearing; the potential to draw actual blood remains real. If the blood does not flow again, then the bad feelings are not released, the trouble will continue, and perhaps the greatest concern of all for yapa is that the threat of sorcery is even greater.

These objects for Warlpiri are two of the most potent symbols of law, specifically the promise of justice. Police and the courts constructed the spear as an "offensive weapon". By denying the defence of "lawful duty", they also delegitimised and disregarded the spear's considerable significance.

Many kardiya would assert that it is the role of the courts to de-legitimise any assertion of an alternative legal system (Cox, 2010). This fails to recognise that the mainstream legal system is a highly contested sphere and, in this country at least, is highly responsive to changes in policy. As Webber, evoking Fuller, puts it:

the primary form of law [is] customary. Law [is] grounded in particular practices, emerge[s] from those practices, and serve[s] to facilitate human interaction within them. Even statutes ... [are] best conceived as punctual interventions by the legislator, comprehensible only against a background of customary norms. ... Law is grounded, fundamentally, in the practices of particular societies. All law, even legislation, finds its meaning in interpretive relationship to those practices. To understand law is to understand norms' relationship to the web of human interaction in a given society. (Webber, 2009)

⁴⁰ A kadaitcha man is a witch doctor, perhaps an assassin, which usually has powers.

⁴¹ Translated by Pawu-Kurlpurlurnu, Henry Jakamara Cooke gave me permission to relate this version of the *tjukurrpa*.

⁴² There is no research to my knowledge about the prevalence of spearing in Aboriginal punishment, reconciliation or dispute resolution practices; developing a methodology for data gathering would present as many challenges as reporting it. Some participants indicate that it is many years since a spearing occurred for many years. The last man granted bail in order to receive "payback", which may or may not have involved spearing in the leg was in 2002: ("*Police v Kevin Webb* (2002) Alice Springs Court of Summary Jurisdiction 20214130 (unreported)");(Morrison, 2002). Fighting as a mechanism for dispute resolution continues on both large and small scale, but not to the extent one might have the impression of from current representations.

Kardiya accept that various claims can be made of the law to which it may respond or not, depending on the shift and changes of what we call politics. It is peculiar to deny the customs and interests of one group and pretend that the law is immutable.

Attempts to delegitimise and disregard objects, practices etcetera of considerable significance to the group do not result in the group's automatic embrasure of the new 'law'. Rather, it either creates disdain for the new law and/or creates a 'vacuum'. The latter is what the law men and law women in Lajamanu have observed with respect to the subsequent events in Yuendumu: there are many now who appear to be 'lawless'.

I'll return to these themes after I discuss the construction of the fight as a disordered 'riot.'

Disorder

As well as weapons related offences, the police originally charged most defendants with an offence of riot, attracting a fourteen year penalty. This offence requires proof that the person is "one of 12 or more people who are riotously assembled" (*Criminal Code Act 1983*, s66(1)), that is, "when an unlawful assembly has begun to act in so tumultuous a manner as to disturb the peace" (section 63(4)), and that a police officer had made a proclamation to desist, and the offender has ignored it.

Although the relevance of harm is not explicit in the construction of the offence, the legitimacy of police intervention of a serious disorder is derived from the perceived need to prevent harm, specifically to protect other community members from violence that may spill over from the melee. There are also arguments about the indirect harm caused to observers, especially children, this last being a matter that the magistrate in sentencing the offenders referred to specifically (*Police v Dickenson & Ors*, 2010 per Bamber SM). Disorder offences are also to suppress the use of illegitimated violence, to reassert the control of the State; 'keeping the peace', after all, is an original function of the police.

The use of the proclamation by the police, places them at the centre of the offence, so in a sense the police are cast as a 'victim'. It also renders police instrumental in generating evidence for elements that are extremely easy to prove, and that transform the offence from one that attracts a max penalty of 3 years (*Criminal Code Act 1983* (NT), sections 63(4), 65) to 14 years and communicates to the crowd that the State will exert control by force, if necessary. In this case, the fact that the police chose not to lay charges until days following the incident is more suggestive of an assertion of State control than harm prevention, particularly where alternate charges were available.

Police determination to criminalise a customary fight or traditional punishment is an attempt to delegitimise this violent practice, while simultaneously asserting the right of the state only to practice violence practices. It attempts to render the acts as irrational.

On the day of the sentence hearing, the police prosecutor withdrew the serious charges of going armed in public and the 14 year riotous assembly and substituted them with the 3-year riot offence (lesser charges of offensive conduct or violent disorder were also available) and possession an offensive weapon (200 penalty units or imprisonment for 12 months).

The incident involves fighting. For kardiya who are not familiar with the people, the relationships, roles, expectations, the threat of sorcery, etcetera it is likely that it would seem to have irrational and disordered. Many kardiya find the use of physical violence unacceptable, including those who purportedly support Aboriginal people's right to 'practice their culture' (Cowlshaw, 2003). The reality is though that desert people still engage in physical violence to settle disputes, and this is something that must be faced by kardiya, as well as in the forms of violence conducted in late modern societies, including sanitised forms of violence such as imprisonment and bureaucratic oppression or overt forms of violence such as use of 'reasonable force' by police. The State seeks to maintain a "monopoly of legitimized symbolic violence" (Bourdieu, 1986: 838).

For the Warlpiri involved and others who were present in Yuendumu at the time, the fight does not appear to have been constructed as 'disordered'. This is not to say that it was not considered lightly. Tommy Watson and those who fought believed that this fight was necessary in order for their community to achieve equilibrium, put this incident behind them, and to achieve harmony: "Could have been sorted a long time ago. We could have been families again now, but now we hate each other now" (Jimmy Watson quoted by Coggan, 2012). Representatives from all the families fighting have made similar statements to the press to this effect: "Leave the police out, leave the mediation mob, leave the Northern Territory Government out, even Federal

Government out. Give us the responsibility back, the rights to make our decisions without someone making decisions for us.” (Harry Nelson quoted by Coggan, 2012). Tommy Watson explained the importance of his actions to the magistrate through his lawyer: attempting to explain the rationality of their behaviour and the practice in which they were engaged, its legitimacy and its authenticity, for example he stressed that he and his family had used traditional wooden weapons. Tommy Watson had tried to bring the uncontrolled violence since the death of Kwementjaye Watson under control through means that were known, recognised, and legitimate to him as an Aboriginal law man and family leader. The defence lawyer emphasised the consensual nature of the violence, and that the police witnessed this; this was not challenged by the prosecutor.

The Warlpiri see their behaviour as rational and meaningful; they see police conduct as violence; they see prison as violence.

Concluding comments: Adjusting to modernity and the aftermath of police interference

Merry observes that:

“law’s power to shape society depends not on punishment alone but on becoming embedded in everyday social practice, shaping the rules that people carry in their heads (Merry, 2006, 57).

The Federal Government’s vision of a ‘unified modernity’, expressed, for example, through the Australian Prime Minister’s Closing the Gap speech (Gillard, 2011), is not achievable in any society. At this point in time, it should be clear that all societies have pluralist systems of law, and that these relationships are constantly being redrawn over time. The question we have to confront in Australia today, is to what degree we allow Yapa to participate in this negotiation? A ‘unified modernity’ is both unachievable and false. It evokes an essentialised idea of culture. This inhibits the potential contribution of local practices, and engenders resistance to change, not assimilation which Intervention is attempting to enforce. Locating the underlying cause of social dysfunction in a ‘culture’ reflects a misunderstanding about culture, as if culture is solid, unchanging and homogenous. It also misleadingly suggests that the harmful practices such as gender violence arise from culture, despite evidence of gender violence or violence against children occurring in every human society and that the underlying causes tend to be common to each. As Merry observes, “the production of local custom is a dynamic and changing process” (Merry, 2006, 10). If social change is required, then opportunities should be sought to engage with local custom not alienate those for whom that custom is the ‘furniture of their mind’.

In my research in Lajamanu there are participants who want to ensure that the core of *ngurra-kurlu* is not lost, not only to the Warlpiri but to all Australians. There are some who are discussing the possibility of discontinuing traditional punishment of spearing in the leg, but this does not arise from external forces of Intervention rather from their own observations of disquieting practices of use of non-traditional implements. They discuss striking with the blunt face of the boomerang instead, for example, and not being permitted to strike the head. A linguist and educator, who has lived and worked in Warlpiri communities for decades, observed that the yapa in Yuendumu have already assimilated aspects of modernism – but the successful changes have occurred because it has been of their own volition. She cites the example of a meeting held in Yuendumu more than ten years ago where they decided no more polygamy, and that promised brides are no longer forced (W. Baarda, 2011).

Warlpiri people are not at all persuaded that their law is illegitimate because of the police suppression of these events. Instead they blame the police suppression for what they now see as Yuendumu’s “lawlessness”. The Warlpiri are being inhibited from practicing their law, the old people have been undermined and shamed by the police and the courts and many young people there now do not accept either law. This last is a recurring theme in ethnographies by anthropologists since first contact, however it may be that this watershed has finally been reached.

Warlpiri have already made extraordinary changes in a remarkably short period of engagement with western culture and modernism in particular: it has been a little over sixty years. Without police intervention the external and inevitable social and global forces may be clearer to the Warlpiri. Instead police intervention is obscuring their need to assimilate the impacts of modernism and 21st century technology: the toxic effects of ‘txt’ messaging, alcohol, mobility of motorcars, proximity of living conditions now, ‘fast food’, etcetera.

Social ills arise from local and systemic forces, not from myth-making about culture. If we blame culture then it demands that we root out culture. But 'culture' is amenable to cataloguing; identifying what it is that should be eliminated is not possible. As culture cannot be eliminated then the intervention must be directed at the people whose culture has been stigmatised.

A quick perusal of some headlines since November 2010 shows, this aggressive response has only exacerbated a chronic problem (AAP, 2012; Coggan, 2012; Dowsley & Boon, 2012; Munro, 2012; NT News, 2012a, 2012b; Puddy, 2012). The only site that I am aware has been able to contain the lawlessness is in Lajamanu. There have been several incidents where Yuendumu people have attempted to re-agitate their dispute (when visiting for meetings) but the Kurdiji⁴³ in that community were able to deal with it effectively, and prevented fighting from starting.

It does not follow that by crushing Aboriginal law and denying Aboriginal people recourse to that law, that Aboriginal people will naturally embrace kardiya law. Removing the social constraints of Aboriginal law has meant that many Warlpiri are now instead "lawless" and have become "homeless in their home" (Pawu-Kurlpurlurnu, 2012). They are losing *ngurra-kurlu*, and its negative impacts are being felt through the region.

What is clear now is that the police assertion of power through the use of public order offences has not solved the problem of uncontrolled violence in central Australia. What can be said is that uncontrolled violence has increased in Yuendumu, and continues to spill over into Alice Springs especially, and that it appears that the attempt to abolish culture has only exacerbated the problems of these people.

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“Teach me about your life”: a critical examination of standpoint theory, Indigenism and narrative method in the study of the post release experience

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“Teach me about your life”, is a rather simple statement that circumscribes a complex concept of a power relationship between the holder of a knowledge or knowing and a pupil or someone willing to listen, hear and learn. Its meaning forms a sharp contrast to the narrative research question of “Describe your life to me”, a question which describes a relationship between study subject and researcher or “expert”.

It is the resolution of this contrast that has been pointed to in the literature as the key in forging a strong, fruitful collaborative relationship between Indigenous and non-Indigenous researchers in the process of overcoming the barriers of neo-colonialism, racism, and the resultant resentment for non-Indigenous researchers conducting research into Indigenous matters pointed to by Indigenous researchers and writers such as Nakata (1998), Smith (1999), and Rigney (2004) amongst others.

This paper will critically examine these barriers within the framework of Indigenism as an emerging cultural and philosophical stance by Indigenous academics, narrative research method and standpoint theory. The concept for this paper resulted from the journey in attempting to gain ethics approval for my research into the narratives of the post release from prison experience. As this research will involve Indigenous Australian study participants, separate ethics submission and approval from the Aboriginal Health and Medical Research Council was required to ensure respect for the validity of, and sensitivity for Indigenist standpoint.

My Standpoint

It is with respect that I broach this topic as a non-Indigenous person and must therefore acknowledge my own background as the son of German migrants. My parents came to Australia in 1956 to escape the uncertainties of post war Europe and the ensuing “Cold War”. As a 9 year old I was thrust into the dominant “Anglo-Australian” culture with what was to me a foreign language and customs. Even though I completed my education in Australia (in as much as education is ever complete, I am now pursuing my PhD in Criminology researching the narratives of men and women leaving prison), I was never able to totally fit in to this culture and to this day consider myself a “child of the world” rather than the “true blue aussie” espoused by this culture. To me the only “true blue aussies” were and still are the first peoples of this country, that is the Aboriginal and Torres Strait Islander peoples. This attitude and standpoint was certainly fostered and encouraged by my parents. It was from this standpoint that I learnt to ask “if not... why not”, a sentiment made famous by the late American senator Robert Kennedy during his eulogy delivered at his brother’s funeral and it is this epistemological sentiment that I bring to this paper. But this is only part of my narrative or story and it is the concepts of narrative and standpoint that I am here to examine, not my narrative.

History of the Narrative Method

The telling of stories or narrative regarding lived experiences has a long history in human development and the construction of meaning of experiences and self. Narrative has been the method of knowledge holding and passing from before the ancient world; it is the method of all religions; all history is embedded in narrative. The narratives of the Grimm brothers depicted the cultural dimension of Germanic folklore in the nineteenth century. This use of the narrative was advocated by Thoms Herder (1846) in his call for a scholarly collection of the vestiges of “peasant culture” during the industrial revolution of the nineteenth century. Herder’s concern was that the industrial revolution was causing the disappearance of certain aspects of this culture (Roberts, 2004).

The use of the narrative as a method of qualitative scientific inquiry, within a life-history context, goes back to the beginning of the twentieth century when it was employed by anthropologists studying Native American

Indian culture (Goodson, 2001; Roberts, 2004). It had been the research tool by which colonising nations could objectify “the other” or native people of other lands outside the European world. These forays into colonial knowledge and truth through sociological and anthropological research led to the development of the life history narrative as a valid and valuable research tool (Denzin & Lincoln, 2000). Sherwood (2010) argues that narrative has been the research tool of Indigenous Australians for thousands of years in the continuing cyclical evolution of Indigenous cultures.

Narrative methodology was further developed as a “bona fide” research device by Freud and Jung and subsequently by the so called “Chicago School”, in Robert Park’s sociological study of Chicago’s underworld and as such flourished as a research device into the 1930’s (Goodson, 2001; Denzin & Lincoln, 2000). It was the 1960’s which saw a resurgence in qualitative studies, albeit in a subjugated and argumented scientific role. This resurgence followed a protracted period of hard empirical research philosophy post World War II and in turn evoked a strong response from qualitative researchers. This response extolled the humanistic virtues of the subjective and interpretive qualities of qualitative research into the life of human groups. The negative aspect of this methodological debate was felt by Indigenous and First Nation groups as they were subjected to both methodologies within a neo-colonialist, and sometimes “racist”, paradigm (Mishler, 1990; Denzin & Lincoln, 2000).

None the less, qualitative, and in particular narrative and life history research continued to gain validity as a reborn methodology in its own right. The rise of second and third wave feminism, feminist research and the ensuing gender based research with its subjective study of life experiences of study participants further enhanced the validity of the narrative as a tool of sociological enquiry. The concepts of power relationships, sexuality and gender constructs were explored largely through the use of this method (Visveswaran, 1997; Denzin & Lincoln, 2000).

It is a curiosity that the process of validation and the term “validity” can be dichotomised in much the same way as narrative inquiry and empirical enquiry. One is an ongoing and dynamic process with interpretive appraisal whereas the other is the gathering of static data by instrument and scores to validate a hypothesis (Mishler 1990). Narrative method, however, can imply the objectification or “othering” of study subjects. By the same measure it has also been argued that all research has roots in narrative inquiry and should incorporate an epistemology of doubt in a bold venture into a terrain of contingent alternatives (Kim & Macintyre Latta, 2010). Mishler (1990) points to Kuhn’s (1970) statement that “conflict and controversy” are an integral part of “normal science” as much as the scientific reports of methods, findings and philosophical analysis. He argues that all excursions into contested domains of endeavour are from subjective standpoints. Furthermore, it is this subjectivity which is of particular interest in an ethnographically heterogenic society such as Australia and, as such, this then puts into play a multiplicity of identities, contexts, experiences and standpoints (MacDonald & Bernado, 2005). This multiplicity can, however, be problematic in terms of power relationships between a dominant culture and the different others whose standpoint can be devalued, ignored and criticised purely on the basis of that difference (MacDonald & Bernado, 2005), thereby being disenfranchised on the personal, cultural and institutional level (Sevig & Etkorn, 2001). This personal, cultural and institutional disenfranchisement is particularly evident in the case of the Indigenous peoples of Australia (Rigney, 2006; Sherwood, 2010; Gooda, 2010).

The narrative, as a method of enquiry, allows this phenomenon to be examined from the human and cultural subjectivity perspective acknowledging the life ownership and expertise inherent in each person’s experience of their life within the framework of the complex interactions of internal and external influences on that life. It therefore has the potential to provide richness of data not possible from the pure observational perspective (Goodson, 2001).

Indigenous Australians’ Narrative

If one accepts the Neo- Marxist perspective that the standpoint of disadvantaged or oppressed people is more valid than that of the ruling classes of any society (Baumrind, 1998), then the use of narrative as an inquiry method can be argued to be valid in terms of Indigenous research. The narrative or story telling has a long history among the Indigenous peoples as a method of the transmission of cultural knowledge from generation to generation. The story lines and “song lines” form an essential part of the culture, community and the individual and has done so “forever” (Sherwood 2010, Amnesty International, 2011). The emerging controversy here is, who is to be allowed to carry out the enquiry in this domain and under what circumstances?

It also cannot be denied that the European “invasion” in 1788 of “Terra Australis” and the subsequent declaration of “Terra Nullius” had a massive negative impact on the Aboriginal and Torres Strait Islander peoples of Australia. The flow on of this impact continues with systematic disenfranchisement and persecution of our First Nation peoples (Sherwood, 2010).

Trewin (2001), in his *Frameworks for Australian Social Statistics*, an ABS publication, states that the disruption of the traditional social and legal system of Indigenous peoples which existed prior to European settlement in Australia was a major cause in the disenfranchisement of the Indigenous people. The system of kinship and ethical laws, reinforced by oral traditions of Indigenous traditional culture, ensured ordered interaction between people as well as the maintenance of essential natural resources. Aboriginal and Torres Strait Islander peoples were, and still are, the custodians of this country.

As pointed out earlier, they too had a long history of narrative or story telling, much longer than that of the European narrative. It must be remembered here that the European narrative is recorded in writing, a technique developed only about 5000 years ago (Strate, 2007). The Aboriginal and Torres Strait Islander story is now recognised as the longest surviving and continuous culture in the world. Its traditions, beliefs and wisdoms were handed down, not in writing, as is the European story, but through a rich, continuous and structured oral tradition going back some 50,000 years or more (Gooda, 2010). It is the cultural disruption of the last 200 years of that story which has threatened its continuity. Yet much of this cultural tradition still remains as a testament to the resilience and strength of the Aboriginal and Torres Strait Islander Australians in their concerted endeavours to reclaim identity and culture (Sherwood, 2010)

Indigenism and Indigenist Standpoint

It is hardly surprising then that, within an environment of reclaiming control of culture and country, Indigenous researchers and writers, such as Nakata (1998), Smith (1999), and Rigney (2004) among others, are espousing Indigenism as a research paradigm, that is Indigenous matters should be researched by Indigenous researchers. This emerging trend is based on Indigenous Standpoint Theory espoused by Nakata (1998) and Smith (1999) and revolves around the concept of “different knowing” of Indigenous people and the ancient tradition of initiation into knowledge based on earned trust (Sherwood 2010). It is also driven by their rejection of, and counter challenge to, a neo-colonialist Eurocentric research paradigm that is still practiced by some in a purported post-colonialist age (Sherwood, 2010). Smith’s (1999) statement, that we are experiencing a neo-colonialist philosophy in our handling of Indigenous affairs and the inept attempts at reconciling our two cultures, is echoed by Sherwood (2010) and captures the present situation. The Northern Territory Emergency Response (NTER) of 2007, with its subsequent suspension of the Racial Discrimination Act (1975), is certainly a tragic indicator of this as it seeks to repeat many of the features of the travesties of the 19th and 20th century (ANTar, 2010; Altman cited in Russell & Wenham, 2010; Amnesty International, 2011).

The earlier reference to “different knowing” which incorporates a complex knowledge system is well expressed by Rosalie Kunoth-Monks, Alyawarr/Anmatyerr elder, Utopia homelands, cited in “The Land Holds Us”, a 2011 report by Amnesty International. She explains:

... the land owning you means that through your song lines, you’ve got to know which part of the land owns you and where you are responsible for the wellbeing of that earth.

That means, country owns or holds you, not you holding the country and becoming master of the land. The land was your mother, your father and everything else.”

And again

“...once we are moved from our place of origin, not only will we lose our identity, we will die a traumatised tragic end.”

It is an inverse relationship with country to that of the European concept of individual land ownership and controlling what we do with the land. A further consequence of the Australian governments handling of the NTER is expressed by a gathering of Aboriginal and Torres Strait Islander Elders in Melbourne in 2011. They poignantly went on to say:

“Under the Intervention we lost our rights as human beings, as Australian citizens, as the First People of the Land. We feel very deeply the threat to our languages, our culture, and our heritage. Through harsh changes we have had removed from us all control over our communities and our lives. Our lands have been

compulsorily taken from us. We have been left with nothing. The legislation under which we now live does not comply with international law. It is discriminatory. We are no longer equal to other Australians. We are no longer equal to you.”

(Amnesty International, 2011)

Nakata (2006) argues that if the research community of scholars, both Indigenous and non-Indigenous are to prevent this divide from creating an “apartheid” (my emphasis) and instead create a relationship of mutual trust necessary for collaborative research endeavour, we must rethink our approach and our standpoint.

Rigney (2004) adds

“Indigenism is not atheoretical nor anti-intellectual. Indigenism seeks the building of a robust Indigenist intelligentsia for the revision of ethics, meta-theories, research epistemes and methodologies to move beyond dichotomies such as object/subject, rational/irrational and white/black”.

Perhaps, as Rigney (2004) also points out, the research community should consider rephrasing the terminology of reference from Indigenous or Aboriginal and Torres Strait Islander peoples to the more inclusive Aboriginal and Torres Strait Islander Australians.

As stated earlier in this paper “Teach me about your life” is a rather simple statement that circumscribes a complex concept of a power relationship between the holder of a knowledge or knowing and a pupil or someone willing to listen, hear, learn and respect. As Wood (2005) argues, it is a paradigmatic shift in research philosophy moving us from standpoint theory towards an intersection with muted group theory. It allows for “the outsider within” to act as a catalyst in letting muted or suppressed voices be heard and understood from both sides of a standpoint (Wood, 2005) and create a new, combined way of knowing. It is a journey of convergence, not apartness that is possible here.

A Learning Journey

The concept for this paper resulted from the journey in attempting to gain ethics approval for research into the narrative of Indigenous and non-Indigenous men and women immediately post release from prison. This journey incorporated 12 months of cultural awareness guidance from a number of Aboriginal and Torres Strait Islander mentors to ensure cultural sensitivity and appropriateness in the conduct of this study. It was realised from an early point in the planning of the study that the intersection of Indigeneity and non-Indigeneity and its subsequent standpoint anomalies would present significant challenges. At one point during this planning stage, these appeared to be insurmountable and it became a point to be considered whether or not to include Indigenous people in the study. It was the mentor support mentioned above which eventually ensured that the Indigenous sector of the study participants remained in the study.

As a result of these deliberations, it was decided that half of the study participants are to be of Indigenous Australian heritage as one third of all prisoners are of Indigenous Australian descent and yet part of a population that is representative of only 2.5 % of the overall population of this nation (ABS, 2010).

To be valid and comprehensive, any study in this domain, therefore, needed to include the narrative of both Indigenous and non-Indigenous peoples. This inclusion of Aboriginal and Torres Strait Islander Australians required separate ethics submission and approval from the Aboriginal Health and Medical Research Council (AHMRC) to ensure respect for the validity of and sensitivity for Indigenist standpoint. This separate ethics process evolved as a result of the non-reciprocity of European researchers gathering knowledge about Aboriginal and Torres Strait Islander Australians in order to solve the perceived “Aboriginal problem” (Sherwood, 2010). Research, considered an “evil” word among Aboriginal peoples (Smith, 1999; Rigney, 2006; Sherwood, 2010), did little or nothing to achieve better Indigenous health outcomes because the knowledge so gained was applied within a paternalistic and therefore neo-colonialist paradigm (Rigney, 2006, Sherwood, 2010). The AHMRC’s role is to ensure that any knowledge acquired is not only a shared knowledge between the researcher(s) and the community it comes from, but also is collaboratively attained and applied within a culturally appropriate paradigm.

Conclusion

The literature based research necessary for the submission to the AHMRC Ethics Committee, as well as learnings from both Indigenous and non-Indigenous mentors, informs this paper and guides this journey as a researcher in this domain. It was, and continues to be, a journey into huge complexities, trust building, unlearning and learning anew from the knowledge and knowing of Indigenous and non-Indigenous members of the academy and the broader community. Yet such a relationship requires an enormous trust base and a “rite of passage” transition (Sevig & Etzkorn, 2001). This process that must begin with the statement “Teach us about your life” as an acknowledgement of the “primacy of Indigenous knowing” (McGloin, Marshall & Adams, 2010; Sherwood, 2010) in the creation of a new understanding, relational trust and a new way of knowing that respects that “primacy”. It is indeed a journey of transformative learning (Friere, 1970 cited in Sevig & Etzkorn, 2001; MacDonald & Bernardo, 2005) that will continue during this study of the narratives of men and women leaving prison.

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PART THREE – LAW REFORM

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Dirty words? Challenging the assumptions that underpin offensive language crimes

Elyse Methven

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Earlier this year, the New South Wales Law Reform Commission ('the Commission') recommended an inquiry into the possible abolition of the crime of using offensive language. The Commission stated that:

Community attitudes towards the use of language, especially swear words, have changed substantially. Some people may find swearing offensive but the issue under consideration is whether it should be a criminal offence (New South Wales Law Reform Commission, 2012, p. 310).

Calls to repeal this offence are not new, yet they continue to be ignored by successive governments and the broader public.

This paper critiques the adjudication of offensive language crimes, focusing on the vague definition of offensive, the cryptic construction of the reasonable person and the elusive concept of community standards. In part one of this paper, I define and give a general overview of offensive language crimes, and examine the existing literature on the unequal enforcement of these crimes. In part two, I discuss how the law requires judges to shew expert linguistic evidence in favour of their 'common sense', thereby rehashing prejudicial stereotypes about language, sex and place. In part three I analyse two cases in which judges espouse opinions that women ought to, and have a greater capacity for self-restraint when it comes to swearing, and that swearing should be reserved for masculinised spaces. I draw upon critical sociolinguistics and the notion of swear words as 'dirty' words to argue that these vague constructions enable police and judges to discriminate against those who challenge their concept of 'order' and 'disorder'.

Offensive language crimes

In New South Wales, s 4A(1) of the *Summary Offences Act 1988* (NSW) makes it an offence to use offensive language in or near, or within hearing from, a public place or school ('the 1988 offence'). Last year, there were approximately 6,000 offensive language incidents recorded in NSW alone (NSW Bureau of Crime Statistics and Research, 2011). It is a defence to a charge under s 4A(1) if the defendant satisfies the court (on the balance of probabilities) that he or she had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence (s 4A(2)).

New South Wales is not alone in criminalizing offensive language. Similar offences, which criminalise offensive, abusive, insulting, or obscene language, exist across Australia. For example, in Western Australia, s 74A of the *Criminal Code Act 1913* (WA) makes it an offence to 'behave in a disorderly manner', which includes the use of 'insulting, offensive or threatening language' in a public place, a police station or lock-up. A person found guilty of the WA offence of behaving in a disorderly manner can be fined up to \$6,000. Offences which criminalise offensive, abusive, insulting, or obscene language overlap considerably (Walsh, 2005), and I use the term 'offensive language crimes' when referring to these offences. In Queensland and the Northern Territory, offensive language crimes attract a term of up to six months' imprisonment.

The conservative Liberal-National Coalition Government led by Nick Greiner introduced the broad NSW offence in 1988, repealing the narrowly worded offence under s 5 of the *Offences in Public Places Act 1979* (NSW), which prohibited a person from:

without reasonable excuse, in or within view or hearing from a public place or school behav[ing] in such a manner as would be likely to cause reasonable persons justifiably in all the circumstances to be seriously alarmed or seriously affronted ('the 1979 offence').

The 1979 offence had attracted considerable criticism from members of the Liberal Party and the NSW Police Force, who argued that the requirement that reasonable persons be 'seriously alarmed or seriously affronted' by the behaviour or language in question placed excessive limitations on police powers and discretion to deal with unruly or undesirable behavior in public space (Hiller, 1983, p. 103). The hostile reaction of police was evident in an advertisement published by the NSW Police Association on 20 August 1979 stating:

You can still walk the streets of NSW, but we can no longer guarantee your safety from harassment...

....Is it possible that the Offences in Public Places Act (1979) could be the seed from which a growth of pattern of New York style street crime will be the future harvest?

When the 1988 offence was introduced, the National Party argued that a more comprehensive offence with a custodial penalty attached to it was necessary in order to 'prevent widespread obnoxious behaviour before it's too late' (New South Wales Legislative Assembly, 1 June 1988, p. 1155). In his second reading speech to the Summary Offences Bill 1988, the Attorney General John Dowd stated:

Underlying the Bill is the Government's concern that all citizens have the right to enjoy public facilities without harassment or interference....The community will have confidence that this legislation will adequately deal with public order, and the police will have confidence that it can be properly enforced (New South Wales Legislative Assembly, 31 May 1988, p. 804).

The 1988 offence and the accompanying penalty of up to three months' imprisonment sparked little opposition from the NSW Labor party, save for the criticism that the new Act was a 'pussy-cat Act' that did not go far enough (New South Wales Legislative Assembly, 1 June 1988, p. 1173).

Despite introducing a custodial sentence, the Attorney General implored police and magistratestouse arrest and imprisonment as a last resort for Indigenous defendants. However his requests were largely ignored. It was not until a review of the legislation that the three-month custodial penalty was removed by the *Summary Offences (Amendment) Act 1993* (NSW). Theremoval of the custodial penalty was prompted in part by the Royal Commission into Aboriginal Deaths in Custody, and also by the reaction to the 1992 ABC documentary *Cop it Sweet*, both of which highlighted the harsh operation of the legislation on Indigenous Australians. The maximum penalty for using offensive language under the 1988 offence is now\$660, or up to 100 hours of community service (ss 4A(3), (6)).

A development that has taken place in the last decadeis that policein many Australian jurisdictions, including NSW, Queensland and Victoria, have the power to issue fines, or infringement notices for offensive language(Leaver, 2011). Thus police are now performing the conflicting roles of witness, victim and judge in perceiving and punishing offensive language.

Recent literature on offensive language crimes focuses on the discriminatory policing and enforcement of such crimes, particularly in relation to Indigenous Australians. Academics from a range of disciplines have critiqued this aspect of the offence (Cunneen, 2001, 2008; Lennan, 2006, 2007; Morreau, 2007; Walsh, 2004, 2005; White, 2002).

The literature demonstrates a deep hypocrisy in the enforcement of offensive language crimes. Chris Cunneen (2001, p. 96) describes how in August 1988, an 18-year-old Aboriginal youth was arrested and charged with offensive behaviour for wearing a t-shirt which highlighted Aboriginal deaths in police custody. Police commonly arrest people for using swear words such as *fuck*, *prick* and *cunt*, which are frequently used amongst police officers and sometimes used by police officers towards members of the public(Brockie, 1992; Cunneen, 2001; Wooten, 1991). Police are often the victims of offensive language crimes, and almost always the witnesses. As Cunneen writes, such charges:

are often representative of direct police intervention and potential adverse use of police discretion. Except for a notional 'community', the victim of the offence is almost invariably the police officer, as shown in numerous studies in most Australian jurisdictions (Cunneen, 2001, p. 29).

Theover-policing and over-criminalization of Indigenous persons' and other minorities' use of 'offensive' language is well documented. With this in mind,the next part of this paper questions how judicial opiniononswearing rationalise an excessive level of police power over some of the most vulnerable members of society.

Language ideologies and offensive language

In my critique of offensive language crimes I draw upon critical sociolinguistic research and the concept of language ideologies. Sociolinguistics is the study of the complex relationship between language and the social context in which it is used. It assumes that language both reflects and shapes society (Eades, 2010, p. 5). Critical sociolinguistics is 'critical' in that it is concerned with questions about access, power, disparity, difference and resistance (Pennycook, 2004, p. 797).

The law is one of the most linguistic of institutions: legislation, police investigations, court proceedings and judgments all being overwhelmingly linguistic processes (Gibbons, 2004, p. 289). Offensive language crimes have an obvious linguistic dimension. In fact, they are a typical example of what forensic linguist Roger Shuy labels 'language crimes', in other words, crimes in which certain kinds of language use are criminalised. Writing about language crimes, Shuy argues that linguistic issues are often overlooked in the law:

Most people use language so easily and naturally that they tend to not really see it very well. What people hear is often colored by their own professional vision, schemas, presuppositions, and expectations (Shuy, 2005, p. xii).

When analysing offensive language, judges and police often do not reflect on how their own frames of reference skew their linguistic interpretations. In applying ideas from critical sociolinguistic research, I am not concerned with prescriptive judgments: professing to scholars the 'correct' way in which language should be understood. Instead, I am interested in exploring and critiquing prejudices about language use that inform judicial interpretation of offensive language crimes, and perpetuate further inequality.

Language ideologies

How we understand language is shaped by the small worlds that we inhabit: the viewpoints and stories we embrace, ignore and reject. To deal with the linguistic dimension of offensive language crimes, judges cannot consult linguistic experts. Expert evidence on questions of language and literature is inadmissible in offensive language cases (*Howie v Winter* (1934) 12 LGR 62; *Prowse v Bartlett* (1972) 3 SASR 472; *Dalton v Bartlett* (1972) 3 SASR 549; *E (a child) v The Queen* (1994) 76 A Crim R 343). Instead, judges rehash folk knowledge as to the way language operates. I use sociolinguist Diana Eades' understanding of the term 'language ideologies' as taken-for-granted or 'common-sense' assumptions about how language works, which permeate legal decision-making. These representations have been socially, culturally and historically conditioned (Eades, 2010, pp. 241-242).

Importantly, 'Ideologies of language are not about language alone' (Eades, 2010, p. 242; Woolard, 1998, p. 3). They also 'serve to rationalize existing social structures, relationships and dominant linguistic habits' (Eades, 2010, p. 242). Similarly, laws that circumscribe language are not just about words, but also seek to control other aspects of human life: conflicts about race, class, culture and gender. Ideological positions often become naturalised into the law (Mayr & Simpson, 2010, p. 56). This process of naturalisation can align people to the mainstream or dominant thinking without questioning the bases of these assumptions.

What is 'offensive'?

The imprecise nature of offensive language crimes creates a space in which language ideologies about swearing flourish. The NSW Parliament chose not to define 'offensive,' the Attorney General stating that it is 'a broad term with which members of the public are familiar' (New South Wales Legislative Assembly, 31 May 1988, p. 804). The case law provides little guidance as to the meaning of this adjective, save for the vague definition provided by O'Bryan J in the oft-cited case of *Worcester v Smith* [1951] VLR 316, in which his Honour stated that 'offensive' means:

...such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person (at 318).

The word 'calculated' in this definition is misleading, as the balance of authority suggests that there is no subjective *mens rea* element in offensive language crimes. Offensive language and behaviour must be conscious and deliberate in the sense that it is not accidental, but the prosecution does not have to prove an intention to offend, or knowledge that the conduct would offend (see *Police v Pfeifer* (1997) 68 SASR 285; *Police v Atherton* [2010] SASC 87).

This definition of offensive outlined in *Worcester v Smith* was adopted by Kerr J in *Ball v McIntyre* (1966) 9 FLR 237. In that case the defendant, Desmond Ball, climbed a statue of George V and hung a placard on the statue that read *I will not fight in Vietnam*. Ball refused to remove the placard or climb down, and was arrested for behaving in an offensive manner contrary to s 17(d) of the *Police Offences Ordinance 1930-1961* (ACT) (now repealed). Commenting on the meaning of offensive, Kerr J held that:

Some types of political conduct may offend against accepted views or opinions and may be hurtful to those who hold those accepted views or opinions. But such political conduct, even though not thought to be proper conduct by accepted standards, may not be offensive conduct within the section. Conduct showing a

refusal to accept commonly held attitudes of respect to institutions or objects held in high esteem by most may not produce offensive behaviour, although in some cases, of course, it may (at 241).

These flexible judicial statements make it clear that judges are reluctant to circumscribe police discretion in dealing with offensive language and behaviour. Police may target a wide range of language, including language that does not involve any threat of violence or other unlawful activity. Courts have also held that it is an error of law to state that words are necessarily indecent regardless of the context in which they are used (*Hortin v Rowbottom* (1993) 68 A Crim R 381; *Bradbury v Staines*; *Ex parte Staines* [1970] Qd R 76; *Dalton v Bartlett* (1972) 3 SASR 549). Furthermore, it is not necessary to demonstrate that some person has actually been offended by the accused's language. The test is an objective one, determined from the perspective of a reasonable person (*R v Connolly and Willis* [1984] 1 NSWLR 373).

The abstract nature of the term 'offensive', the inadmissibility of expert evidence on questions of language, the lack of any subjective *mens rea* standard, and the application of the 'reasonable person' standard all contribute to the wide discretion bequeathed upon judges and police when interpreting offensive language crimes.

The reasonable person and community standards

We can see a rather cautious, normative discourse develop around the construction of the reasonable person in the case law on offensive language. This hypothetical person is not thin-skinned, nor overly thick-skinned (*Re Marland* [1963] 1 DCR 224; but see *McCormack v Langham* (Unreported, Supreme Court of NSW, 5 September 1991, Studdert J)). He or she is apparently reasonably tolerant, understanding, and contemporary in his or her reactions (*Ball v McIntyre* (1966) 9 FLR 237). However the reasonable person has some sensitivity to social behaviour, and social expectations in public places (*Evans v Frances* (Unreported, Supreme Court of NSW, Lusher AJ, 10 August 1990). A reasonable person is neither a social anarchist, nor a social cynic (*Spence v Loguch* (Unreported, Sully J, Supreme Court of New South Wales, 12 November 1991). And in interpreting the perspective of the reasonable person, the court must have regard to contemporary community standards or the standards of 'right-thinking', 'decent-minded' people (*Melser v Police* [1967] NZLR 437; *Crowe v Graham* (1967) 121 CLR 375; *Heanes v Herangi* [2007] WASC 175).

Thus the case law demonstrates that reasonable people are altogether unremarkable. The reasonable person is not sceptical of existing hierarchies. Reasonable people adhere to the status quo. Judges do not acknowledge the cultural and historical assumptions that inform their view of who this right-minded person is. In referring to the illusory, abstract standards of 'decent, right-minded people' and an imagined 'community', courts are able to apply their own naturalised prejudices relating to swearing and proper language use.

When arbitrating offensive language cases, the judiciary clings to a belief in their ability to discern 'community standards' on bad language, even in the face of sociolinguistic research that demonstrates that there are no universal norms on swearing. Attitudes towards bad language change throughout time, across cultures and between individuals (Hughes, 2006; McEneary, 2006; Montagu, 1967). Bad language is as much a social/historical phenomenon as a linguistic one (McEneary, 2006).

The complex cultural and historical foundations of attitudes towards bad language are forgotten in the assessment of who this 'reasonable person' might be. Magistrates and judges reject linguistic evidence in favour of language ideologies on what is offensive. Their judgments are infused with normative statements about age, sex and social class, as well as arguments about purity, power and 'proper' English usage. The judges adopt folklinguistic theories on 'bad language', relying on moral absolutist beliefs, referring to concepts such as morality, decency and common sense, without assessing the assumptions that have informed such beliefs.

The illusive reasonable person test in offensive language cases has not entirely escaped criticism from members of the judiciary. In *White v Edwards* (Unreported, Supreme Court of New South Wales, 5 March 1982), Yeldham J considered a charge under the repealed s 5 of the *Offences in Public Places Act 1979* (NSW), of behaving in a manner as would be likely to cause reasonable persons to be seriously alarmed or seriously affronted (the predecessor to the 1988 offence, discussed above). The facts were that at around 12.15am on 28 February 1981, a young person was standing near an intersection in Kings Cross, Sydney. The young person was with a group of five or six friends, 'dressed in attire similar to that worn by "punk rockers"'. The young person said *Fuck off cunts* and *Get fucked you cunts*, in a loud tone of voice. These words were heard by a nearby police officer.

Justice Yeldham contemplated the difficult task of determining what constitutes the standards of 'reasonable persons' early in the morning at Kings Cross, asking whether this objective test:

...envisages the standards of prostitutes, of dedicated church-goers, of young people or of old, of visitors to the area or of residents of Kings Cross? In the course of argument one counsel said that "at Kings Cross you may find a prostitute shoulder to shoulder with an Archbishop"...The very nature of a place such as Kings Cross, where there is to be found a large cross-section of persons, not all of whom may be regarded as "reasonable", emphasizes the problem (at [5]-[6]).

Justice Yeldham's critique of the reasonable person test is unusual. For the most part, magistrates and judges do not embark on a critical assessment of who this reasonable person might be. Instead, they hide behind a cloak of objectivity in order to proffer their own thoughts on who should and should not swear, who may and may not be sworn at, and the spaces in which swearing is or is not permissible. The concerns raised by Yeldham J about the reasonable person standard give rise to the question of how, in a pluralist society, might a police officer or magistrate make an 'objective' assessment about the offensiveness of language. What values does the 'reasonable person' in Australia hold in relation to swearing across a multitude of public places?

Case studies

Del Vecchio v Couchy

To further explore judicial discourse relating to the reasonable person and community standards, I turn to the Queensland case of *Del Vecchio v Couchy* [2002] QCA 9. This case concerned a charge of using insulting words in public contrary to s 7(1)(d) of the *Vagrants Gaming & Other Offences Act 1931* (Qld) (which has since been repealed and replaced by the offence of public nuisance under s 6 of the *Summary Offences Act 2005* (Qld)).

To summarise the facts of this case, at approximately 4.00 am on 21 September 2000, in inner-city Brisbane, an intoxicated, homeless, disoriented Indigenous woman, Melissa Jane Couchy, was approached by a male police officer, Sergeant McGahey. McGahey asked Couchy if she wanted to go to 'the compound' – a nearby shelter. Couchy replied: *Sarge, the Compound is for fucking dogs*. A nearby female police officer then asked Couchy to state her full name and address. Couchy replied: *You fucking cunt* (or words to similar effect). Couchy was arrested for using insulting language and received a sentence of three weeks' imprisonment. While her sentence was reduced to seven days on appeal to the District Court, Melissa Couchy's appeals against conviction to the District Court, the Queensland Court of Appeal and to the High Court were rejected.

Couchy's case is not unusual. Couchy was homeless, which increases her visibility in public spaces. She is Indigenous and so is much more likely than a non-Indigenous Australian to be charged with using offensive language (NSW Bureau of Crime Statistics and Research, 1999). Indigenous persons are also subjected to a greater degree of intervention in their everyday activities, including the 'most intimate parts of their lives' (Ronalds, Chapman, & Kitchener, 1983, p. 171). Couchy's Indigenous identity is also significant in that a growing body of evidence suggests that many Indigenous Australians use swearwords differently and more frequently than non-Indigenous Australians (Taylor, 1995, p. 236).

There is an obvious power asymmetry in Couchy's case; the police are in a position of authority, and she is not. The police officers felt empowered to direct the defendant as to how she should act, what she should say, and where she must go, even if Couchy was not legally obliged to comply with these directions. Couchy had few tools at hand to subvert this power asymmetry. Taking into account the fact that she is Indigenous, frequently occupied 'public spaces' and regularly came into contact with the police, we might perceive her use of the word *cunt* to be an expression of resistance or perhaps sheer frustration, in response to the suggestion that she be transported to 'the compound'.

However the courts do not entertain such a sympathetic reading.

The Queensland Court of Appeal denied that Couchy's 'Aboriginality', her poverty and the 'plight of Indigenous people in the community' were relevant to the assessment of whether a reasonable person would regard her language as insulting with regard to contemporary community standards. The Court effectively asserted that taking Couchy's Aboriginal identity and poverty into account would be an example of reverse discrimination. In the Court of Appeal transcript, Douglas J states that:

I just think to add the word "Aboriginal" stretches the bar too far; it's not necessary.

McPherson JA agrees, going on to suggest that:

You mean that if I said these words I'd be guilty of an offence, but if she says them she's not?

... One law for the rich and another for the poor.

Thus, in the name of 'equality before the law', the Court refuses to acknowledge fundamental aspects of Couchy's identity and social situation.

While McPherson JA's hypothetical example, that 'if [his Honour] said these words [he'd] be guilty of an offence, but if she says them she's not' may be persuasive in theory, it is almost impossible to imagine a scenario in which any of the Queensland Court of Appeal judges might be arrested or imprisoned for using insulting language. As white, upper-class Australian males, they occupy an elite position in society. Linguist Brian Taylor has observed that people who enjoy a more privileged position in Australian society, by virtue of their profession, social status, education and 'connections' are rarely prosecuted for using what Taylor calls 'high category' swear words such as *cunt* or *fuck*, even where they use these words in relatively public locations (Taylor, 1995, p. 232). Meanwhile, less privileged members of society, including those disadvantaged by poverty, homelessness, those whose language deviates from 'Standard English' and Indigenous persons continue to be overrepresented in offensive language cases (Taylor, 1995, p. 234).

While the Queensland Court of Appeal blinded itself to selective aspects of the appellant's identity, both the Queensland Court of Appeal and the High Court were very alive to the issue of gender, offering their own hypotheses about how a reasonable male or female might perceive the use of the word *cunt* to a female. The judges profess to be concerned about 'equality before the law', and yet do so inconsistently. While their Honours assumed that a reasonable female would react to the word *cunt* in a different manner to a reasonable male, they also assumed that a homeless, intoxicated Indigenous woman should not be held to a different standard of language use compared to a white, upper-class male.

The judges reject sociolinguistic evidence that there is no universal standard on insulting language, instead relying on language ideologies which are highly evaluative, emotional and aesthetically judgmental, drawing links between swear words, disorder, incivility and harm (Burridge, 2010; Cameron, 1995; Wajnryb, 2004). As Paula Morreau (2007) argues, by applying so-called 'universal' standards, judges effectively penalise the failure of Indigenous and other marginalised defendants to adhere to majority (white) values.

The common sense assumptions about how males and females react to swearing are even more pronounced when Melissa Couchy's application for special leave to appeal is heard before Gummow, Callinan and Heydon JJ in the High Court of Australia (*Couchy v Del Vecchio* [2004] HCATrans 520). In the hearing of the application, Gummow J states:

The form of words here and the gender of the officer to which they were addressed are quite significant in a way. This is a very strong form of words.

Justice Callinan adds:

Even a very well-trained police officer might be offended by these – a female police officer particularly, having regard to the words....

... The other point is that, despite equal opportunity, perhaps even today the fact that those words were said to a woman might provoke a physical response on the part of men who were also present. I think there were male police officers present here too, is that not right?

It is incredible that in the twenty-first century, Australian High Court judges are entertaining assumptions about female delicateness and male gallantry in interpreting whether language is 'offensive'. The judicial statements of both the High Court and the Queensland Court of Appeal provide a vivid illustration of how judges adopt an essentialised view of men and women, in which both sexes must conform to certain stereotypes when reacting to the utterance of the word *cunt*. While a female should react in horror and disgust upon hearing the word *cunt*, a male might feel compelled to defend the distressed female, perhaps even in violence. The judges choose to ignore anything that complicates their normative assumptions about swearing in the presence of a female, particularly the defendant's Aboriginality, her poverty and her intoxication.

McCormack v Langham

In *McCormack v Langham* (Unreported, Supreme Court of New South Wales, Studdert J, 5 September 1991) the respondent, Geoffrey Langham, was having lunch at Leo's Hot Foods in Lismore, NSW. Approximately 30

people were in the restaurant, including adults and children. Two police officers walked into the restaurant, and Langham was alleged to have said (with some degree of foresight) in a loud voice: *Watch these two fucking poofers here, how they fuckin' persecute me.*

Geoffrey Langham was arrested and charged with using offensive language. Magistrate Pat O'Shane dismissed the charge, finding that the language complained of was 'language of common usage these days and not such as would offend the reasonable man'.

When the case was heard on appeal, Studdert J overturned Magistrate O'Shane's ruling and remitted the matter for re-hearing. In assessing the offensiveness of the language, Studdert J stated that:

What might pass as inoffensive language if exchanged between footballers in an all male environment in a dressing room after a match might well offend if repeated in mixed company in a church fete.

This statement was cited with approval by Higgins J in *Saunders v Herold*(1991) 105 FLR 1.

And thus what are essentially gender-biased, aesthetic tastes become naturalised into law. The judges advocate the cordoning off of 'all-boy' spaces, so that men may 'talk dirty' amongst themselves, free from any disapproval of the opposite sex. It is acceptable for males to swear amongst males, at the football – a heavily masculinised space, for that is merely dirt amongst dirt. But by swearing amongst churchgoers, in the presence of a police officer, in mixed company, or in front of children, we are polluting clean spaces, and thus offending the natural order of things.

A threat to police authority?

A significant feature of both *Couchy's* and *Langham's* cases is that the defendants uttered swear words towards, or in the presence of police officers. Implicit in the sanctioning of such conduct is that swearing at or in the presence of police might undermine a police officer's authority. It is clear from judicial and parliamentary statements that offensive language crimes are primarily about commanding respect for police. When the *Summary Offences Act 1988* (NSW) was introduced in June 1988, the Attorney General stated:

The police- young men and young women-have to suffer foul and offensive language from people trying to breach their authority. I will not have police officers insulted (New South Wales Legislative Assembly, 1 June 1988, p. 1178).

Courts have also recognised that challenges to police authority are likely to be considered disorderly or offensive conduct (*Heanes v Herangi* [2007] WASC 175 at [177]).

Offensive language crimes could conceivably target an indefinite number of insulting or abusive phrases. Yet prosecutions are limited to a small number of swearwords, primarily *fuck* and *cunt*. Do these swear words have an inherent quality that renders them a threat to police authority?

The law cannot seek to censure swearwords *per se*; such an aim would be futile. American and English linguistic research has demonstrated that swearwords are uttered at a relatively high frequency - a rate of 0.3-0.7% of total words used. This can be benchmarked against the frequency of first personal pronoun use (such as *we*, *us*, or *our*), with such words occurring at a 1.0% rate. As linguist Timothy Jay states, language researchers do not regard personal pronouns to be low-frequency words (Jay, 2009, p. 156). So the law cannot possibly sanction the use of all swear words. Nor could police conceivably target every use of the words *fuck* or *cunt* in a public place. Instead they must select certain words, uttered by certain people, in certain places. These people are often the most vulnerable and visible members of our society. Why?

Dirty Words

Offensive language can be conceived of as language out of place. This notion of language out of place is central to how the law understands offensive language. We are historically and socially conditioned to perceive swear words as 'dirty words', without questioning why this is so. Many can hardly articulate the word *cunt*, preferring euphemisms such as 'the c-word', let alone turn their mind to what *cunt* might mean in a given context, or try to understand it as anything other than dangerous or unspeakable. This understanding of swear words as dirty or filthy is so deeply engrained that it requires no explanation. In *Couchy's* case, the Magistrate finds it unnecessary to explain why the word *cunt* is offensive; it just is, stating:

Any word other than cunt I think may have put a doubt in my mind. But the word "cunt" itself, I would hold to be insulting of a female, be it a police officer or otherwise.

We might perceive swear words as the dirt of our language. Anthropologist Mary Douglas considers the link between tabooed practices, the construction of 'dirt' and the ordering of society in *Purity and danger: An analysis of the concepts of pollution and taboo* (Douglas, 1966). Douglas states that humans classify, separate, purify and punish dirty ideas, practices and people to 'impose system on an inherently tidy experience' (Douglas, 1966, p. 4). She argues that dirt offends against order, but only where dirt is 'out of place'. Similarly, swear words only offend against order when they pollute a public space, but in certain spaces, do not transgress any perceived system. There is no such thing as absolute dirt; dirt exists in the eye of the beholder (Douglas, 1966, p. 2). And it is the dominant ideology that labels that which is 'dirty' and that which is 'clean':

Dirt then, is never a unique, isolated event. Where there is dirt, there is a system. Dirt is a by-product of a systemic ordering and classification of matter, in so far as ordering involves rejecting inappropriate elements (Douglas, 1966, p. 35).

Just as dirt out of place contaminates a space, it is only where swear words are uttered out of place that they offend right-minded people (Burridge, 2010). Swear words are only 'dirty' in certain contexts. It is up to police, judges and magistrates to determine what these contexts are. Uttered amongst equals, for example amongst police officers, swear words are perfectly permissible. Yet where there is asymmetry, the consequences are criminal.

Conclusion

In this paper I have argued that magistrates and judges rely on simplistic assumptions about language, place and gender in order to inform their interpretation of offensive language crimes. The law requires that judges reject expert evidence and resort to their own prejudices regarding community standards and the qualities of the reasonable person, leading to inconsistent results that too often discriminate against the poor and disenfranchised. In defining offensive language as that which offends hypothetical persons in selective contexts, the law legitimises the imposition of police power on the powerless.

The case studies that I have discussed exemplify the language ideologies that judges and magistrates espouse to classify words as 'offensive' and therefore contaminative of a space. Offensive language is clearly a malleable construct. While the judiciary links the offensiveness of language to gender, sport and religion, they reject or downplay considerations of homelessness, intoxication, Aboriginality and power.

Sociolinguistic research points to the conclusion that police, magistrates and judges cannot fairly and objectively interpret what is offensive language. This idea tears at the very foundation of offensive language crimes. Are we prepared to accept this research, or must we continue to allow adjudicators to cling to ill-informed stereotypes about swearing, and in doing so, punish people and ideas that transgress the elusive line between order and disarray?

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Populism, predictions and the unacceptable risks of positivism – Victoria’s serious sex offender post-sentence scheme in the courtroom

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Victoria’s post-sentence scheme for serious sex offenders empowers the court to make a supervision or detention order of up to 15 years in duration, if the court is satisfied that the offender is likely to commit a relevant offence if released to the community. Since its creation 7 years ago, little is reported about the operation of the controversial scheme and who it captures due to the veil of secrecy; courts have issued complete suppression orders in all but five cases. This paper presents a case study of these five cases to provide a critique of Victoria’s scheme with a focus on psychological methods and judicial reasoning and compare the populist and positivist foundations with the reality in the courtroom. This is an inadequate sample of the approximately 100 orders in force in Victoria today and unknown number of unsuccessful applications by the State to have post-sentence supervision or detention; but it is an opportunity to consider the case studies – to glimpse beneath the veil – record some observations and reflect on whether the scheme is operating as intended.

In 2006, the State Governments of Victoria, New South Wales and South Australia each established a post-sentence supervision and detention scheme. Victoria, like its neighbours, introduced and passed new principal legislation in response to the High Court upholding of the constitutional challenges to Queensland’s landmark scheme (*Fardon v Attorney General (Qld)* (2004) 210 ALR 50; *Dangerous Prisoners (Sexual Offenders) Act 2003*). Victoria’s post-sentence scheme assumes that technologies of risk that measure the probability of future offending are reliable, accessible in a courtroom and able to assist the court exercising its unique post-sentence powers. Under Victoria’s *Serious Sex Offenders Monitoring Act (Vic) 2005* (“Monitoring Act”), the court is empowered to impose a supervision or detention order of up to 15 years in duration, if the court is satisfied that the offender is likely to commit a relevant offence if released to the community. What do we know of the post-sentence scheme in Victoria and who it targets? Robin Angus Fletcher is the only person subject to Victoria’s scheme not afforded the protection of identity and suppression of the reasons for imposing the order. Fletcher served ten years’ imprisonment for three counts of wilfully committing an indecent act with a child under the age of 16 years, one count of child prostitution and one count of attempting to pervert the course of justice. While on remand, he sought the assistance of a fellow prisoner to have the two girls killed so that they could not give evidence against him, which led to the last count. Fletcher explains his behaviour as being part of a pagan ritual, justified by “Wiccan religious beliefs” which he continues to promote and teach (via letters intercepted by prison authorities). Fletcher may well be the archetypal predatory paedophile that Parliament had in mind when Victoria’s scheme was legislated on a wave of penal populism and actuarial justice. Whether Fletcher is representative of the criminogenic profile of the scheme’s subjects is unknown due to the veil of secrecy. Indeed, Victoria’s courts have issued complete suppression orders on all but 5 cases in the 7 years of the controversial scheme.

This paper presents a case study of these 5 cases, to provide a critique of Victoria’s scheme with a focus on psychological methods and judicial reasoning and compare the populist and positivist foundations with the reality in the courtroom.⁴⁴ Part one provides a brief exegesis of the scheme in Victoria, focusing on Parliament’s discourse and the legal framework defining critical roles for the courts and mental health professionals. Part Two then considers the risk technology and its critique before the case studies are presented in Part Three. This is an inadequate sample of the approximately 100 orders in force in Victoria today and unknown number of unsuccessful applications by the State to have post-sentence supervision or detention; but it is an opportunity to consider Fletcher and the other cases and to reflect on whether the scheme is operating as intended. This paper is an opportunity to glimpse beneath the veil and record observations.

⁴⁴ Although this paper is focussed on the courtroom, this paper does not consider the legal critiques of the system which have comprehensively dealt with elsewhere. McSherry, B., & Keyzer, P., (2009), *Sex Offenders and Preventative Detention*, Sydney: Federation Press; Williams, C.R., (1990) ‘Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case’, 16 *Monash University Law Review* 161; Von Hirsh, A., & Ashworth, A., (2005). *Proportionate Sentencing*, Oxford: Oxford University Press; Baker, E., (1993). “Dangerousness, Rights and Criminal Justice” 56 *The Modern Law Review* 528; and Gray, A., (2004). ‘Detaining Future Dangerous Offenders: Dangerous Law’ 9(1) *Deakin Law Review* 244.

Victoria's post-sentence supervision & detention scheme

Populism and positivism in the hygienist's utopia

Robert Castel (1991) has written eloquently on how technologies of risk assessment have eclipsed the idea of dangerousness when dealing with offenders. The outcome is, according to Castel (1991, 289):

a vast hygienist utopia (which) plays on the alternate registers of fear and security, inducing a delirium of rationality, an absolute reign of calculative reason and a no less absolute prerogative of its agents, planners and technocrats, administrators of a life to which nothing happens. This hyper-rationalism is [...] a thoroughgoing pragmatism, in that it pretends to eradicate risk as though one were pulling up weeds.

Post-sentence detention schemes have been shown by others to reflect what Garland (2002) calls the 'culture of control' and Pratt (2000) describes as the 'decivilising process'. Pratt and Brown's work (2002) on the conception of 'dangerousness' has illuminated (among other things) the cultural relativity of its meaning through time. Hence, the attractiveness of 'risk' in recent times – as a replacement to 'dangerousness' in managing recidivism – as an objective, empirical, actuarial mechanism for determining social inclusion/exclusion.

The Victorian Parliament's deliberations on the serious sex offender scheme confirms our status as a 'vast hygienist utopia' – at least that is the intention when one observes Parliamentary debate and the legislative framework for the scheme. When the scheme was introduced, the responsible Minister told Parliament:

The community is rightly concerned about the *evidence* that some paedophiles are likely to *offend again and again* throughout their lifetime and that they are likely to have many victims. ... In light of *what we now know about child-sex offenders* it is appropriate and necessary to provide for the supervision of these individuals. (Hon Tim Holding, Parliament of Victoria, Legislative Assembly, February 22, 2005, at 9)

In response, the Opposition "applaud[ed] what is a major step forward" and moved an amendment to extend the scheme beyond offenders convicted of child sexual offences to cover "all offenders":

...whom we deem to be a continuing danger to our community. We are already, if you like, identifying ... predatory criminals regardless of the offence. ... [A]s we know, with child-sex offenders. ..[t]hey have *very, very high recidivist* rates. ... It is a pattern of behaviour that is recognisable in that particular offence (my emphasis). (Hon Mr Robert Doyle, Parliament of Victoria, Legislative Assembly, February 23, 2005, at 137-138)

How does the scheme manage risk of reoffending?

The purposes of 'extended supervision order' (ESO) conditions are twofold, namely:

- (a) to ensure that the community is adequately protected by monitoring the offender;
- (b) to promote the rehabilitation, and the care and treatment, of the offender. (Monitoring Act, section 15(2))

Section 16(3A) provides that the Adult Parole Board (APB) may give an instruction or direction which requires the offender to reside at an address including a residence *inside* prison walls but legally outside the 'prison land'.⁴⁵ In such a case, the offender is considered to 'have been released in the community and to be residing in the community' for the purposes of the Monitoring Act (section 16(3B)). As at August 2009, there were 40 offenders subject to ESOs or Interim ESOs.⁴⁶ Half of these offenders (20 in total) are required to reside at facilities on prison land. Five offenders are housed within the secure perimeter of Ararat Prison, while the other 15 offenders are housed on prison land outside the secure perimeter.⁴⁷

⁴⁵ See *Secretary to the Department of Justice v AB* [2009] VCC 1132 ('the AB case') Judge Ross, 28 August 2009 at [4] quoting Callaway AP in *TSL v Secretary to the Department of Justice* (2006) 14 VR 109 at [10]: 'Monitoring' is an understatement of the restrictions imposed on a person subject to an ESO. As Callaway AP observed in *TSL v Secretary to the Department of Justice*: 'A person subject to an extended supervision order is a prisoner in all but name.'

⁴⁶ *Secretary to the Department of Justice v AB* [2009] VCC 1132 (28 August 2009), para 126. Derived from State Exhibit A15.

⁴⁷ All are subject to curfews and lock-downs, electronic monitoring and are prohibited from leaving without an escort. Other restrictions are similar to imprisonment. For example, visits are rostered a month ahead and are difficult to change. Although these offenders are encouraged to engage in paid employment, none of those residing in Ararat are in paid employment and none have had conditions changed to allow them to attend work without an escort. See *Secretary to the Department of Justice v AB* [2009] VCC 1132 (28 August 2009), para 126. Derived from State Exhibit A15. Ibid, testimony of

The role of the court and the assessment report

The application for such an ESO is made by the Secretary to the Department of Justice (DOJ) to the court that sentenced the offender for the relevant offences, which in most cases is the County Court of Victoria. To obtain an order, DOJ must satisfy the Court “to a high degree of probability” that:

... the offender is likely to commit a relevant offence if released in the community on completion of the service of any custodial sentence that he or she is serving, or was serving at the time at which the application was made, and not made subject to an extended supervision order. (section 11(1))

An ‘assessment report’ must accompany the State’s application and can only be made by a psychologist, psychiatrist or other prescribed health service provider, following a personal examination of the offender (sections 6 and 7(1)).⁴⁸

The scheme empowers the Court to impose an ESO on an eligible offender for a period of up to 15 years. Since there is no limit on how many ESOs may be imposed on a person, in theory, a series of ESOs of up to 15 years each may be imposed on a person who continues to meet this test.

Reliable technologies of prediction and risk assessment

The state of the science and best practice

Eccelston, Brown and Ward (2002) outline guidelines for addressing issues in clinical versus actuarial assessments of dangerous behaviour and risk. Their synopsis of recent research on dangerous behaviour and risk presents an illuminating review of assessment models, indicators of risk and causal variables to navigate through the ongoing controversy of the science. Risk factors can be categorised into static (fixed) and dynamic (changeable) variables. Static risk factors are defined by past events such as history of childhood maladjustment, having criminal parents, offence history, or previous substance abuse (Hanson, 1998; Quinsey, Harris, Rice & Cormier, 1998). Static predictors may indicate an offender’s deviant development trajectory, the propensity to violence, but:

...are nonetheless inadequate predictors of recidivism. [...] Arguably, dynamic risk factors, interacting with other factors such as personal characteristics, have a more important role to play in predicting recidivism. (Eccelston et al, page 81)

Dynamic risk factors of dangerous behaviour reflect the contextual, situational, and temporal criminogenic needs (antecedents of criminal behaviour) of the offender prior to an offence (Andrews and Bonta, 1994; Quinsey et al, 1998). Dynamic risk factors include difficulties offenders experience in interpersonal relationships, the presence or absence of social support networks, difficulties in finding (and keeping) legal employment, money problems, substance abuse, criminogenic needs, and continued contact with peers with criminal attitudes and behaviours (Eccelston et al, page 81).

The clinical assessment reports provided to courts under the Monitoring Act include information derived from the ‘Static 99’ actuarial risk assessment tool. The Static 99 operates by scoring an offender against various ‘static risk factors’ (eg, whether the offender’s victims are male) based on a sample of actual offenders who were followed over time and who went on to sexually recidivate. Therefore, the tool is able to indicate the statistical probability of an offender in that group with these characteristics sexually re-offending over a period of time.

However, the probability estimates produced by the Static 99 do not directly correspond to the recidivism risk of a particular *individual* offender. This risk can only be reasonably identified having taken into account other ‘dynamic’ risk factors, which might otherwise increase or decrease the offender’s risk. It follows that once a

Ms Jennifer Hosking, Sex Offender Monitoring Branch, Corrections Victoria, summarised by Judge Ross of the County Court in *Secretary to the Department of Justice v AB* [2009] VCC 1132 (28 August 2009), para 119. *Secretary to the Department of Justice v AB* [2009] VCC 1132 (28 August 2009), Tn 251, Lines 1-22 (Ms Hosking) para 119. *Secretary to the Department of Justice v AB* [2009] VCC 1132 (28 August 2009), para 124, citing Ms Hosking, Corrections Victoria, Tn 261 Lines 22-23. *Secretary to the Department of Justice v AB* [2009] VCC 1132 (28 August 2009), para 124, citing Ms Hosking, Corrections Victoria, Tn 254 Lines 22-25.

⁴⁸ Notably, section 8(2) provides that an assessment report must state: “(a) the medical experts’ assessment of the risk that the offender will commit another relevant offence if released in the community and not made subject to an extended supervision order; and (b) his or her reasons for that assessment.”

clinician modifies an offender's risk using their clinical judgment, which considers the additional dynamic factors that the Static 99 does not account for, the Static 99 statistical probabilities no longer apply. Moreover, given that statistical probabilities are derived from data based on sexual reconviction rates, it is not possible to allocate a numerical score to an individual on the basis of his or her unique, dynamic factors.

Critiques of the technology

Three issues are worth noting with Parliament's presumption that experts can accurately predict future offending. First, there is no generally accepted legal, psychiatric or medical definition of "dangerousness" or an "unacceptable risk to the community"; it is not part of a professional's training (Brooks, 1984; Lucas, 1991, p.227). A health expert must develop their own subjective definition likely to be developed with reference to personal attitudes to freedom, liberty, maintaining order and social control, as well as their own personal experiences, motivations and behaviours.

Second, the Monitoring Act scheme is premised on the modernist assumption that serious sex offenders are a homogenous, specialist, "type" of character that can be objectively identified as likely to reoffend with further sexual offences. It is the role of the expert to provide scientific proof of this truth. However, the research on the nature of sexual offending has consistently shown that this is not the case: sex offenders and violent offenders are generalists in their offending, not specialists (Sentencing Advisory Council, 2007, [3.26-3.27]). Smallbone and Wortley's (2000, p.20) comprehensive Australian study on sex offenders concluded that child sex offenders are not specialists but demonstrate "considerable versatility" in their criminal careers. A review of studies examining recorded recidivism rates of sex offenders (Hanson & Bussiere, 1998) found that only 13.4 per cent committed a new recorded sexual offence (within four to five years). Like general criminal offenders, there is a diversity of pathways to offending.

Third, there is still a lack of consensus on whether there is an available means of predicting re-offending that is reliable and accessible in the courtroom. Mercado and Ogloff (2007, p.57) argue that while contemporary empirically-based approaches to determine the risk of re-offending have "advanced far beyond what was available scarcely a decade ago", the role of the expert in the legal process should be limited and subject to ordinary rules of evidence and hearsay. Predictions of risk of reoffending come "perilously close" to chance (Ogloff, 2006).

Reliable or pliable technology?

The scheme embodies the modernist view that "dangerousness" can be identified based on privileged (scientific) knowledge utilising risk technologies that allegedly embody the scientific traits of positivism, empiricism and deductive logic. Parliament presupposes the existence of a means to measure risk for this purpose and a medical community prepared to testify as to the veracity of the risk-assessment. Despite the emphasis on 'what we now know about [serious sex offenders]' (Parliamentary debate, Section 1.1 above) and implicit reference to state-of-the-art technologies for identifying people who are at risk of re-offending, O'Malley (2004; 2008a; 2008b; 2010) argues that risk has become a means where the reconstituted Right have reinvented its politics into a categorical and exclusionary form of criminal justice. In this way, risk is deployed as a tool of exclusion, 'preventative' detention, punishment and incapacitation.

Rather than being pessimistic about the catastrophic abuse of human rights brought about by these schemes, O'Malley (2004, page 334; 2008a) flips the notion that risk is a tool of exclusion *only*.⁴⁹ In the post-sentence supervision and detention context, risk provides an opportunity to consider a multitude of competing factors beyond the mere likelihood of reoffending. Models of democratizing risk can be applied to post-sentence supervision cases to illuminate how courts deal with these complex cases. Later in this paper we shall see that while the scheme operates to identify offenders who pose an 'unacceptable risk of re-offending' if included in the community; by implication, an *acceptable* degree of risk exists in the community. Accordingly, as the scheme continues and offenders appear to be subject to indefinite terms of 'preventative' detention, the courts are likely to turn their attention to whether the restrictions are an appropriate balance between the rights of offenders and the acceptable risk to the community. The scheme is likely to face further difficulties if the State internalises the modernist fallacy that a homogenous class of sexual recidivists exist and can be

⁴⁹ O'Malley identifies the inclusion/exclusion axis in which risk operates in terms of inclusively to delimit a conception of risk with a preventative effect but with a minimum of domination. For example, harm minimisation policy is inclusive, it draws the subject of risk into the government and integrates them into social networks. Instead of the drug user being the risk to society, the user is one drug risk in a society characterised as having drug risks.

objectively identified.⁵⁰ Perhaps the State has abandoned its original trajectory, guided or driven by an overarching rationale or empirical truth of “dangerousness”, and as Castel warned, operates by processes of individualised reasoning characteristic of pragmatism.

Case Studies

The 5 case studies include two unsuccessful applications by the State and three successful application to post-sentence supervision or detention. These cases were not selected by the author, but are the only publicly available written material produced by courts which provide enough information to be analysed here.⁵¹ The focus is on the role of risk, as used by the expert evidence and judicial reasoning to compare the populist and positivist foundations with the reality in the courtroom.

Secretary to the Department of Justice v DW [2007] VCC 470 (Judge Sexton) (“the DW case”)

On 10 September 2001, DW was sentenced for two counts of rape to five years, six months imprisonment with a three years, six months non-parole period. Only the first count is a ‘relevant offence’ under the Monitoring Act (at the time of the application), as it was committed against a child aged 16 years. DW was 17 years of age at the time of the rape.

On 28 January 2007, less than a month from the expiry of his sentences, the State applied to the County Court that DW be made subject to an ESO under the Monitoring Act. In the opinion of the State’s expert, DW remains at risk of sexual re-offending against women of his age and older. However, she considered it highly unlikely that DW would re-offend against children, although she thought it was not beyond the realms of possibility that he could offend against a female at the upper end of the ‘child’⁵² age range. In response to the application, DW filed an independent assessment report that assessed DW as posing a moderate risk of re-offending in the long term. In court, DW’s expert was unable to predict risk of reoffending to a 17 year old specifically, as opposed to children (16 years and under)⁵³ generally, which risk he thought was low.(DW,para 10)

Judge Sexton reviewed the evidence of the appellant and respondent and delimited the Court’s role in this case.⁵⁴ The Court noted that “the evidence shows that there is no indication that [DW] has *targeted* child victims in the past. ... it is my view that there is nothing to suggest that he is likely to target females aged under 18 in future.”(DW, paras 9 and 10, emphasis in original) While there is little material publicly available to discern the Court’s appraisal of the expert opinions, the judgment provides some insights. Judge Sexton notes the relative youth of DW, the fact that only one of his victims was younger than him and the circumstances apparently opportunistic and situational. The Court ultimately used both expert testimony to conclude that there was “nothing to suggest” (DW, para10) the case submitted by the State, that DW is likely to commit a relevant offence if not subject to a supervision order.

RJE v Secretary to the Department of Justice [2008] VSCA 265 (Maxwell P and Weinberg JA) (“the RJE case”)

RJE served a 10 year sentence for cumulation of five offences committed at his home in June and July 1997. The offences included rape and intentionally causing serious injury to his partner of 17 years; two counts of incest involving his assumed daughter from a brief sexual encounter and; rape of a 15 year old friend of RJE’s

⁵⁰ The State may wish to consider embracing Miller and King’s (1998, p.58) notion of “practical theory”. Practical theory is a “critical reflection on practice as well as imaginative reflection on possible modifications of that practice.” See also King (1998, pp.163-64).

⁵¹ To some extent, the courts have selected which cases are publicly available as it is understood anecdotally that, generally, all parties support suppression of the cases and the exceptions are where the court itself has taken a different view. However, one can only speculate as to the reasoning. It is also worth noting that as a matter of general practice, the County Court of Victoria does not publish decisions.

⁵² In this context, “child” is defined as less than 18 years.

⁵³ In evidence, DW’s expert used this definition of ‘children’ as it is the range used in defining paedophilia. DW case, at para 5.

⁵⁴ Judge Sexton said “I am not concerned with a likelihood of re-offending generally, nor a likelihood of committing sexual offences in future, except to the extent that these are likely to be committed against children.” DW case, at para 8 (Judge Sexton).

daughter.⁵⁵ On 23 April 2008, the County Court ordered that RJE be subject to an ESO for a period of 10 years. RJE challenged the County Court's decision on the grounds that the evidence was insufficient to meet the test in the Monitoring Act and on human rights grounds.⁵⁶

Increasing the probability of a 'relevant offence' by expanding the definition

The State was unsuccessful in the first two case studies (DW and RJE) *inter alia* because the original statutory definition of 'relevant offence' (ie, the offender committed and is likely to commit again) was too narrow; limited to sexual offences against the child. Both these cases serve to haunt Parliamentarians who overstated the rates of recidivism among serious sex offenders and the translation of numerical probabilities to common language. In 2008, the Act was amended to expand the scope of eligible offenders by widening the relevant offences to include *any* sexual offence, including sexual assault of an adult.⁵⁷ Without knowledge of the practical issues arising in these cases, the broader definition or 'relevant offence' appeared to be a simple exercise in scope-widening in line with the Opposition's original amendment.⁵⁸ However, these two cases demonstrate that the scope of 'relevant offence' has a critical role in determining risk of reoffending, both as considered by the Court and in the clinical assessments. The wider the definition of *relevant* future conduct provides clinical experts with more confidence for predicting the probability of occurrence. Further, by generalising the relevant conduct to any sexual offences, the number of offenders determined high-risk assessments would be expected to increase.

Significance of 'negative' assessment report

The Court of Appeal held that there was "no basis for departing from the expert's assessment of the risk" that RJE did not present a high-risk of reoffending.⁵⁹ The expert called to support the State's application was revealed through cross-examination to disagree with a number of submissions made by the State. For example, the Solicitor-General as Counsel for DOJ, submitted that RJE had begun "grooming" a family through several letters to the single-mother of three children. The Court of Appeal concluded that, without the expert's support, "...the submission about grooming advanced on the Secretary's behalf was simply not open." (Maxwell and Weinberg JA, 2008, at [86])

Importantly, the Court of Appeal (2008, paras 67-79) also considered a pre-sentence report by Dr Lester Walton, a consultant psychiatrist with extensive forensic experience, made relatively soon after RJE's sole period of sexual reoffending. Of most relevance were the following comments in Dr Walton's report (the Court's emphasis):

I am inclined to describe [RJE] as sexually irresponsible rather than determinedly paedophilic in terms of his sexual proclivities and clearly his predominant and preferred mode of sexual interaction is with age-appropriate females. ... [H]is recent offending has arisen out of a particular set of circumstances which

⁵⁵ RJE lived with his partner of 17 years, CF, and their 15 year old daughter, TE, and a 16 year old girl, PD, who had arrived two months earlier and said she was his daughter from a brief sexual encounter with her mother. RJE committed two counts of incest on PD in June. A few weeks later, RJE raped CF after she refused to have sex with him. The next count was intentionally causing serious injury to CF which led to her and the daughters moving out. RJE accused CF of being unfaithful, struck her, threw her across a room and against a wall. CF was able to placate him momentarily, but RJE continued to assault her. She suffered a swollen and slightly lacerated lip, bruising to thighs and hands, and suffered pain to the back of the head. After this incident, CF and his daughters moved out of the house and ceased to have associations with RJE. The final count of rape was committed to CH, a 15 year old friend of his daughter. CH later said that she trusted RJE because she had known him since she was a child as TE's father.

⁵⁶ RJE's submissions also challenged the making of the ESO on various grounds arising under the *Charter of Human Rights and Responsibilities Act 2006* ("Charter"), including whether the County Court had erred by failing to apply the methodology (for interpreting legislation) allegedly required in section 32 of the Charter when considering the test in section 11 of the Monitoring Act.

⁵⁷ 'Serious sexual offences' is defined in the Schedule to the *Sentencing Act 1991*. The expanded definition was made by Part 4 of the *Justice Legislation Amendment Act 2008* (Assented to 2 June 2008) <http://austlii.law.uts.edu.au/au/legis/vic/num_act/jlaa200821o2008339/index.html> accessed on 20 August 2012.

⁵⁸ See section 1.1 above.

⁵⁹ The State's application was accompanied by an assessment report from a forensic psychologist, Ms Raymond. By the time of the hearing of the application, Ms Raymond had prepared an addendum to that report. No assessment report was prepared on behalf of RJE.

would seem most unlikely to arise gain, thus the likelihood of recidivism for sexual offending would seem to be reasonably low [...]

Secretary to the Department of Justice v AB [2009] VCC 1132 (Judge Ross) (“the AB case”)

In the third case study, Judge Ross of the County Court⁶⁰ provides a thorough and rigorous analysis of the post-sentence scheme to determine the application by the State for an ESO in respect of AB. For our purposes, it is not required that we set out in detail the facts of the AB case as its significance rests singularly on the Court’s approach.⁶¹ Judge Ross was satisfied – to a high degree of probability – the new test under the Monitoring Act was established and found it appropriate that an ESO be made in AB’s case. Judge Ross provided a 455 paragraph judgment that takes time to subject all elements of the scheme to exegesis.

While Judge Ross ultimately rejected a challenge to the reliability of the assessment instruments used, his judgment stated that the limitations of the instruments should be acknowledged (particularly in relation to aboriginal and female offenders) and they should be used in combination with dynamic variables specific to the particular offender (Ross J, 2009, at 345). While “the instruments should not be used as a mechanistic way” and simply translated into the risk assessment required by the 2009 Act, they are “a legitimate component of a structured clinical judgment about an individual offenders risk of reoffending” (Ross J, 2009, at 345).

The State sought an ESO imposed on AB for a 15 year period of operation. In consideration of the State’s submission, Judge Ross reviewed the existing literature and cited UK research to note that most long term studies suggest that the rate of sexual reoffending goes down over time and the highest risk is in the first 5 to 6 years immediately after release.⁶² Judge Ross was not persuaded that a 15 year duration was warranted and opined that a minimalist approach should be taken to the determination of the duration of an order. (RossJ,2009,at31). Under examination, the clinical assessment’s were asked to speculate on the duration of treatment required for AB to reduce his risk of reoffending. The experts estimated the required period to be between a ‘couple of years’ and ‘another five odd years’. Instead of providing the State with a 15 year ESO sought, Judge Ross ordered that the ESO operate for 5 years with the first review in 2 years after the order’s commencement.

IK v Secretary to the Department of Justice [2012] VSCA 12 (Hansen JA) (“the IK case”)

On 5 April 2005, IK committed what Justice Hansen described as “a brutish example of what is an especially cruel offence.”(Hansen JA, 2012, at 2) IK followed the victim walking in the early evening, tackled her, held a knife to her throat and raped her twice; digitally and by unprotected penile penetration. At the time, IK was 17 years and 8 months, while the victim was not yet 15 years old. On 15 December 2005, IK was sentenced to five years’ imprisonment with a minimum of three years. IK was released on parole on 10 February 2009 but did not remain out of trouble. In August later that year IK breached his parole by slashing the tyres of a man he believed had been with his then girlfriend and threatening to kill his rival’s parents. As a result of the breach, he returned to custody to complete the original sentence.

On 4 April 2011, the County Court imposed a 5 year supervision order under the 2009 Act with a review after 3 years. IK appealed the supervision order on several grounds which are not all relevant. The Court of Appeal upheld the supervision order but reduced the review period to 2 years and modified several conditions to ease or remove unreasonable restrictions on IK’s liberty such as strict curfews and bans on socializing with under 18

⁶⁰ Subsequently, Justice of the Supreme Court of Victoria and President of Victorian Civil and Administrative Tribunal.

⁶¹ The Court summarised AB’s history at [431]:

“AB has a long history of offending, prior to the index offence he has had 27 convictions from eight court appearances between 1995 to 2001. Many of these convictions were for sexual offences. AB has consistently struggled with remaining offence free. Relapse and re-offending have been the primary cause of AB’s breaches of orders and, according to Assessor 1, are necessarily indicative of lack of co-operation with supervision. Three out of four occasions upon which he was ordered to be subject to a CBO or Intensive Corrections Order he breached those orders. And he breached parole.”

⁶² Ibid, at [448], Judge Ross cites Cann J, Falshaw L and Friendship C (2004) ‘Sexual offenders discharged from prison in England and Wales: A 21 year reconviction study’ in *Legal and Criminal Psychology*, 9, pp 1-10, and notes: For example a study of sexual offenders released from prison in England and Wales showed that a quarter of the offenders (24.6%) were reconvicted of a sexual offence over the 21 year period of the study. But the rate of reoffending was highest (15.8%) in the first five years after release and thereafter the rate of reoffending diminished such that the cumulative rate at 10 years was 20 per cent and was 24.6 per cent at 21 years.

year olds. With “a degree of micromanagement”(Hansen JA, para34) the Court considered in detail the three assessment reports tendered including the respective methodologies and use of Static 99 measures. Implicit in this analysis is the difficulty in predicting the future of a young man (23 years of age) who has spent almost 5 years in custody and has no friends outside of his family. The court made the following observations in an attempt to relate the expert testimony:

“... Assessor C emphasises that ‘prediction of reoffending is imprecise and there is a significant rate of false positive and false negative results.’⁶³ Like Assessor B, he notes that there is no evidence that the appellant is a sexual deviant, though disordered sexual attitudes are present. ... [All] accept that, in Assessor C’s words, a ‘possible offending scenario would involve [the appellant], possibly with depression or significant stress as in a tenuous relationship, becoming intoxicated and engaging in violence with a sexual element.’⁶⁴ [... Assessor A and] Assessor C ‘would regard [IK’s] risk of sexual reoffending as moderate.’(Hansen JA, paras 63-64)

The IK case has similarities with DW above. Both offenders committed sexual offences at 17 years of age. In DW’s case, the narrow definition of ‘relevant offence’ meant the statutory test could not be met. Under the 2009 Act, IK’s breach of parole (by property offences and threat to kill) was relevant to the assessment of IK’s general behaviour and skills for managing stress and negative emotions. Rather than being a pre-occupied sexual offender, IK appears as a youth with alcohol and marijuana issues since the age of 12 years, suffering a number of cognitive distortions which erupt into acts of violence when in stressful or emotional situations. Nevertheless, in the Court’s view, the risk of another situation arising that triggers a sexual offence like IK’s original convictions was sufficient to meet the statutory test.

Secretary to the Department of Justice v Fletcher [2010] VSC 170 (Bongiorno JA) (“the Fletcher case”)

In the final case study, we return to Robin Angus Fletcher, the pedophile and facilitator of child-prostitution, who continues to justify his conduct on religious grounds.⁶⁵ Fletcher presents the archetypal subject for a scheme designed to protect the community and promote rehabilitation. Ironically, the risk technologies used to identify these people within the existing prison population could not assist in Fletcher’s case. The Supreme Court’s review of the ESO noted that while there was ‘ample evidence’ to satisfy the test for imposing an ESO, “...the general opinion of the other medical experts was that the use of actuarial assessment instruments in the case of someone as unusual as Mr Fletcher is probably of little value.”(Bongiorno JA, para 122) His Honour Bongiorno JA was bluntly critical of the State’s litigation conduct and use of written evidence. His Honour commented on twenty lever arch folders of evidence⁶⁶ tendered as evidence by the State “... [but during the hearings] very few references were made to the above material. The relevance of much of it was very tenuous (Bongiorno JA, para 55).

⁶³ Report of Assessor C, 20 February 2011 (cited by Harper JA) at [63]

⁶⁴ Report of Assessor C, Ibid, at [55].

⁶⁵ Justice Bongiorno [at 123] notes:

[Fletcher’s] persistent denial of having harmed ... [D]espite having spent 10 years in gaol and some years since in virtual, if not actual, custody, his views and attitudes on sexual activity between adults and young people under the age of consent appear not to have changed. ... [Fletcher lacks any restraint that comes from] self-realisation of the harm he has caused and the harm he could potentially cause again if he re-offended... Even if he accepts, reluctantly, that his activities were illegal, he maintains his innocence in his own eyes and, he says, in the eyes of his religion.

⁶⁶ In His Honour’s decision, this evidence is described as consisting of (at para 55):

- 900 pages “of Court documents, and psychiatric, psychological, medical and other reports and affidavits concerning Mr Fletcher”
- One affidavit with 143 exhibits comprising approximately 2,500 pages contained in six lever arch folders “said to be source material” for one of the State’s assessment reports.
- One affidavit with four lever arch folders of exhibits being “77 various documents concerning Mr Fletcher including notes made by supervisors, escort officers, case workers, psychiatrists together with residential environment scanning and suitability assessments. ... [the] affidavit amounted to approximately 1,000 pages.”
- Four lever arch folders entitled “Case material referenced in the table summary of incidents. ... These folders, comprising about 1,200 pages appear to relate to Mr Fletcher’s accommodation and activities since the ESO was imposed on him.”

His Honour considered Fletcher's physical attributes to assess his capacity for reoffending and advancing age, as well as permanent damage suffered as a result of his voluntary food refusal. His Honour commented that it is difficult to assess the extent to which these physical disabilities would inhibit his offending if he were not restrained. It "cannot be reliably predicted" and if Fletcher "began taking proper food he could certainly reverse some of his physical deficits, even if his blindness were still a severe disability." (Bongiorno JA, para 125)

In Bongiorno's final statements in the decision to continue the ESO imposed on Fletcher, His Honour reminds the State of the purposes in the Monitoring Act to promote the rehabilitation, care and treatment of the offender. His Honour criticises the restraints imposed under the ESO which limit the offender's capacity to rehabilitate or demonstrate a willingness to avoid reoffending. The Court goes further to suggest that Fletcher's ESO is not an indefinite sentence and it may be revoked in future. Indeed, the State should work towards reintegrating Fletcher with a view to releasing Fletcher from supervision in the near future.⁶⁷

Conclusions

Chair of Victoria's Sentencing Advisory Council, Freiberg argues in his paper entitled "Guerrillas in our midst" that judicial traditions provide a number of ways in which judicial interpretation of statute law has scope for the effect or meaning of the law to be turned.⁶⁸ By focussing on 'risk' in the scheme and the way the courts and other actors frame and apply its meaning in the scheme, this case study highlights that the scheme's weakness is not created by guerrillas high up on the judicial bench, but the conceptual framework and unpredictable technologies used by the State and the expert community.

The Courts reveal a preparedness to engage with the conception of 'risk' as part of the judiciary's role within the post-sentence scheme. The quasi-inquisitorial approach to these cases and methodology for determining what outcome is an 'unacceptable risk' was, perhaps, unexpected by the State or Parliament and is complicated by many factors. First, the policy presumes that a means of identifying the regime's targets is available, reliable and accessible. The seductive scientific basis for the post-sentence scheme is placed under greater scrutiny by the courts when used by the State to limit an individual's right to liberty and release from custody.

The state of the art of predicting re-offending has improved but weaknesses remain. These weaknesses manifest in the courtroom in various and contradictory ways. In the *RJE case*, the Court of Appeal held that it was not open to the Court at first instance to find that RJE would re-offend if released without supervision unless the expert had also reached that conclusion. In the *AB case*, the State did not have expert testimony to justify an order for 15 years duration and received a 5 year order with a review in 2 years. It is also unclear to what extent the State undertakes thorough scrutiny of clinical evidence prior to testing it in court. In the cases of *DW* and *RJE*, the State's experts could not support the State's legal submissions that the relevant offenders were high-risk predators.

The role of science and expert testimony in predicting future behaviour cannot aspire to the traditional scientific aim of validity, objectivity and may wish to investigate constructivist techniques.⁶⁹ Perception of the "dangerous" people in society is not a "capital-T Truth" but a social conditioning negotiated by the participants involved, from the judge to the members of the State and the officers and experts advising it.

⁶⁷ Justice Bongiorno, at [129] stated:

[T]he instructions and directions currently controlling his activities must be moderated [...] perhaps gradually, to permit him more freedom of movement and freedom of association whilst still under supervision. More effort should be put into finding suitable accommodation for him in a less remote location than Ararat. For his part, Mr Fletcher must cooperate with his supervisors to enable them to become increasingly confident that in future he will carry out his stated intention not to break the law. It should be the aim both of the APB and Mr Fletcher that by the time his ESO expires in June next year, there will be no need for any application to be made for any further restraint on his liberty. This possibility should not be dismissed.

⁶⁸ Arie Freiberg, "Guerrillas in our midst? Judicial responses to governing the dangerous" in Brown and Pratt (2000), 51-70. Freiberg's analysis places the courts as engaged in a battle of principled wills, pitting their own principles of legal justice against the legislative efforts to express community sentiment and to force popular ideas of moral right into the judicial process.

⁶⁹ Perhaps for another paper's discussion, State policy officers and experts may seek to aspire to the constructivist aims of credibility and transferability instead of scientific validity; reliability becomes dependability; and objectivity becomes confirmability (Erlandson, Harris, Skipper and Allen, 1993 at 133).

The rational exercise espoused by the post-sentence scheme – to employ systematic forms of expert knowledge and calculations to achieve its aims – is incomplete. The concept of ‘risk’ has meanings that shift to suit the actors and the forums in which it is used. Between 2005 and 2009 there have been 10 piecemeal legislative modification and already since the new Act commenced in 2009, there have been 6 amendments. This urge to constantly tighten the legislative basis (including many amendments to the actual grounds for imposing these orders) reflects the State’s difficulty at predicting the outcomes of the continued detention scheme.

It is notable that two of the available cases (representing 40%) involve young offenders (DW and IK) with no sexual offences following release from prison. A valuable area of research might be to question whether young offenders are disproportionately represented. Risk technologies can more confidently predict future behaviour where a person has not demonstrated stability at any time in their life (eg, through relationships or employment). Young offenders that have served long sentences in adult offenders are more likely to fall into that category than older offenders. Further research could assess the influence of the risk technology, its areas of strength and weakness, and whether it shapes the scope of the scheme.

Finally, in the cases of *Fletcher* and *AB*, the court’s turned to the operation of the scheme to understand what impact strict conditions have on the assessment of risk during the period of supervision or detention. In *Fletcher*, the court indicated that conditions should be relaxed so that the offender is provided with arrangements that resemble ordinary life in the community so that self-regulation is developed and rehabilitation can take place. The value of risk technologies applied in the assessment reports were openly diminished due to Fletcher’s unique characteristics. Despite these facts, the Court queried whether risk of reoffending could be assessed without Fletcher being afforded greater liberty, so that his capacity to reoffend if returned to society could be measured. Further, the Supreme Court suggested that the State must do more than offering treatment and programs including moderating the strict conditions and finding less remote accommodation so that Fletcher can regain is full liberty in a year.

While this research provides some reasons for optimism with this glimpsed beneath the veil on Victoria’s post-sentence supervision and detention scheme, a persuasive reason for pessimism and scepticism continues with the lack of transparency and basis for evaluation of the scheme. It is unknown how the scheme operates for other subjects. Positivist risk management, when armed with potent tools of detention and surveillance, is corrosive to civil liberties and the foundational principles of criminal law. There is a pressing need for vigilance and further research to verify whether the ‘dangerous classes’ has conceptually eclipsed ‘risk’ once the pretence of science is diminished.

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PART FOUR - RESEARCHING FROM A CRITICAL PERSPECTIVE

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Ethnography and cultural criminology: What makes a research method critical?

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Whether you view it as original and exciting with a bold political message, or alternatively as a romanticised and even degenerate version of critical theory (Hall and Winlow 2007, O'Brien 2005), no one could dispute that cultural criminology has been easily the most exciting intellectual movement within critical criminology in the last two decades. Unusually, it has also placed considerable emphasis on methodological issues. Jeff Ferrell, Keith Hayward and Jock Young (2008) have argued that mainstream criminology has become both highly conservative, and also boring, in requiring researchers to collect and analyse quantitative data. They advocate that critical criminologists should conduct ethnographies, or use qualitative methods in analysing cultural processes. Although this is a controversial and deliberately provocative viewpoint within critical criminology⁷⁰, it raises issues about how we should conduct research and produce criminological knowledge that are not usually raised by other traditions.

This paper will not consider every issue relating to cultural criminology, but will focus on the arguments made about method. It will start by reviewing the history of ethnography, and qualitative research more generally, within critical criminology. It will also review how this is understood by cultural criminologists as a critical method that is ethically superior to quantitative research, but also to interpretive approaches that only describe how people understand their own lives. This tradition in critical ethnography seeks to address lived experiences, with a particular focus on the emotions, but understands this within a theoretical and political programme that promises social change.

The rest of this paper approaches these issues from a different direction, through discussing some uncomfortable moments during an ethnographic study about sentencing young offenders in children's courts. These illustrate the tensions and contradictions within cultural criminology in seeking to combine interpretive and critical traditions. They also make one think about the ethical basis⁷¹ of critical ethnography as an intellectual pursuit that seeks to produce a better world. The paper concludes with some observations on the claims made for ethnography as a means of reviving critical criminology.

ETHNOGRAPHY AND CRITICAL CRIMINOLOGY

As some critical scholars, including the feminist Anne Oakley (2000) have noted, there is nothing intrinsically conservative about quantitative methods, and one can add that there is nothing inherently critical or progressive about ethnographic methods. To give an example, Albert Cohen's (1955) *Delinquent Boys* describes the mechanisms through which working class youth subcultures were reproduced in an American city during the 1950s. He explains and theorises these developments using Robert Merton's strain theory, which attributes crime to consumerism and the barriers to advancement in a class-based society.

Surprisingly, Merton is presented in some collections and handbooks of critical theory since the 1990s, especially in the USA (for example, Lynch et al 2000) as a critical theorist, even though he supported both the existence of inequality as a motivating force in a capitalist society and the need for continuous economic growth⁷². My point here, however, is that ethnography can be used as a vehicle for advancing any political viewpoint, or no political viewpoint (although if you have strong political views, there cannot be a neutral position). Nevertheless, it has more often than not been employed or advocated by progressives against mainstream criminologists who employ quantitative methods and support established institutions and

⁷⁰ One criticism of cultural criminology is that it focuses on lived experiences, without advancing a systematic analysis of the economic and social processes that produce inequality in current times (for example, Hall and Winlow 2007).

⁷¹ This has nothing to do with how ethnographic research is assessed as ethical or risk free by ethics committees.

⁷² This refers to another potential tension within critical criminology at the present time, ignored in most collections even if they contain a chapter on green issues. Traditional left wing political parties seek a fair distribution of income and wealth within an industrial society. By contrast, the radical wing of the environmental movement questions whether our present way of life is sustainable.

economic elites. This statement needs, however, some unpacking since interpretivists, critical realists and postmodernists have each understood criminology and ethnography differently.

Interpretivists

The interpretive tradition sees itself as the heir to Max Weber (1978), and other thinkers who have believed that social science should address the meaningful nature of human group life. It includes symbolic interactionism and ethnomethodology in sociology (themselves diverse traditions), approaches with similar assumptions in anthropology and socio-linguistics, and philosophically driven traditions of reflection and empirical enquiry such as phenomenology and hermeneutics. The crucial assumption, most explicitly advanced by Herbert Blumer (1968) in symbolic interactionism and Harold Garfinkel (1967) in ethnomethodology is that researchers should study how people engage in their everyday social activities in Garfinkel's terminology "without irony". Most sociologists, whether they have conservative or progressive political views, view social actors as deficient in some way. In the Marxist tradition, they suffer from false consciousness. In the functionalist tradition, they are not aware of the latent functions of social institutions. But the interpretivist is only interested in how criminal justice practitioners or those charged with offences understand their own actions.

Critical realism

Critical realism is an epistemological position, associated with Marxism, that is based on the view that there are real social structures and processes that have causal effects, and can be investigated using scientific methods⁷³. From this perspective, interpretive ethnographies were strongly critiqued by critical criminologists from the late 1960s. In championing the underdog, interactionists were accused of accepting both capitalism and liberal democracy. According to Gouldner (1975), those commissioning and facilitating such studies had a personal and professional interest in the perpetuation of poverty and deviance. Interactionist studies were also criticised for their alleged focus on individuals rather than the social structures that underpinned inequality and discrimination⁷⁴. There was even fiercer criticism of ethnomethodology for its policy of indifference towards moral and political questions (Garfinkel 1967).

Nevertheless, critical criminologists have often drawn on interactionist methods and concepts, while incorporating these within a theoretical framework that recognises and explains structural inequalities. Pat Carlen's (1976) study of a magistrates court in Britain demonstrated how one could employ interactionist methods and concepts in researching the oppressive treatment of defendants at the "micro" level, within a Marxist analysis of law as a "macro" institution. She went on to pursue a feminist critique of the penal and welfare systems based on interviewing women about their experiences (for example, Carlen 1983). Although there have been relatively few critical ethnographies, based on long periods of fieldwork, that focus on criminal behaviour or the criminal justice system, any in-depth study that recognises structural constraints normally generates considerable interest. Perhaps the best known critical ethnography in recent times is by the anthropologist Philippe Bourgois (2003) who lived among crack cocaine dealers in Spanish Harlem, New York. Another example in England that was well received among the critical community was Dick Hobbs' (1988) study about the relationship between criminals and detectives in the East End of London. Although the subject matter of these studies was very different, they each described a social group carefully using ethnographic methods, and theorised this using a Marxist theoretical framework.

Postmodern ethnography

Postmodernism is a diverse, intellectual movement that questions philosophical assumptions underpinning social science disciplines, such as the idea of progress and the pursuit of truth. These ideas have not influenced the conduct of criminological research, although the work and ideas of Michel Foucault have been incorporated into discussion of theory mainly by critical criminologists. In anthropology and sociology, postmodernism has influenced how some researchers practice and conceptualise ethnography, and led to lively debates with realists (for example, Clifford and Marcus 1986 and Gubrium and Holstein 2003). Despite their apparent commitment to relativism, postmodern ethnographers often advance similar political viewpoints to those held by critical realists. But they also attempt to subvert or make trouble for how conventional researchers represent social institutions. Some sociologists have, for example, written up their

⁷³ For an influential statement of this position, see Bhaskar (2008).

⁷⁴ For an interpretivist view of social structures, see Dennis and Martin (2010).

findings as plays which are directed against what is portrayed as boring and politically conservative, mainstream research (for discussion, see Hammersley 2008, chapter 1).

CULTURAL CRIMINOLOGY AND ETHNOGRAPHY

Cultural criminology is a mix of ideas from different traditions, and one can admire the skilful way these are developed and packaged into a criminological position. Cultural criminologists believe, like previous critical ethnographers, that "existing subcultural and interactionist perspectives only gather real explanatory traction when integrated with historical and contemporary criminologies of power and inequality" (Ferrell et al 2008, p.5). They have also drawn on the work of interpretive ethnographers, such as Jack Katz (1990), and postmodernism at a theoretical level, in recognising the importance of the emotions. This inclusiveness, however, comes at a price. Cultural criminologists do not usually acknowledge differences within the traditions they combine⁷⁵, or work through possible tensions between them. The contradictions can be demonstrated through reviewing their criticisms of quantitative research, and then considering how their own ethnographies represent lived experience.

A critique of quantitative methods

Many criminologists today not only believe that exploratory qualitative research through ethnographic case studies has little practical value (for example, Wiles 2002), but they seem uninterested in everyday actions, motivations or social processes. Ferrel et al (2008) argue that quantitative methods assist in portraying offenders as deviants. According to them, the articles published in mainstream journals, based on analysing statistics, present a reductive, de-humanised account of criminal behaviour as caused by social structural factors or psychological and even biological deficiencies. Instead, ethnographies conducted by cultural criminologist reveal that offenders obtain emotional satisfaction and thrills from, for example, shoplifting or criminal damage. They make it possible to view criminal behaviour sympathetically as a response to inequality.⁷⁶

One response might be that cultural criminologists offer an equally idealised, selective and politically motivated view of crime. Nevertheless, it is difficult to contest the central argument that quantitative studies cannot address the lived experiences of offenders. Moreover, Ferrell et al (2008, p.166) note that conventional studies cannot address the experiences of victims: "the vivid experiential agony of crime victimisation transmogrifies into abstract empiricism" (Ferrell et al 2008, p.166). I would go further and argue, as an interpretivist, that it is also important to investigate the experiences of practitioners, even if this does not normally involve heightened emotions.

⁷⁵ To give an example, ethnomethodology is mentioned by cultural criminologists at various points, but there is no discussion of the distinction between ethnomethodological ethnography and conversation analysis. Similarly, there is no discussion of feminism as a distinctive tradition (theoretically and methodologically) within critical theory.

⁷⁶ For a similar view, see Taylor, Walton and Young (1973). Jock Young played a central part in this influential critical project during the early 1970s as well as in developing cultural criminology. Interestingly, he was also a left realist during the 1980s, and at that time was less sympathetic towards working class offenders, siding instead with their victims.

Cultural criminologists and lived experience

What though of the implicit claim that cultural criminologists know more about crime than the people they are researching? It should be evident that strain theorists or control theorists do not have a monopoly when it comes to imposing their political views on a messy social reality. Ethnographers can also interpret the actions of their subjects in ways that bear little relationship to how they understand their own lives. One contradiction that seems to arise from trying to combine interpretivism and critical theory is that cultural criminologists seek to address the meaningful character of human group life, while at the same time claiming to have a greater insight into the structural forces that shape our actions than their research subjects.

These difficulties are, to some extent, acknowledged by Jeff Ferrell (1993) in his critical ethnography about graffiti artists in Denver⁷⁷. In the following passage, he argues that it is important to understand their activities and viewpoint. But he also claims to understand the structural forces that shape their actions:

"Does this imply that every broken window...every Krylon-tagged alley wall..signifies an act of politically conscious resistance? Absolutely not, and maybe yes. Our answer depends, at least in part, on what we mean by 'conscious'...The question thus becomes, not 'Is this crime or resistance,' but 'In what ways might the participants in this event be conscious of, and resistant to, the contradictions in which they are caught?' Whatever the answer, two things seem certain. The first is that we must take the time to pay attention to what people are actually doing when they are sticking up liquor stores, shoplifting shoes, or spraying graffiti. The second is that political-economic structures - and thus power, control, subordination and insubordination - are embedded in these events as surely as in governmental scandals or labor strikes" (Ferrell 1993, p.172).

In their discussion of method, Ferrell et al imply that that there is something democratic about participating in different social worlds, and particularly about sharing in the experiences of offenders:

"To engage in ethnography...is to humble oneself before those being studied, to seek and respect their understandings, and to take note of cultural nuance because it matters" (Ferrell 1993, p.176).

It is, however, not always clear how the critical ethnographer differs from mainstream criminologists in imposing a political interpretation over the lived experience of offenders or criminal justice practitioners. If ethnography is a critical method, superior to conducting surveys or analysing statistics, it is not without its own problems. For one thing, the messy and complex nature of the social world makes it difficult to advance a critical, political viewpoint while addressing different perspectives and experiences. There is also, arguably, an ethical problem that arises today, but did not exist during the 1960s or even the 1980s, in justifying research that provides a one-sided, political account without engaging with these complexities. This is because there currently seems little prospect of transforming the capitalist system through political action. The next section will explore the issue of what makes ethnography critical through considering an interpretive study about sentencing in Australian children's courts.

AN ETHNOGRAPHY OF SENTENCING YOUNG OFFENDERS

I conducted this ethnographic project on children's courts in Tasmania, Victoria and New South Wales during the period 2005-2010. It was based on observing hearings and interviewing practitioners, with the aim of understanding the practical and legal considerations in sentencing young offenders (Travers 2010, 2012). The analysis is not informed by conflict theory. It is not even critical in the same way as labelling theory through siding with young offenders against the police and courts (a central element in cultural criminology). In focusing on what happens inside children's courts, it could perhaps be criticised as a "courthouse ethnography" (Ferrell et al 2008, p.165), although this term as used by Polsky (1967) refers to corrective studies informed by the perspective of official agencies.

Nevertheless, through adopting an appreciative stance towards the experiences of young offenders, and looking carefully at the nature of professional work, particularly that of magistrates in sentencing, this ethnography does address the complexity of offending and the social response by welfare agencies and courts.

⁷⁷ There are, in fact, few ethnographies by cultural criminologists, outside the work of Ferrell (1996, 2006) and a few collaborators (for example, Ferrell et al 1998). Owing to the difficulties in doing longterm fieldwork at the present time, students are encouraged to do "instant ethnographies" based on the political interpretation of street scenes or current events, or cultural commentary informed by an "ethnographic sensibility" (Ferrell et al 2008, p.179).

It can be contrasted with statistical studies that present young people as deviant, and have recently been used to call for a tougher response to offending in New South Wales (for example, Wallace and Jacobsen 2012).

Some uncomfortable moments

Any study by a middle class researcher about the social experiences of marginalised groups will produce some uncomfortable moments, both because you come across people in distress, but also because you sometimes feel like a voyeuristic outsider in a different social world (an ethical problem). The following examples raise issues about our own privilege, and the extent to which we understand the lived experiences of our subjects:

A young girl screaming in court

During one morning in court, a 14 year old girl who had run away from a care home, and committed some minor offences, was sent to Ashley Youth Detention Centre as a temporary measure for her own protection. She was brought into the court building hand-cuffed. After the hearing, when she was cuffed, she was screaming with anger and complete despair. I felt disturbed observing this, but noticed that for practitioners this was a normal part of their work.

A young offender gives me the finger

While observing a hearing, I noticed a young offender in cuffs, waiting at the entrance of the tunnel from the police station. He could only be seen from where I was sitting. I had not seen this before, and was intrigued by how he was able to sign a document while wearing the cuffs. He saw me looking, and gave me the finger⁷⁸.

An Indigenous offender asks for help

In one hearing in New South Wales, an Indigenous young person in detention was given the opportunity to attend the Youth Drugs Court. He had been in care and suffered abuse, and was wary about welfare programmes. I had been identified by the magistrate as a researcher. During the hearing, he looked at me several times.

Addressing lived experiences

From a critical perspective, it is easy to see these defendants as members of subordinate groups responding as best they can to an oppressive court system. If, however, one considers these events in more depth, it should be apparent that social reality is more complex. In the first example, the only person who was disturbed during this hearing, aside from the young girl, was the researcher. The practitioners had encountered distressed defendants many times before. They did not see sending her to a detention centre as ideal, but they were adopting a caring, professional approach to a vulnerable young person. Similarly, cultural criminologists often portray male defendants as engaged in an act of unconscious rebellion against the capitalist system. But how did the offender who gave me the finger actually understand his own life and criminal activities?

Cultural criminologists complain that statistical studies are "carefully designed for neat execution and clean results" (Ferrell et al 2008, p.59). But similar criticisms can be made of critical studies by interpretive or postmodern ethnographers. It is hard to resolve the tension between addressing meaning in all its complexity, and offering a political reading that is at some remove from how offenders and practitioners understand their own actions.

The ethical basis of critical research

These experiences also make one think about the ethical justification for researching the life experiences of subordinate groups. There is much talk about ethical considerations these days in universities. Ferrell et al (2008, pp.164-5) see the ethics system as presenting "endless impediments" to qualitative researchers while supporting standardised quantitative research. To talk about ethics in a more interesting way, it seems important to recognise that social science research seldom causes physical or psychological harm. This is why ethics review is often viewed as unnecessary or burdensome. Nevertheless, it remains important to ask ethical questions about the value and purpose of social scientific research.

⁷⁸ What seems intriguing or disturbing is not simply the manual dexterity of the defendant, but the way the police did not bother to remove the cuffs until immediately before a short appearance.

Although my project was not explicitly informed by critical theory, it was motivated by an interest in social justice. Because of this, I would resent being described disparagingly as a "zoo keeper" of deviance, the criticism made of interactionists during the 1960s by critical theorists (Liazos 1972). Nor would I see describing these experiences as voyeuristic. This is because, like critical criminologists, I understand my research in ethical and even political terms. One objective is to change attitudes held by professionals and the public about criminal behaviour, and the practices and policies of agencies such as the police and courts.

This, however, is still a liberal reformist position. A critical researcher would be right in complaining that my ethnography does not challenge or problematise the structures of inequality that produce disadvantage and crime. By contrast, cultural criminologists continue to be influenced by conflict theory, and often Marx's ideas about the class basis of crime and law, even if there are few references to Marx in this critical literature. A central assumption is that ordinary people suffer from false consciousness, but can be emancipated by the critical theorist through identifying the institutions that maintain this, not least the mass media and the legal system. Ferrell notes, for example, that

"a criminologist is well-suited for investigating the foundational mythologies of the legal process - that, for example, legal rules and social facts exist exterior to those who utilize them, and can thus be apprehended objectively - and for documenting the specific manner in which the powerful create these rules and facts in their interests" (Ferrell 1993, p.190).

Cultural criminologists are also concerned with transforming or even abolishing existing institutions; not simply in reforming how control is achieved through the existing system. Consider, for example, this statement by Ferrell, influenced by labelling theory:

"In attacking legal and political authority, anarchist criminologists must be willing to confront the moral entrepreneurs⁷⁹ of the moment, to push for decriminalisation and other strategies that can begin to dismantle some of the repressive legal machinery left over from past entrepreneurial campaigns" (Ferrell 1993, p.195).

It is this uncompromising political stance, recognising inequality and not crime as the problem, that makes critical criminology critical. It also, perhaps, provides ethical justification for misrepresenting or simplifying the experiences of offenders and professionals working in criminal justice agencies. There are, however, difficulties in claiming the moral high ground as a critical criminologist today. Critical ethnographies conducted during the 1970s were informed by the optimistic view that capitalism could be challenged by the organised working class, or would collapse under its own contradictions. Today, there seems little prospect of transforming the capitalist system or improving the economic and social conditions of disadvantaged groups through political action.

CAN ETHNOGRAPHY REVIVE CRITICAL CRIMINOLOGY?

This paper has looked at the role of ethnography in the history of critical criminology, and at the claims made by cultural criminology about its superiority as a research method over quantitative analysis. There seems no easy way to combine elements of the critical and interpretive traditions: in sociological terms to address structural conditions and subjectively experienced action. Whereas cultural criminologists present ethnography as an unified enterprise, I have demonstrated that there are tensions and contradictions that should be acknowledged, and may be productive for critical purposes. Two questions worth considering by way of conclusion are whether ethnography is, by itself, critical, and whether ethnography as a research method can revive the critical project.

As has already been stated, there is nothing inherently critical about ethnography as a research method. However, at the present time, in a similar way to the 1960s, any research project that describes what takes place in the criminal justice system will be critical when compared with the studies published by mainstream, quantitative criminologists. With characteristic style, optimism and self-belief, cultural criminologists claim that their ethnographies, and a new focus on the culture industries and media analysis (not considered in this paper) will revive the critical enterprise. Here a critical response, even a reality check, seems needed. Critical criminologists sometimes congratulate themselves on the growth in their numbers and publications in the last

⁷⁹ This term comes from Howard Becker's (1962) *Outsiders*. Becker applied it to those campaigning for the criminalisation of drugs. Ferrell is critical towards laws against graffiti artists, but also crime control more generally. Anyone seeking tougher penalties, even greater welfare interventions, is viewed as a moral entrepreneur from this anarchist perspective.

two decades (see, for example, the preface to DeKeseredy and Dragiewicz 2012). But they also know that they are struggling to get heard in an increasingly conservative intellectual and political environment, and perhaps also that there are few contributions with the anger and bite, or intellectual depth, found in the best critical theorists from the past.

There is, undoubtedly, much work for critical criminologists, at the present time, as the world struggles with massive problems, including the continuing global financial crisis and the possibility of environmental collapse. Ethnography will not, by itself, revive the critical project: this needs hard, theoretical work. But ethnography can reveal the experiences of subordinate groups, and make one think critically about the gap between ideals and realities in the criminal justice system. It becomes a critical method when used for these purposes.

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Proscribed Perception: Participant Perspectives on Legitimacy & Criminality in the Non-Medical Use of Painkillers

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The use of medication for reasons other than medically instructed is not necessarily a criminal act. However there are a series of moral imperatives attached to the practice which implicate criminality. The 'illicit' perception of any form of heavy drug consumption is necessitated by a homogenised moral code, which constructs research into the practice as at least partly proscriptive. Likewise deviation from medical instruction involves a level of moral condemnation (Turner 1995). Indeed the perceived value of research into the practice seems tied to the moral assumption that drug use is 'bad'. The stigmatized perception of substance use, as well as the institutional criminalization of addiction, permeates a diverse range of social contexts. The dispersment of criminalized images and its subsequent impact on criminal activity forms the focus of this paper. The paper draws on Governmentality literature to unpack relevant discourses about the social control of drug users in particular (Alaszewski 2011).

Noticing the problems which have developed in North America, the Australian medical community has begun to raise concerns about the ways in which people acquire and consume their medications. It is important to note that the best available Australian data paints a drastically different picture to that of the US figures, which have been said to be at epidemic proportions (Drugs and Crime Prevention Committee 2007). The focus of this paper however is not to examine the prevalence of non-medical use in Australia, but rather to engage the perspectives of those who use painkillers non-medically in an attempt to better understand the rising popularity of this trend. In saying so, this paper seeks to identify aspects of the perspectives of non-medical users that help to facilitate criminological discussions about the way such perceptions interact with broader discourses about health and safety, recreation and risk. Drawing from sociology of deviance and critical criminological perspectives about the label of criminality, the paper explores the perspectives of users and the proscriptive frameworks which inform them. In line with criticisms about a lack of consideration of personal context in early criminology labeling theory (Wellford 1975), the focus of the paper will lie primarily with the personal accounts of user. This will allow for an important exploration of the material consequences of the ways in which participant perceptions are manifest in the narrativization of the 'legitimacy' and 'criminality' of their own experiences.

Defining the Non-Medical

Within the available literature about the non-medical use of pharmaceuticals, a vast assortment of terms has come to be applied to the practice. As according to the broad set of research the practice has been referred to as; abuse, illicit use, harmful use, recreational use, extra-medical use, dependent use, misuse, non-adherence, non-compliance, aberrant medication-related behavior, diversion, and the list goes on. Though each term refers to a specific type of use, from the perspective of a particular discipline, many are used interchangeably and in ignorance of one another. Broadly speaking the vast majority of research uses the definition of the Substance Abuse and Mental Health Services Administration (SAMHSA) of the US Department of Health and Human Services. As advised by the SAMHSA generic non-medical drug use is usually defined (in research contexts) by the following characteristics; "...the use of a prescription drug when 'it was not prescribed for you', or that was taken 'only for the experience or feeling it caused'" (Sees, Di Marino et al. 2005). Criticisms of the SAMHSA's approach mainly surround the uncertainty of the assumptions which underpin the definitions. Of particular concern is when the definition is applied to the complex messy contexts of everyday life. Take for instance a circumstance where someone cannot afford to fill a prescription of Oxycontin and they borrow some from a friend. Even if they use the same drug, at the same dosage, and under the same medical instructions, they may still under the SAMHSA definition be thought to of engaged in non-medical use. Moreover, it is somewhat problematic to assume that patients who use painkillers, whether prescribed to them or not, are not doing so solely for the feeling or experience it causes. The desired feeling/experience may simply be pain relief, or intoxication, but separating the two so neatly presents its own problems.

From the data gathered as part of this research it is clear that the classificatory structures used by research communities (medicine, psychology, etc) are largely inadequate for understanding the lived experiences of those who use painkillers non-medically. In anticipation of the inadequacy of such categories the paper took a different approach to identifying and classifying use than in much of the previous research. Research participants self-identified as either 'aberrant', 'recreational' or 'dependent' non-medical users (definitions are discussed below). Of the 25 participants the majority responded to a series of online advertisements. Other methods for gathering participants in this study included talks before undergraduate lectures at the University of Western Sydney and Macquarie University, and the display of posters and flyers in Sydney's Medically Supervised Injecting Centre (MSIC). This diverges from more epidemiological studies whose primary recruitment involves health services and criminal justice systems. These methods include needle and syringe programs (NPS) (Stafford and Burns 2011), opioid substitution treatment (OST) programs (Degenhardt, Larance et al. 2009; Winstock and Lea 2010) and survey data from police detainees (McGregor, Gately et al. 2011; Ng and Macgregor 2012). Such methods reflect the proscriptive elements of drug research, reinforcing and (re)establishing the perceived 'illegitimacy' of non-medical use and drug use more generally.

Unlike much of the strictly categorized criteria found in the epidemiological literature, use of any particular drug was not required for participation in this research. This provided an important opportunity to access participant's perspectives on what they regarded as pain (or painful) and what was suitable for its relief. The focus on painkillers does however come in response to the epidemiological data, which suggests that within both the US and Australia by far the most widely non-medically used pharmaceuticals are painkillers (Australian Institute of Health and Welfare 2010: 13). Though pain is largely regarded as a physical problem, it is also widely used (metaphorically at least) to describe social unease or emotional difficulty. In saying so, a critical discussion of current, largely medical conceptualizations of pain will also be developed. Such a discussion will reflect the importance that problematized notions of pain played in the collection of data. This approach again diverges from that of epidemiological research whose definitions of pain tend to remain uncritically attached to the physical. The paper therefore focuses on the discursive elements of the legitimization of certain kinds of pain in the face of the de-legitimization – and perhaps stigmatization – of other kinds of pain. In doing so broader discussion about the oppressive elements of the control of persons deemed criminal because of drug use will also be explored (Seddon 2006; Corva 2008). An in-depth assessment of the diverse perspectives spanning the spectrum of legitimacy through to criminality, and the ways in which they intersect with wider medical and social discourses, will be addressed.

The complexity which accompany the many terms used in the literature on non-medical use is too dense a topic to properly explore here. Use of self-identification from a broad reaching cross-section of the population was pursued to ameliorate much of the moral weight applied to established categories and the terms which accompany them. Participants were provided the following definitions for each category of user; 'Aberrant non-medical use of painkillers refers to the occasional or infrequent use of a painkiller for purposes other than medically prescribed; examples may include taking a painkiller not prescribed to you or for your particular pain problem, to cope with a stressful situation or to get a good night's sleep. Recreational non-medical use addresses the use of painkillers for enjoyment, usually in a social setting. Dependent use of painkillers concerns people who have developed a dependency on the use of pain medications, whether physically or psychologically, through the course of medical treatment or recreational use.' It is important to note that these categories were not implemented as firm profiles of types of users, nor did the self-identification of a particular category significantly alter the questions or structure of the qualitative interview. Rather the three categories were simply used to help talk through (and beyond) some of the complexities which surround the myriad of terms and definitions used in the field.

In the study a total of 27 interviews were conducted with 25 participants. Participants moved readily between aberrant, recreational and/or dependent use throughout their descriptions of non-medical use. Some participants originally stated that they felt their use fell in an ambiguous position between the three categories. Of the three categories, dependent users were the most difficult to access. They therefore represented the smallest number of participants. Dependent users represented 8 of the total sample, with only 6 likely to meet any medical definition of dependence. The largest part of the sample, 9, firmly identified with aberrant use. Identification with recreational use represented 8 of the sample of 25. When overt cross-overs between the categories were taken into consideration the sample was broken down as follows; 14 aberrant, 12 recreational and 6 dependent.

Legitimacy

In order better understand the impact of criminogenic images in non-medical use it is first important to identify the legitimizing narratives which juxtapose them. While a diverse set of opinions on what actually constituted the act of non-medical use emerged among the participants, this is not my interest here. Rather, this section wishes to explore the narratives by which participants explain the perceived legitimate aspects of behaviour which they themselves regarded as non-medical. The most significant narrative of legitimacy which emerged was a re-configuration of medical paradigms. Many participants discussed taking painkillers after a 'big night', which often involved the use of illicit drugs. The common reason for this was to counteract whatever was in their system at the time that was keeping them awake. Essentially they used painkillers to calm themselves down, and get a good night's sleep. One participant, who was a pharmacy student, explained the chemistry of how the drugs (such as painkillers and anti-anxiety medications) had this effect; he concluded that "...[they] work well in conjunction with acid." Another participant recalls that she has used painkillers after a 'big night', saying; "...so it would be dexamphetamines or MDMA; anything that was in my system that was keeping me awake. So if I wanted to counter that... I think of it as a safe guard." Indeed Jane describes the 'typical' circumstances of a night out by saying that painkillers are "...part of my medical kit if anything goes wrong." Both Sunny and Jane, who identified as aberrant users, believe that such behaviour is non-medical, yet they use medical language in describing the reasons why they (or their friends) use painkillers in this way; they seek to avoid physical pain or other medical complications. The term extra-medical use has been usefully applied to cases such as this.

Extra-medical use most often refers to use "...without a prescription, but does not exclude the possibility that the user may have medically driven reasons for using the drug"(Degenhardt, Larance et al. 2007: viii). This definition is particularly significant because it concedes, at least in part, medicine's monopoly over the conceptualization of health(Race 2009: 33). Unlike traditional approaches to medicine, under this definition the patient determines his/her own health problem and (self)medicates. Of course, extra-medical use rarely facilitates the empowerment of the patient in the doctor/patient relationship. Rather it is vehemently discouraged at all levels, perhaps highlighting the threat it poses to medical authority. In any case, extra-medical use is a useful term that can be used to negotiate the complexities surrounding patient perception and medical instruction. In particular this term helps to ameliorate some of the problems associated with determining that use of a drug for its 'feeling' or 'experience' is automatically medically, and by implication lawfully problematic. Extra-medical use provides the potential to recognise that use might be outside of medical instruction, but still within the realm of medical convention. Moreover, the term is therefore useful in helping to explain many of the grey areas of the practice, especially as it relates to users who transition from being entirely medically compliant to thoroughly dependent.

Of course there were participants whose use of a quasi-medical justification seemed less empowering. Many such participants related their use to emotional/social suffering. 'Emma', as she will be called, identified as a dependent user, who also disclosed a history of problematic use with marijuana and, later, heroin. Emma observes that;

It's hard because I believe in the concept of not 100% blame. So in these statements, I say that 'yes, it was my fault'. But I was in a really abusive relationship, and it was painful, it was really painful... So I guess for me using numbed the pain or prevented it...

Here Emma describes her use as a way to avoid or ameliorate the substantial difficulty she was experiencing in her relationship. Though serious, an abusive partner is hardly regarded as a medical problem. Still, the legitimizing narrative of emotional anguish does not seem entirely unfamiliar. While not directly associated with medical notions of pain, the psychiatric community has for many years pursued pharmacological remedies to adverse psychological states that are the result of circumstances such as abuse. Psychiatry might advocate the use of anti-depressants or anti-anxiety medications instead, however the 'legitimate' pursuit of pharmacological aid in the face of emotional difficulty remains somewhat resonant. What is perhaps clearest from observations about the narrative of self-medication is that it operates in degrees of legitimacy. Those who describe their use as addressing a physical problem seem better able to convincingly express their behaviour in legitimized terms, at least in comparison to those who identify with an emotional/social difficulty.

Criminality

In this section I will explore the ways in which participants took up or interacted with a criminal association when discussing non-medical use. It should be noted that this section does not necessarily engage criminal behaviour, instead it analyses the incorporation of criminogenic images. Some of the most interesting references to criminality came from participants who did not identify as criminals, or as engaging in criminal behaviour. Many of the participants, particularly those who identified as aberrant users, juxtaposed their own experiences with criminalized images. 'Jane' explains "I like to have Panadeine Forte there if I need it, but I wouldn't go to the doctor and try and get a prescription in order to use it recreationally." Others sought to avoid illicit implication altogether, often by speaking about using painkillers to prolong or enhance the effects of alcohol. Many participants mentioned that it was simply cheaper to mix painkillers with alcohol to 'get more drunk'; as though the painkiller delivered no separate intoxicating effects. Though acknowledged as non-medical, discussion about the mixture of painkillers and alcohol often simply precluded the implied criminal element. This avoidance of criminality seems only to re-enforce imbedded moral undertones present in much drug research. A participant who used painkiller with alcohol, who we will call 'Henry', alluded to this dynamic, saying "We didn't really advertise it... I suppose it was the sense that maybe we were doing something morally or ethically which was a bit left of centre and it might have been frowned upon." The particular legalities of non-medical use are already unclear, and they are made even more so in cases where alcohol is involved. Questions of social control and personal responsibility are also complicated by ambiguous classificatory structures that may define the practice in criminal terms.

On the other hand, many participants made direct reference to criminal behaviour, almost all of whom identified an emotional/social imperative attached to their use. 'Murray', as he will be referred to, was a current (dependent) user at the time of the interview. He described his initial problematic encounters with painkillers as almost synonymous with other forms of illicit drug use;

A couple of years ago, I had a girlfriend that got murdered. And I started using them to block that out. Cuz I couldn't sleep at night, and a friend put me onto them... I was trying all sorts of other drugs to just knock myself out.

Indeed in many of the stories heard as part of this research painkillers and illicit drugs were often talked about as though they could be used interchangeably. This was particularly the case with those who identified as recreational and dependent users. Of course the chemical similarities between opioid analgesics, like OxyContin, and illicit opiates, like heroin, are widely accepted in the medical and scientific community. However acknowledgement of the chemical similarities of such drugs is largely absent from popular discourse. The conceptual and experiential merging of licit and illicit forms of drugs and their use seems most pronounced in cases of addiction. Much has been written about the deep stigmatization and subsequent criminalization of a range of addictions (Leshner 1997; Keane 2002; Chandler Rk, Fletcher B. W et al. 2009). Examples in this research contribute further to the notion that the stigma associated with addiction is likely to encourage the internalization of a 'criminal identity' and thus perpetuate criminal activity (Lenson 1999: 22).

Another interviewee, 'Felix', as we will call him, is a long-time participant in one of Sydney's methadone programs. Felix describes himself as having a problem with heroin, and said that the fluctuation in price and uncertainty of the quality of 'street heroin' meant that OxyContin became a much more stable drug for him. On reflection of his time when using Felix made the following observation; "You feel like you're coming apart at the seams... it would be a daily thing of just living in panic chasing after this stuff." Felix revealed that he owed his life to the culture of harm minimisation which has come to characterize much of the health and social services of Sydney's Kings Cross district. In trying to come to terms with the great moral weight attached to his time as an addict on the streets of King's Cross, Felix comments that; "I was involved in a lot of... harm minimization and peer to peer education. So the line gets really blurry between that and the fact that everything that you're doing is illegal." Here Felix describes an acceptance of his designation as 'criminal', but also of his role in the perpetuation of criminality (Rotenberg 1974). The role of harm minimisation, with reference to crime, has broadly been to reduce theft and violence to members of the non-drug using public (MacCoun 1998: 338). Still, Felix seems at pains to reconcile the illegality of his behaviour alongside, what he regards to be, the necessity of peer education of harm minimization. Felix's example demonstrates the tensions present in an environment under which the need for social control of drug users overwhelmingly outweighs a minimisation of the harms of drug use (Keane 2003).

While use of criminogenic narratives usually called upon a sense of illegitimacy, elements of the self-medication narrative also found resonance. As alluded to previously Emma repeatedly described herself as half-way between legitimized and criminalized contexts. Emma recalls;

...my partner who I was using with, he was a little bit of an angry man. And it just made the whole situation together, easier. For me personally that's what it was about, it wasn't always about getting high for fun. It was about relaxing.

Indeed when explaining her reasons for taking up painkillers Emma often referred to a dual desire to be intoxicated and numb an emotional pain. Emma's use of painkillers developed into a problem with heroin. Both Felix and Emma's experiences provide further examples of how medical and illicit drugs interact in the biographical narratives of participants. Like with the multiple accounts of legitimacy, narratives of criminality also find differing social resonance. It would appear that using painkillers illegally to facilitate legal (ethanol) intoxication does not invite the same image of criminality that intravenous use on the streets of Kings Cross does. Even more interesting to note is that participants popularly evoked the notion that painkillers and illicit drugs can be used interchangeably. The thoroughly normalized notion of taking some OxyContin after surgery and the deeply stigmatized image of injecting heroin seem to somehow converge in the narrativization of experiences of non-medical use. Where almost none of the participants discussed painkillers as though they had recreational properties, many described them as substitutes for recreational drugs or as interchangeable with other illicit substances. The example here demonstrate that the degree of criminality applied to a particular incident of non-medical use is not only linked to discourses about drug use, but also to wider medical conceptualizations that must be unpacked.

Problematizing Pain

This section will seek to explore some of the problematized notions of pain developed by the participants. The diagnosis and treatment of pain related symptoms and disorders forms one of the most complex, unresolved debates in the medical community. Of the many contentious elements of the debate about pain, it would seem that the medical community agree on one thing; pain is a physical problem. Indeed it seems a commonsense assumption that pain is both caused by and emanates from a physical part of the body. Everything from sporting injuries to headache pain are said to be 'targeted' by the most popular over-the-counter pain relievers. *Neurofen* advertises its generic brand as providing "Targeted relief from pain" (Reckitt Benckiser (Australia) Pty Limited 2012), while its *NeurofenZavance* range is advertised as providing "FAST targeted relief from pain" (Reckitt Benckiser (Australia) Pty Limited 2012). However, the ideological frameworks which accompany the association between pain and the physical are not necessarily concrete, nor do they represent all experiences of pain.

Beyond medical understandings of pain the term seems to have a broader resonance for application outside the physical world. Indeed it is common to describe an awkward social encounter or a difficult divorce as *painful*. However such references are usually thought of as metaphorical. One participant speaks about a difficult break-up remarking, "You know it's not anything physical or real that pain in your chest", another says that she can remember "...using pain as like a metaphor... but I don't think I've ever felt *in pain* in an emotional way." The distinction between 'real' and 'metaphorical' pain can be traced to the imbeddedness of the Cartesian legacy in contemporary medicine (Turner 1992) and its disbursement into popular, and thus embodied discursive knowledge. The notion that physical pain has emotional or social consequences which actively interact with the physical problem is not however new to the speciality of pain medicine (Cohen and Wodak 2010). A significant proportion of pain medicine practitioners subscribe to the biopsychosocial model. Under the biopsychosocial model three key aspect of the patient are assessed; they have been briefly summarized as "'Bio-' (what's happening to the body)... '-psycho-' (what's happening to the person)... [and] '-social' (what's happening in the person's world)" (Cohen and Wodak 2012). What is a somewhat more controversial claim is that 'real' pain can be created solely by an emotional/social difficulty and manifests in an emotional/social capacity.

While almost all of the participants identified with the notion of using pain as a way of describing an emotional/social suffering, many also declared that such pain was as real as physical pain. Discussing her experiences when feeling stressed out, one interviewee says; "You feel pain, but you don't know where. Sometimes it's not a headache, it's not a shoulder, it's not belly ache... it's just pain, but you don't know where." Indeed in a social environment which has for years encouraged the expansion of the use of pharmaceuticals to

treat an increasing number of physiological states, the implications of such conceptualizations of pain seems important. For many of the participants, pain was not at all limited to medical understandings of physical unrest. Medical discourse did however provide a platform for the rationalization of the legitimacy of their experiences of pain, especially as it related to their use of medications. The term extra-medical therefore seemed to sufficiently capture that which was not medically prescribed but had a physical and thus quasi-medical rationalisation. However, those who accounted for their use in emotional terms were left outside dominant medical conceptualizations of pain and thus erred closer to the realm of criminality.

The social control of drug users has often been described as oppressive (Bourgois 2000; Keane 2009). Though few of the participants directly referenced social or legal sanctions as specific sources of 'oppression' or as forms of 'social pain', many did incorporate stories about the difficulties they presented. Felix's difficulty reconciling his involvement in peer education of harm minimization is perhaps one example already discussed. A participant who we will call 'Meridian' gave examples of the oppressiveness of the social control of his drug use. Meridian began his use of painkillers after being hospitalized for Osteomyelitis, eventually becoming a thoroughly dependent injecting opiate user. When discussing new regulations to be introduced for the recording and monitoring of pharmaceutical purchases he says; "now I feel a lot of pressure and stress from how the government has announced that they are going to monitor S8 drugs through a bank." Meridian goes on to specifically describe the impact of such policies as *painful*, saying; "I do think a lot about mental pain too. I guess that's a lot more painful than physical aspects... The torment that you go through from being addicted to painkillers and the tricks you have to do to sustain it." Meridian's example, alongside the others in this section, demonstrate that pain is not necessarily limited to physical world. It must be noted that the problematized perceptions of pain present in this research impact not only on the legitimized narratives of physical ailment, but also on that which is conceptualized as criminally deviant.

The Role of Discourse

In this section I would like to explore the role that discourse plays in the forging of the participants' perspectives, and thus experience of legitimacy and criminality. As alluded to earlier, the discursive influences present in the participants' perspectives reach far beyond the definition of what is considered non-medical use. Of particular interest is the influence of discourses which surround pain. The perceived medical legitimacy of physical pain is powerfully resonant. This is demonstrated most clearly in the early examples of Sunny and Jane. Though recognized as medically 'unauthorized', Sunny and Jane explain their use in terms of a desire to medically address a physical (pain) problem. Whether it be to relieve a headache or a racing heartbeat, the intention to ameliorate a physical problem continues to provide a legitimizing medical narrative for the use of painkillers. Though induced by illicit drug use Sunny and Jane's pain is legitimized both by its physical manifestation and subsequent pharmacological 'treatment'. This is the case because, while considered non-medical by the exclusion of the physician's direct input, wider popularizations of medical discourse imply the legitimacy of the pain and its medication; thus application of the term extra-medical use would seem appropriate.

In contrast, Emma's example provides a demonstration of the material consequences of being unable to access 'medical legitimacy.' While resonant in psychological discourse, the legitimacy of pharmacologically treating 'emotional pain' does not enjoy the same popular sentiment as physical pain. When comparing the language Emma and Jane use to explain their use the role of discourse becomes more apparent. Utilizing the legitimizing narrative of physical ailment Jane is able to rationalize the 'high' she receives when taking painkillers as merely part of the process of alleviating pain. When discussing use of painkillers more generally Jane explains "...I might additionally enjoy the kind of swimmy headspace zone out effect, along with the relief of pain. But I don't think I've ever taken it specifically for that feeling." On the other hand Emma's drug of choice (opiates) does not align with current psychological traditions for the treatment of mental conditions. Conceptualizations of pain and criminality intersect most interestingly in cases such as this. Emma's use of painkillers for an apparently less 'legitimate' pain becomes quickly entangled with her subsequent criminal behaviour. When describing why she used painkillers Emma consciously separates her desire into two distinct categories; "...I was half doing it because I wanted to get high and half just because I wanted a fucking break from Jake." Without an adequately legitimized claim to use of the drug Emma is not able to rationalize her use as simply self-medication, and thus must also incorporate 'self-indulgence.' Such an explanation draws close similarities to that of illicit drug users and the criminal worlds in which they must occupy.

The importance of a criminogenic association is of particular interest here. Participants who feel as though they have been labelled as 'deviant' or 'addict', and by association 'criminal', often discussed the impact this perception could have. Meridian articulates the powerful adverse consequences of this kind of embodied labelling;

Living this illegal sort of underground life-style. I mean how can you esteem yourself? You're not working. You've got no goals. Nothing stimulating to wake up to everyday. It's not just the painkillers, it's all the social problems that it brings. You know unemployment. And especially how it impacts on your confidence and self-esteem and how you feel about yourself. You know even though you can support your addiction and everything, it's nothing to be proud of. It just eats away at you. Lately I've been thinking of just having a big shot and just going to sleep and not waking up.

Meridian's description above illustrates both the impact of the social control of drug users and the internalisation of the stigmatized discourses which allow for the perpetuation of such measures.

If we are to consider this comparison more closely it is imperative to ask how different the manifestation of Jane's physical unrest from Emma's emotional anguish and Meridian's social suffering. Indeed a night on amphetamines, an abusive argument with your partner, and panic about your next 'fix' might all 'keep you up at night.' However, the degree to which such narratives of legitimacy are popular enough to find root in socially significant ways substantially influences the outcome of those who use painkillers non-medically. Precisely because Emma's use of painkillers utilizes an emotional rationalization it must also incorporate an experience of deviance from medicine more generally. Likewise Meridian's acceptance that he lives an 'underground-lifestyle' constricts his ability to legitimately access a social or verbal vocabulary outside the world of criminality. It can be expected that such experiences of 'deviance' only exacerbate the emotional and social difficulty Emma and Meridian were facing. Moreover, the discursive formation of a self-indulgent or deviant experience of drug use readily plays into popular narratives about addiction. Thus, Emma and Meridian's conceptual placement as deviant, self-indulging drug users seems likely to have adversely influenced the prospects of their escalating drug use as well as their involvement in criminal activity.

Importantly, it must also be noted that the perceived 'illegitimacy' or 'criminality' of participant's experiences are fundamentally relative. Emma might never have experienced her abusive relationship quite as intensely 'painful' had she been in a social/personal context that readily appreciated the difficulty of her emotional suffering. She might not have chosen to use painkillers to 'escape' if she had not grown up in a culture that sees intoxication (largely with alcohol) as a normal method for social lubrication. Her use of heroin, or pursuit of painkillers for emotional relief, might not be considered criminal only fifty or a hundred years ago. Similarly, Meridian's reliance on painkillers after his hospitalization may never have translated into an internalized criminal identity had the policies of only a hundred years ago been in place. This paper does not wish to suggest that an applied perception of criminality parlays automatically into criminal behaviour. Indeed wider discussion about broader medical frames are incorporated in order to complicate the oversimplification of much of the early labelling and self-concept literature (Wellford 1975; Wells 1978). Though labelling theory clearly provides a relevant conceptual frame, a stronger focus on the embodiment of a range of knowledge discourses is perhaps most relevant here (Emily K. Abel and C. H. Browner 1998; Yardley 1999). In saying so, competing regimes of legitimacy and criminality, and their subsequent disbursement into the social fabric form an important part of the conflicted accounts of non-medical use gathered as part of the study.

Though not all encompassing, the ways participants perceive their experience of non-medical use must not be taken for granted. Similar experiences deployed in discursively divergent ways can have entirely different consequences. Competing discourses that govern the ways in which perception interacts with experience are not static. Though the notion that pharmaceuticals are safe and illicit drugs are dangerous never had any solid underlying scientific foundation, its perpetuation remains popular. The emergence of non-medical use of pharmaceuticals has however begun to call into question the simplicity of this popular notion. What is clear from these very preliminary observations is that medical discourse plays a pervasively influential role, even for practices that people regard as non-medical. Criminality also seems connected to those for whom medical deviance is inferred. Medical and criminological discourses are not however simply transmitted, without impediment or alteration, to those who experience pain, use painkillers or become addicts. The proscriptive elements of medicine and the law seem to provide a dominant, yet entirely contestable framework by which participants adapt to the realities of their own particular physical, social and emotional circumstances.

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Beyond Normative Constraints: Declining Institutionalism and the Emergence of Substantive and Procedural Justice

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The criminal trial is a significant institution of social control. It operates as an institution of control by offering a process for the determination of wrongdoing, and for the meting out of punishment where the accused is convicted of an offence. In common law jurisdictions, the criminal trial is seen to operate around a set of normative assumptions traditionally characterised as an adversarial engagement between counsel before an independent magistrate, or judge and jury. These normative assumptions are held in the popular conceptualisation of the criminal trial but are also considered amongst common lawyers as the institutional form of the rule of law. This presents a standard mode of process that affords the accused a due process of law. Modification of the institutional form that the adversarial trial ought to take, and the processes afforded to the accused, is generally resisted by lawyers, judges and others out of adherence to a mode of trial that is constitutive of the common law method. This paper argues that common law jurisdictions have moved substantially away from these normative assumptions. In its place, the criminal trial has been modified or abandoned altogether for alternative processes that seek to hold wrongdoers to account in new and innovative ways. The rise of control orders, modifications to the law of evidence, and the right of the accused to confront their accuser, together with the inclusion of non-traditional agents of justice, specifically victims and the community, evidences a significant shift away from the adversarial criminal trial for alternative institutional forms that seek to afford voice and representation to a range of stakeholders that might otherwise be removed from common law processes. What results is a debate as to the extent to which the normative constraints of the criminal trial are under attack, and the extent to which the twenty-first century is witness to a new form of substantive and procedural justice that transgresses normative boundaries for a range of new trial processes.

The trial is a balancing ground for the substantive and procedural rights of parties that exercise agency within a dispute. Rather than focus on whose rights are recognised by a particular model or under an accepted approach, a focus on substantive and procedural rights asks us to question the scope, content, application and outcome of the rights afforded by legal processes. Such perspectives move away from the dominance of the adversarial model that emerged toward the end of the seventeenth century. Unlike the adversarial trial, however, a procedural justice approach does not assume that certain agents or stakeholders are irrelevant or prejudicial to the interests of justice. Rather, a substantive and procedural justice perspective invites new perspectives and participants but only to the extent that they may be relevant to the resolution of the dispute. It is in the balancing of the interests of various, at times competing parties, that we are able to break away from normative approaches to embrace nuance and innovation. The rise of problem-solving courts provides a key example. Victims and the community are not deemed irrelevant or prejudicial within such perspectives. However, in order to establish problem-solving justice as an inclusive court of law one must challenge the normative perspective that constitutes the trial as an exercise between prosecution and defence, within common law jurisdictions (see generally, Berman and Feinblatt, 2001). Interestingly, it is those jurisdictions that have seen the re-assertion of the adversarial model (see Sklansky, 2009; Summers, 2007), which have led the charge in establishing these nuanced and innovative programs as viable alternatives to adversarial justice.

In *R (on the application of McCann and others) v Crown Court at Manchester; Clingham v Kensington and Chelsea Royal London Borough Council* [2002] 4 All ER 593 ('Clingham'), Lord Hutton remarks that the standard of proof applicable to the Anti-Social Behaviour Order ('ASBO'), a court order utilising a civil standard of proof to place restrictions on the conduct of persons engaging in behaviours that are deemed to disturb the peace, needs to be read in the context of the balancing of competing interests (at 631):

The submissions of counsel on behalf of the defendants and on behalf of Liberty have laid stress on the human rights of the defendants. However the European Court has frequently affirmed the principle stated in *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 52, para 69, that the search for the striking of a fair balance 'between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights' is inherent in the whole of the Convention. In these cases which your Lordships have held are not criminal cases under the Convention and therefore do not attract the specific protection given by Article 6(3)(d) (though even in criminal cases the European Court has

recognised that 'principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify': see *Doorson v Netherlands* (1996) 22 EHRR 330, 358, para 70), and having regard to the safeguards contained in section 4 of the 1995 Act, I consider that the striking of a fair balance between the demands of the general interest of the community (the community in this case being represented by weak and vulnerable people who claim that they are the victims of anti-social behaviour which violates their rights) and the requirements of the protection of the defendants' rights requires the scales to come down in favour of the protection of the community and of permitting the use of hearsay evidence in applications for anti-social behaviour orders.

The rise of new and innovative court proceedings for the determination, control and punishment of wrongdoing has been most controversial, especially from a human rights perspective (Ashworth, 2004, 2009; also see Matthews, Easton, Briggs and Pease, 2007: 55–62). Criticisms abound as to the extent to which new procedures may impact on the liberty of individuals without the safeguards of full procedural fairness or due process. The movement away from criminal law for civil proceedings, seen through the development of alternative frameworks for the regulation of conduct in ASBOs and control orders, may point toward the unsatisfactory degradation of the criminal trial by usurping the criminal jurisdiction for the novel use of civil law. This has certainly generated a heated response (see Duff, Lindsay, Marshall and Tadros, 2007; Ashworth, 2004, 2009; Doak, 2008; Wolhunter, Olley and Denhan, 2009) out of concern that the rights of defendants are being diminished for a popular 'reactionist' politics that may well be driven by popular media, than well thought-out and principled criminal justice policy. Such policies have been identified in terms of a re-direction of criminalisation that is largely a response to the dramatic events of the beginning of the twenty-first century, specifically 9/11 and the destruction of the World Trade Centre (Tadros, 2007: 664). These various changes to criminal justice policy, in particular, the development and proliferation of the control order and associated processes for the detention of persons suspected of social disorder or even terrorist activity, are now well familiar within domestic law and order, with the use of control orders or ASBOs increasingly being targeted toward the regulation of specific 'risky' groups.

The use of control orders in NSW and South Australia restricting the association of members of organised motorcycle clubs indicates how, for instance, such orders have been used to modify traditional court processes for the control of suspected persons (as to the appreciable limits of such modifications, see *Wainohu v New South Wales* [2011] HCA 24; *South Australia v Totani* [2010] HCA 39). The increase in alternative modes of 'trial', whether characterised as civil or criminal, is of concern if such alternatives lack the specific safeguards of procedural justice and a right to a fair trial that are affiliated with the adversarial criminal trial. Ashworth (2009: 96) deems such alternatives to be a 'carefully designed hybrid' to the extent that they traverse the civil and criminal jurisdictions. ASBOs, for example, may be a civil order until a controlled individual is in breach of an order. Once breached, the individual is brought within the criminal law, and exposed to a term of imprisonment, whether the breach is disposed of summarily or on indictment. As the House of Lords accepts in *Clingham*, however, there are various interests to be balanced by the introduction of new frameworks for the control of civil unrest. The 'balancing act' that is requisite of the fair trial as indicated in *Doorson v The Netherlands* (1996) 22 EHRR 330, is treated as a constitutive principle of justice that extends beyond the appreciable limits of the adversarial criminal trial. It is held out as a transformative principle to the extent that it reinforces the expectation that human rights discourse provides for an inclusive doctrine of justice that speaks for all individual liberties, including those of victims, witnesses or as considered in *Clingham*, vulnerable communities and individuals that suffer under the threat of anti-social behaviour. The rights of the 'weak and the vulnerable' are thus as potentially constitutive of the fair trial, per *Doorson*, as are the individuals to whom such orders are directed. The use of control orders, however, for the criminalisation of conduct of members of declared organisations demonstrates the limits that may be placed on the modification of normative court processes. Cowdery (2009) notes that the NSW legislation for the control of rouge 'bikie groups' (and potentially other groups) contains numerous procedures that depart substantially from orthodox criminal process. Together with the use of novel tests for the declaring of an organisation and the use of interim and final control orders for individuals who are members of the declared organisation. Such legislation, per *Wainohu v New South Wales* [2011] HCA 24, went sufficiently beyond the exercise of judicial power expected of a Supreme Court judge that the legislation was deemed unconstitutional. Comparisons between jurisdictions thus suggest that departures from the criminal trial, through varied in form and substance, will often conflict with existing legal mechanisms or the determination of wrongdoing.

Despite the varied success of changes to criminal process, departures from the adversarial criminal trial as a model of justice continue to prevail. In Australian law, *Fardon v Attorney-General (Qld)* [2004] HCA 46 set in motion the substantive basis for departures from the criminal trial by way of a procedural justice model.

Approving the Constitutional basis for the legislation, Gummow J highlights the procedures that allow for an alternative means by which sex offenders may be subject to a period of further or preventative detention upon completion of their original sentence:

... under the present legislation, in considering the application for a continuing detention order against the appellant, the Court was required to have regard to the matters listed in pars (a)-(j) of s 13(4). These include psychiatric reports indicating, with reasons, an assessment of the level of risk that the prisoner will commit another serious sexual offence if released from custody or released without the making of a supervision order (s 13(4)(a), s 11(2)); the existence of any pattern of offending behaviour on the part of the prisoner (s 13(4)(d)); participation in rehabilitation programmes (s 13(4)(e), (f)); and "any other relevant matter" (s 13(4)(j)).

The Court was obliged by s 17 to give "detailed reasons" for the making of the continuing detention order in respect of the appellant and to do so at the time that order was made. Provision is made in Pt 4 of the Act (ss 31-43) for appeals by the Attorney-General or the prisoner against whom a decision under the Act has been made. An appeal is to the Queensland Court of Appeal and is by way of a rehearing (s 43(1)). The Court of Appeal has all the powers and duties of the court that made the decision from which the appeal is brought and "on special grounds" may receive further evidence as to questions of fact (s 43).

Fardon v Attorney-General (Qld) [2004] HCA 46 shifted focus toward the legitimacy of the protection of substantive rights within a procedural model of justice that may not accord with normative constructs of what it means to be sentenced following trial. The normative positioning of the criminal trial as the method by which wrongdoers will be held to account for their conduct has shifted and a range of alternative processes have been supplemented. These alternatives constitute a new apparatus of holding to account to the extent that they break some of the rules of criminal procedure, while holding onto others. Ashworth's (2009: 96) 'hybrid' perspective illustrates the fact that we are long removed from coherent, jurisdictionally based, justice that is constituted by a set of principles of general application. The acceptability of nuanced modes of calling to account, whether classed as civil or criminal, must therefore be assessed from the perspective of a procedural model of justice that emphasises the rights of all persons in a fair and transparent way. It therefore seems we have an answer to McBarnet's (1981) dilemma, that the criminal process is determined by practices shaped by the normative reality of the courts. By rejecting the notion that due process rights are constituted through particular courts, adhering to particular normative constraints, policy makers are able to give rise to new and innovative processes disconnected from the normative assumptions that might otherwise limit courts to deal with matters in certain prescribed ways.

The significance of the development of systems of procedural justice may be discussed in terms of the development of the 'accusatorial trinity'; the increasingly significant important of the interaction between prosecution, defence and judge (Summers, 2007: 27). This 'trinity' allows for points of connection between the different systems of justice that provide for the movement of ideas and approaches that may be rooted to the structural framework of the legal system of each state or jurisdiction, or even between civil and criminal processes within the same jurisdiction (see discussion of ASBOs, above). Summers (2007: 99-103) argues that this 'accusatorial trinity', and the balancing of interests therein, became the accepted basis upon which the jurisprudence of the European Court of Human Rights ('ECtHR') is considered as successfully mapping a coherent notion of the 'fair trial'. This cohesion is meted out through the adversarial procedural requirement and doctrine of equity of arms that has emerged in the ECtHR's jurisprudence (see *Doorson v The Netherlands* (1996) 22 EHRR 330). However, the process as it applies to criminal proceedings is defined in terms of a 'balancing' of rights and is not exacting. This approach appears to focus on the fundamental characteristics common to each jurisdiction, as Summers (2007: 180) explains:

Although inconsistencies in the Court's notion of fairness are particularly evident in relation to the case law on the right to question witnesses, they are also reflected in the failure to address serious institutional flaws in various European criminal procedural systems. There can be little doubt that the coherence and consistency of procedural fairness could be improved through an acknowledgement of the reliance of its adversarial proceedings and equality of arms doctrines on the accusatorial trinity. A more sound approach to the regulation of fairness in European criminal trials requires recognition both of the European procedural tradition and the common institutional values which it implies.

Summers' (2007) focus on procedural justice over any normative or nationalised perspective is a powerful reminder that justice need not be organised in a prescribed or determinant way. Under the European Convention of Human Rights ('ECHR'), the content of the substantive criminal law is generally left to the individual state, with the ECtHR focusing on matters of process and procedure that may deprive an accused of

a fair trial. The significant differences between state authorities have been cited as limiting a common conception of procedural rights. Adversarial and inquisitorial justice, for example, has been deemed incompatible to the extent that each model of justice values processes that are denied by the other. The re-assertion of the parameters of adversarialism by the United States Supreme Court, under the new restricted interpretation of the confrontation clause per *Crawford v Washington* (2004) 541 US 36, demonstrates how an adversarial processes may be phrased in terms of an anti-inquisitorial process (see Sklansky, 2009). What belies such approaches is the assumption that adversarialism operates according to a set of normative constraints that render it incompatible with other, perhaps foreign, perspectives. Such assumptions seek to protect and constrain the operation and development of a jurisdiction in accordance with certain preconceived notions as to what it means to be adversarial. This defines a set of institutional arrangements that provides voice and representation to some but not to others.

This normative context of the trial was brought into question in *R v Camberwell Green Youth Court* [2005] 1 All ER 999 per Lord Rodger of Earlsferry at 1004-1005, his Lordship referring to the impact of technology on the long held traditions of the direct examination of witnesses in the criminal trial. Referring to s 21 of the *Youth Justice and Criminal Evidence Act 1999* (UK), his Lordship notes:

According to the popular image, in a British criminal trial witnesses give evidence before a robed judge and a jury and they are examined and cross-examined by bewigged counsel for the Crown and for the defence. Inevitably, that image is over-simplified... Since the forms of trial have evolved in this way over the centuries, there is no reason to suppose that today's norm represents the ultimate state of perfection or that the procedures will not evolve further, as technology advances.

Doak (2005: 294-295) examines the holding of *R v Camberwell Green Youth Court* in the context of the long held tradition of orality in the English criminal trial. Courts and policy makers seem comfortable using technology to present testimony in non-direct ways. However, the departure from traditional adversarial processes in *R v Camberwell Green Youth Court* provides for the significance of the case. This significance is provided in Lord Rodger of Earlsferry's dicta, '[s]ince the forms of trial have evolved in this way over the centuries, there is no reason to suppose that today's norm represents the ultimate state of perfection'. There are several points raised here. The first is that the current trial process is identified as a 'norm', and that, secondly, this 'norm' is not the 'ultimate state of perfection'. These statements combined suggest that the adversarial criminal trial occupies an unquestioned, fixed status that may be held out, arguably, as the pinnacle of the development of the common law. Lord Rodger of Earlsferry's judgement traverses the dominance of the adversarial paradigm for a reflexive process that may move beyond the fervent nationalism that Summers (2007) identifies as limiting the consideration of alternative processes in adversarial systems. *R v Camberwell Green Youth Court* [2005] 1 All ER 999 asserts that the trial will continue to transform to meet new needs, in that one system of justice need not be bound by particular normative assumptions as to its limited capacity to adapt to alternative processes for the hearing of evidence (see Schwikkard, 2008: 12-18). The arguable point is that the criminal trial is not beyond change, but rather that it may be identified as a transformative institution of social control.

Summers (2007: 17) overcomes the assumption of the rigidity of individual system of (adversarial) justice by steering away from a comparative jurisdictionally based perspective that seeks to rate the extent to which adversarial procedure may be compatible with inquisitorial processes. Such methods highlight the differences which Summers (2007) seeks to critique, or at the very least, argues should be left behind. Summers (2007: 17) argues that the ECtHR, for instance, offers us a critical starting point in the delimitation of individual jurisdictional exceptionalism (really adversarial exceptionalism), 'for its existence hints at the possibility of pre-existing common, underlying values in the field of criminal procedure law'. Schwikkard's (2007, 2008) work on the convergence of criminal procedure between adversarial and inquisitorial systems is, for example, founded upon the strength of shared values between common and civil law traditions. The development of an adversarial approach out of an inquisitorial process demonstrates that neither system ought to be restrained by the other but can benefit greatly by moving beyond normative assumptions that limit the development of the trial in one direction. By moving away from the language of adversarial and inquisitorial justice, Summers (2007) seeks to raise the prominence of a fair criminal procedure that takes a procedural rather than institutional form. This is a result, arguably, that manifests in the current Swedish practice of integrating both adversarial and inquisitorial 'models' of justice into the one process for the determination of liability and punishment at the trial level (see, for example, see Wolhunter et al. , 2009: 187-189; Herrmann, 1996). Other examples of the integration of adversarial and inquisitorial processes abound, including the pre-trial and trial phases of the criminal process in the Netherlands, Denmark, Portugal, Spain and Italy.

As we move toward a reflexive criminal procedure that takes account of various competing interests, including those of the state, defendants, victims and vulnerable witnesses, our conceptualisation of the criminal trial shifts to allow for new and innovative procedures that provide for the balancing of these competing interests. In this context, the criminal trial is much more than a static tribunal bound by immovable rules for the testing of evidence against an accused. The trial emerges as a dynamic institution reflective of the changing interests of society, which, in the recent past, has been significantly determined by the fear of the arbitrary exercise of state power against the interests of the individual. Debate as to the scope, content and form of the trial is a healthy sign of a society concerned with one of its most crucial institutions. Lawyers, lawmakers and scholars need to be mindful that an argument favouring a normative perspective of the trial may be to prescribe the trial's form and function in a way that is inconsistent with its dynamic function as an institution of social power. Normative assumptions have the potential to silence voices relevant to the broader interests of justice and may stifle the growth and development of the law. The criminal trial is an important social institution that is moving toward a model of procedural and substantive rights, with growing interconnections between new and innovative modes of justice that transgress adversarial and inquisitorial paradigms. Though controversial, these changes inform us that the normative assumptions as to the criminal trial lock us into a mode of determination of wrongdoing that is historically and institutionally specific, and denies that dynamic capacity of criminal law and procedure as a means of control responsive to the changing needs of society.

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Security, Control and Deviance: Mapping the security domain and why it matters

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Security is one of the foundations on which a stable and cohesive society is built. It is this security that allows citizens to go about their daily lives with freedom and certainty,affording them the ability to make their own choices as to what they do. Yet it may be argued that security is a concept that is misunderstood and perceived in a myriad of ways by the various stratum of society. Since the tragic events of 9 September 2001, security has become a much used and abused term. Law and legislation have been changed and enacted to protectand control the community. Personal rights and freedoms have been given up, wars have been waged and it may be argued by some, police states have emerged out of democracy in the name and pursuit of security. In this period,the global community has witnessed massive growth of global security organisation and the rise and legitimization of its cousin the global private military company. Yet there is remarkably little consensus as to what security is, what constitutes the security domain and just how much freedom should be traded in a free and democratic culture in pursuit of this nebulous concept that issecurity. The purpose of this paper is to establish a roadmap for domain exploration which focuses attention on the complex and often contradictory nature of security.

Notwithstanding scholarly difference and interpretation of the context of security, and the lack of a singularly acceptable definition of security and ignoring the argument that security is so broad as to lack meaning, the authors will assert that security is a legitimate and necessary construct, with specific concerns.This position is framed within the argument that the alternative of non-security(Manunta, 1998) is not acceptable in the context of a civilised world.This paper is presented in four parts, beginning with a discussion of the domain in general. In the second part the concept of security deviance will be discussed before finally proposing a way forward for domain research and discourse.Then, the structural relations, indicating the depth and embedded nature of security in a modern society, will be presented to articulate the opportunities for security deviance in a modern society.

Security: definition and context

Whilst various definitions of security which have emerged over the years, andsome of these will be explored further in this paper, in order to anchor the reader contextually the following definition represents the authors view of security for this paper: security is the application of sufficient control mechanisms to ensure a safe environment which enables a nation, organisation, or individual the freedom of action to engage in an activity in a specific context.

When scholars, professionals or the lay community define security it is usually done so within an individual or group contextual paradigm. Throughout the 80s and into the 90s, the scholarly discussion of security tended to be dominated by the cold war, national security and the concept of high security. However the last decade has seen much of the security dialogue (whilst still national security centric) framed within a context of terrorism. This period has also seen an increased growth of global security companies and a resurgence of private military power as a legitimised mechanism of security. Each of which has been the subject of significant debate(Cha, 2000; Drohan, 2003; Hough, 2008; Leander, 2005; Singer, 2003).In parallel there has also been an emerging security dialogue framed by climate and environmental concerns(Barnett, 2003; Cordell, Drangert, & White, 2009; Ehrlich, Ehrlich, & Daily, 1993; Myers, 1989). Such security dialogue is limited in scope and dominated by elites, and fails to account for the layman's security context and concerns. Security is more than a philosophical construct. It is a reality that all people and organisations interact with throughout the course of daily activity even though that interaction may be beyond a sensed threshold.

What is the concept of security and is the concept of security equally understood by both layman and the elites? Wolfers(1952)suggested the concept of security could be explained by an "absence of threats to acquired values".Baldwin,(1997) however suggests a modification of this phraseology in order to limit ambiguity and articulates the concept as "a low probability of damage to acquired values". Baldwin further argues that once

we have an agreed concept of security, future dialogue is bounded by that common understanding and becomes meaningful to all participants irrespective of their contextual paradigm, i.e. national security, corporate security or one focused on food security. The concept of security therefore is a foundation on which the security domain is built and the domain is then described or maybe defined by the nature of the adjective applied. Manunta(1998) proffers an alternative perspective on security, arguing that security is a function of an antagonist, an asset and a protector in a specific situation. Whereas Baldwin seeks to broaden the context of security to account for threats posed by natural events such as flood and earthquakes, Manunta seeks to exclude such natural events and limit security to situations in which a protagonist with some form of intent exists. Whilst Manunta refers to assets suggesting a physical attribute requiring protection, Baldwin and Wolfers use the term acquired value suggesting things beyond the physical. For the purpose of this paper we will use the term acquired value to refer to both tangible and intangible assets.

Accordant with Manunta's(1998) view, security appears to revolve on three attributes. Firstly, there needs to exist a threat of some form where if no threat exists then damage to an acquired value is unlikely and therefore the context of security is not required. Secondly an acquired value must exist and it must be of interest to both the threat and the protector, without an interest or focus from both the threat and the protector the context of security will not exist. Finally the protector must exist and must be aware of the acquired value of interest and must have a genuine fear or belief that there is a threat to the acquired value. This model whilst adequate at a simplistic level is lacking when the situation becomes more complex. Ownership of the acquired value is rarely considered and there appears an assumption that protection and ownership have mutually understood perceptions of the threat.

An alternative construct may provide a better definition of security whilst also providing insight as to why security may be perceived as much in the negative as the positive by the community. For security to exist, a threat must also exist where the threat may be fully defined or have the potential to cause harm. An acquired value must exist and it must be known to exist. The value must have an owner and finally there must be a guardian. However, the owner and guardian may not be the same. In such circumstances difficulty arises in the security context when the owner and the guardian perceive the threat differently thereby perceiving differing needs in terms of response or applied control mechanisms. This it may be argued provides a useful lens through which to view government and community response to the perceived threat of terrorism. In this case the threat, terrorism, is recognised by both the government and wider community. The acquired value in this case is the Australian way of life. The guardian is the Australian government through its proxies, the national security community. However the owner of the Australian way of life is not the government, though it does have stake in such, the owner is in fact the Australian community. At this point the community as owner of the way of life must determine, what is an acceptable trade-off between freedom of action and a safe environment? An optimal outcome for the owner is sufficient protection whilst maintaining maximum freedom of action. Whereas the government, as the guardian of that way of life, will seek to influence and persuade the owner of the need for maximum security control mechanisms in accordance with its perception of the threat. In each case either stakeholder may exploit fear, or the absence of fear, through amplification or attenuation messages, to make the case for their optimal outcome.

Security as a Mechanism for Control

Whilst there appears many different understandings of security, a common theme is emerging from the literature posing the question as to whether or not security can be used as a lulling term for control through the use of what Weiten(2002, p. 258) refers to as 'semantic slanting'. Semantic slanting refers to the use of language to deliberately choose words which create specific emotional meanings. In this case this is to imply a service rather than impose power over others. Drawing on such literature, the contention of this paper is that in reality all security is focused towards achieving a desired level of control within a context, be it globally, nationally, at a State level, organisational level or domestic –individual level.

Underwood (1984, p. x) identified the very construct of security as one of ancient need which was expressed as a psychological necessity for humans by Maslow(1970, p. 39). However, Brooks (2009, p. 12) highlights that, as a construct, security has defied singular definition, and can be found to be defined in many ways. For example, Underwood (1984, p. x) defined security as "confidence in the retention of belongings", "confidence in personal safety", whereas O'Block, Donnermeyer and Doeren(1991, p. 7) defined security as "freedom from fear of crime and the actual danger of being the victim of crime". Such views in principle are supported by Craighead's(2003, p. 21) definition which sees security as "free from danger" or "safe". Yet Fisher and Green

(2004, p. 21) expand the concept to define it as "a stable relatively predictable environment in which an individual or group may pursue its ends without disruption or harm and without fear or disturbance or injury". Such definitions focus the concept of security towards the inner workings of a nation state, but Brooks (2009, p. 12) points out, security must also consider national security and the defence of a nation, a context emphasised in the writings of Ullman (1983) and consistent with the earlier writings of Rothschild (1995). Thus, in the words of Rothschild (1995, p. 55), security can be extended downwards from the security of nation states within an international or supranational environment to include the security of groups and individuals. In addition, security can be extended horizontally to include contextual elements and encompasses military, political, economic, social, environmental or human concerns.

Whilst it is evident that many definitions and contexts exist, a common theme is that for there to be security, there must be a means of control. This point is emphasised in the physical security domain which has adopted the term access control (ASIS, 2009; Norman, 2012) and is supported in security focused texts such as the guidelines for security lighting (IESNA, 2003, p. 3) which articulates that for property the burden of security and safety is generally placed on those individuals who have primary control over the property, arguing with the right of control comes the responsibility of control. This point is evident when analysing the themes emerging across the various security contexts in relation to the various definitions of control. Definitions which include (a) to command or rule, (b) to check, limit or restrain, (c) to regulate or operate, (d) to regulate, (e) and to examine (Hanks, Makins, & Adams, ND). Such themes of control are embedded in the various discourses on security.

Ullman (1983) argues that for society to work there must be control, both externally and militarily, and internally through other mechanisms. Drawing on the early writings of Hobbes, Ullman (1983, p. 130) argues the point that regardless of whether threats to security stem from within or externally of one's own nation, a victim is still a victim and so citizens within a state seek protection against both types of threats, that is foreign and domestic. Citing Hobbes emphasise on the lack of control in one environment, regardless of the controls in others would still result in peril. Ullman focuses further attention on the writings of Hobbes to introduce security as an absolute value, where the state directs how much control it requires to provide a level of security (Ullman, 1983, p. 130).

A control thesis of security arguably means a reduction in freedoms, choices and privacy eroded through mechanisms of control which aim to provide a secure safe environment. For example, the very concept of a government security clearance imposes a level of control over an employee, reducing their civil liberties to engage in actions considered contextually deviant, it is accepted control, but control nonetheless. Ullman (1983, p. 130) notes that, total control is an extreme at odds with the desires of the wider community whom aim to balance security needs against others such as freedom and privacy. This creates the need for a trade-off between liberties and security, where in addition to protection against non-State threats, citizens also seek security against the State, or more specifically against the excess of controls enacted by the state to achieve its preferred level of security. This could also be argued to apply at an organisational level within the state. Thus, a discussion of security is really a discussion about control, real and perceived across all strata of society.

An alternative perspective is that security is not about control but rather one of safety. However without providing some mechanisms for control it is questionable as to how can we provide a safe environment. Evidence of control as a sub-text of the security discourse is evident in the broader literature on security (Baldwin, 1997; Hudson, 2005; Shearing & Stenning, 1983; Smith, 1999; Wolfers, 1952). However further specific evidence supporting the control thesis can be drawn from Ullman's (1983) writings where it is argued (pp. 134-136) that much of the nation's resources are focused towards military threats, yet minimum resources are steered towards managing those internal or natural threats which also threaten a nation. One argument could be that managing those external military style threats reduces the threat through expenditures which provide mechanisms of control, real and perceived. Yet those resources spent in preparing to respond to disasters whilst posing a severe threat with a higher likelihood do not provide any mechanisms for control, just preparedness, response and recovery. Newman (2010) considered security to be about the pursuit of policy, which if correct, is a policy to gain and maintain a level of control within an environment where security resources are aimed to achieve such control.

Security Deviance

The inclusion of the concept of control into the security discourse requires the concept of deviance being introduced into the security literature. Deviance is a concept readily identified throughout all strata of society (Box, 1971; A. K. Cohen, 1966; Erikson, 1961; Garland, 2001; Innes, 2003). According to Cohen all societies, subgroups and institutions have rules which when violated draws emotive responses including disapproval, anger and indignation. If human beings are to do business together there must be rules, and people must be able to assume that, by and large, these rules will be observed (A. K. Cohen, 1966, p. 3). According to the Cohen where there are rules there will be accompanying deviance. This view supports the concept of security deviance, which within the context of this paper is considered the exploitation of security measures implemented to achieve a state of control within a specific context. However, that state of control is obscured by the use of the lulling term, security. Whilst most systems can tolerate a substantial amount of deviance according to Cohen (1966, p. 4) it can impact in three salient ways: it can be analogous to the loss or defect of a critical part in a delicately coordinated mechanism; or it can undermine an organisation by destroying people's willingness to play their parts, reducing their contribution to the ongoing activity; and it can destroy trust, destroying confidence that individuals will play by the rules. Nevertheless deviance may in some cases make a positive contribution to objectives. In some circumstances people acting defiantly can overcome barriers to objectives due to red tape (A. K. Cohen, 1966, p. 6), where emphasis may shift from actor based views of deviance to situational views of deviance depending on context (A. K. Cohen, 1966, pp. 43-44). Thus, Box (1971, p. 12) adds the point that deviance is more of a subjective label which must consider the quality of the reaction to it.

Fear and the amplification or attenuation of fear messages has contributed to the all-pervasive nature of security in the lives of all people. Lianos (Lianos, 2000, 2003) introduces a concept of institutional control as a natural evolution from social control and one in which fear, suspicion and vulnerability all contribute to a greater desire for security. Whilst Lianos argues that to some extent the construct of 'dangerization' means an end to deviance in fact the authors would argue that the 'safety paradox' to which Lianos refers actually adds weight to the argument that security control mechanisms may be exploited in a deviant manner. "In terms of social organization, this can be represented by a vicious circle: institutional activity^{to} control^{to} predictability^t ° safety/certainty^{to} vulnerability^{to} dangerization^{to} new claim for control^{to} new institutional activity...and so on" (Lianos, 2000, p. 275).

Given that the control expressed by either a nation state or institution is represented in the language of the security it provides towards managing those threats which pose a risk at either a global, national, State, organisational, or domestic-individual levels. Raises the question, how is the breadth of such control represented in any given society and where are the opportunities for security deviance? Given the breadth and multidisciplinary nature of the security domain, suggests control is pervasive and opportunities for deviance within the mechanisms of control are as broad as the domain.

Mapping the Security Domain: Uncovering the mechanisms of control and deviance

Baldwin (1997) has suggested that once the context of security is understood a security dialogue can occur across thematic boundaries, and that those thematic boundaries are defined by the adjectives combined with security. It is asserted by the authors that teasing out the thematic contexts of security exposes both mechanisms of security control and opportunities for security deviance. In order to map out the domain, a variety of media forms ranging from print news media, popular audio visual media and a range of magazines and academic journals were analysed. Figure 1 is a map of sampled domains, themes and forms of deviance identified from the literature to date. This was derived from a review of the media forms and thematically coded. The authors have also noted that in explicating the themes there are those themes which are not simply the adjectival combination of security but rather terms in which security is implicitly embedded, in some cases it is simply the substitution of the word security with a term such as protection however the authors would also include terms such as counterterrorism.

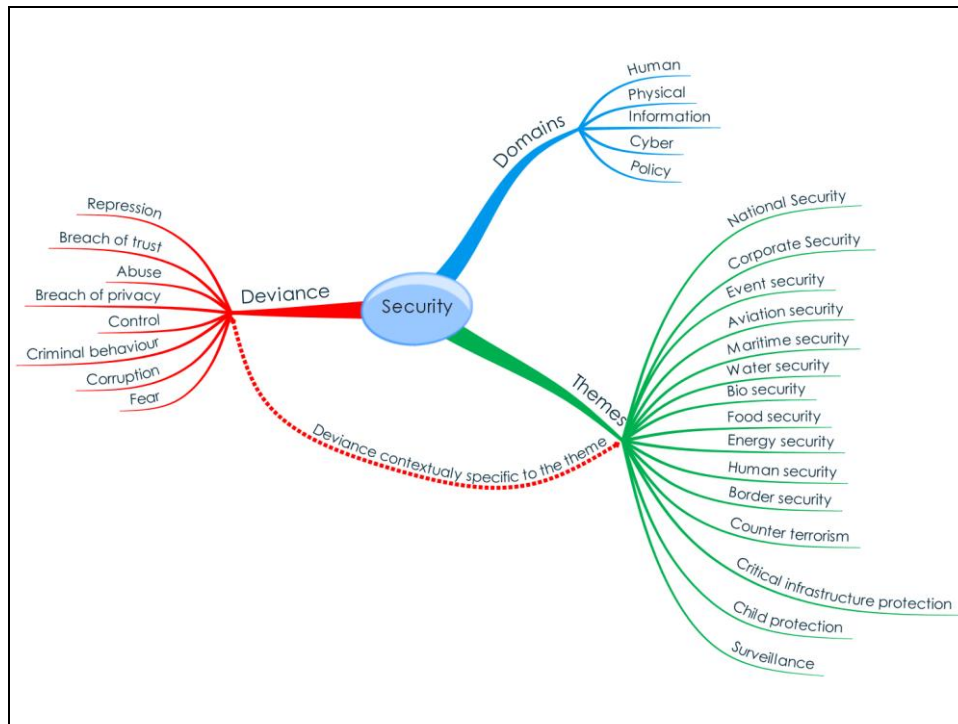


Figure 1 - Identified security domains, themes and deviance indicators

Initial analysis of the data identified the broad foundational domains of security existed, then we sorted the contextually specific thematic forms of security. For example, bio security is built on elements of human, physical, information and policy domains. The domains identified are broadly in keeping with security domain as identified in the literature (Brooks, 2009; Craighead, 2003; Fisher & Green, 2004). The next step identified the thematic forms of security, this was achieved in the first instance by finding the word security, observing the adjective conjoined with it and then determining the context in the sentences either side of its use. It was evident that this approach had a specific limitation in that it did not capture concepts such as counterterrorism or child protection. Therefore a second pass was undertaken and on this occasion synonyms for security such as protection were considered along with the contextually obvious terms such as counterterrorism. The themes shown in figure 1 are a representative sample at this time. It should be noted here that two forms of security themes that were specifically excluded, those being financial security and social security.

The data was then reviewed again to look for indicators of deviance, it should be noted that further data analysis is required in this area. Notwithstanding that a variety of forms of deviance were identified as having contextually specific links to thematic forms of security. Figure 2 conceptualises how the themes are impacted by deviance factors, yet both are shaped by the domains in which they exist.

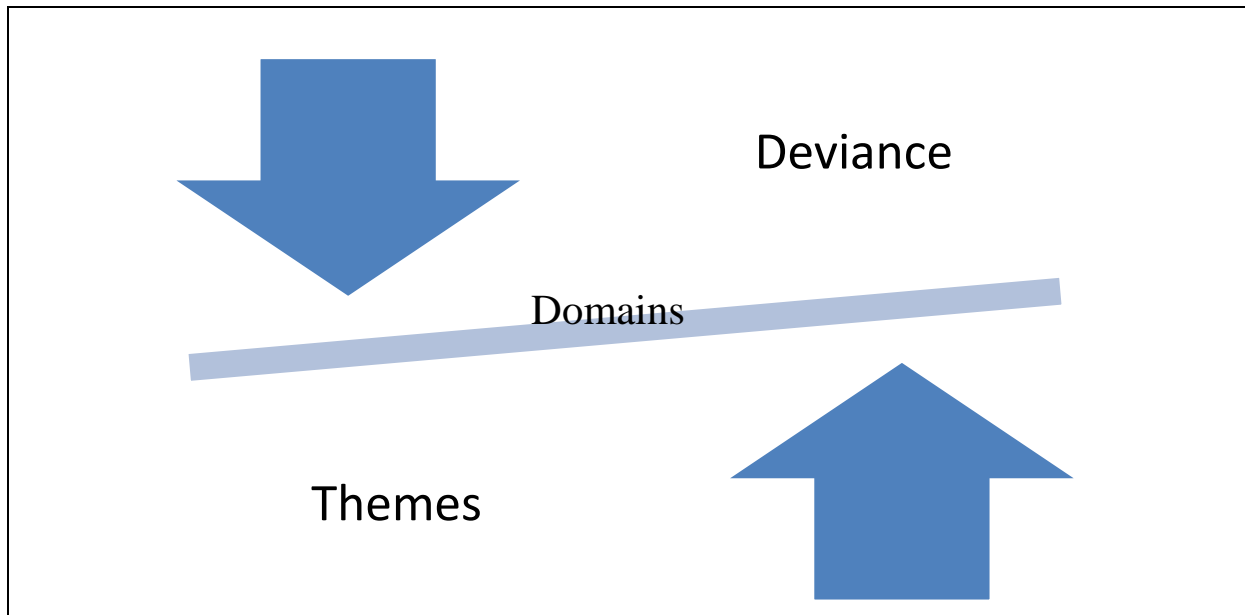


Figure 2 Interrelationship between deviance and security themes

In order to understand the interaction of the domains, themes and resultant deviances, and to provide a context for further investigation social control is a lens through which we can examine deviance. The social contract refers to the means where citizens and the state agree on the provisions of protection in exchange for traded freedoms. A theory of social control according to Johnson(1995, p. 258) seeks to explain the origins and binding force of mutual obligations and rights in society, protection for the submission of authority. As Abercrombie, Hill and Turner (1986, p. 194)point out, in a pre-social state of nature people enjoy absolute freedom (freedom of action), which as a consequence exposes them to threats of harm, removing safety. To achieve a safe environment, mitigate the threat, people enter into a social contract where absolute individual freedoms are surrendered to a third party (the state) that becomes the agent of guaranteeing social order and stability producing a safe environment. It is accepted within many sociology forums that social control is the means of providing such a secure environment which according to Abercrombie, Hill and Turner (1986, p. 195) is achieved through a combination of compliance, coercion and commitment to social values. As such, deviance is considered as any behaviour or appearance which violates societal norms (Johnson, 1995, p. 78). From a functional perspective deviance is a cultural creation as it is through norms that societal benchmarks are set to be violated. However, through a conflict approach power defines norms and therefore defines deviance (Johnson, 1995, p. 78). Thus, it is argued that one of mechanisms for social control is what is generally referred to as security, which is as previously noted essentially a lulling term for control.

The concept of deviance is a significant concern within the sociological literature with much of the focus steered towards the unintended consequence of police control (Abercrombie, et al., 1986, p. 67). These authors point out the sociological approach in a broader sense sees deviance as a socially prescribed departure from normality where many different, even non legal forms of deviance may be condemned taking a more heterogeneous category of behaviours as its lens of enquiry towards deviance within any given society. According to Abercrombie, Hill and Turner (1986, p. 68) deviance studies have embraced a great diversity of behaviours including drug abuse to football hooliganism where it is argued that extending the concept into the security domain is a natural, and given the embedded nature of security in modern society, logical extension of previous works. As Anthony and Cunneen(2008, p. 148)explain,directing a lens of purview towards the systematic abrogation of people's rights is not new for critical criminologists, especial in the manifestation of social injury through the violation of legal rules or cultural, moral norms. However, this discourse is often directed to deviance of the state.Yet security deviance can be those actions against the state, or actions committed by the state or its agents or private parties at both a national and international level. In addition, security deviance or potential actions for such deviance can be amplified through the various media forums by shaping content and language within transmitted messages (Abercrombie, et al., 1986, p. 67 ; Johnson, 1995, p. 78).

Security deviance is framed within a human rights approach to security where the ever complicated trade-offs between societal safeties as afforded by control versus reduced freedoms of choices or actions must be considered against the conceptions of social injury (Anthony & Cunneen, 2008) in terms of harms inflicted against people in its pursuit. It is important to note that in terms of exploiting the mechanisms of control implemented to provide a secure environment, collectively a coalition, state, organisation, group or individual can engage in deviance within the context of a social harm model. However, security deviance must not be limited to purely social harms. Consistent with Anthony and Cunneen(2008) it must also embody deviance which results in fraudulent materials gains or serious human rights abuses which can again be manifested by a coalition, state, organisation, group or individual, resulting due to the pursuit of, instrumental gains, the maintenance of influence or control, justified through rationalizations. Security deviance as a concept relates to Cohen's(1993) expressed concerns where the very agents responsible for providing societal security are actually responsible for various acts of deviance facilitated by exploiting accepted mechanisms of control.

Conclusion

Security allows us as individuals, organisations, nations and humanity freedom to act in appropriate ways within a specific context at a specific time. However in order to exercise that freedom control mechanisms can and will be applied across a spectrum from the individual domain to that of the national. Security control mechanisms may be explicit or they may be implicit irrespective of that they are contextually specific. Contextual specificity is determined by the selection of adjectives linked to the term security or security synonym. This in turn allows the breadth of the security domain to be determined which enables security controls and deviance to be clearly identified. Security control mechanisms may include, legislation and law, rules and regulation, and policy security deviance it may be argued occurs at that point where such mechanisms extend beyond sufficient control. Security deviance represents a threat to effective and necessary security control mechanisms through its potentially corrosive impact on community trust. Whilst this research is still in its early stages it is the authors view that carefully mapping the security domain with an aim to identify and catalogue forms of security deviance will enable a better balance to be achieved in the trade-off between liberty and security.

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