The Routledge Handbook of International Crime and Justice Studies

Edited by Bruce A. Arrigo and Heather Y. Bersot

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The Routledge Handbook of International Crime and Justice Studies presents the enduring debates and emerging challenges in crime and justice studies from an international and multi-disciplinary perspective. Guided by the pivotal, although vastly under-examined, role that consumerism, politics, technology, and culture assume in shaping these debates and in organizing these challenges, individual chapters probe the global landscape of crime and justice with astonishing clarity and remarkable depth.

A distinguished collection of experts examine the interdisciplinary field of international crime and justice. Their contributions are divided into thematic sections, including:

• theory, culture, and society
• industries of crime and justice: systems of policing, law, corrections, and punishment
• the criminal enterprise
• global technologies
• media, crime, and culture
• green criminology
• political violence
• public health criminology
• the political economy of crime and justice.

All the chapters include full pedagogy and instructional resources for easy referencing or classroom use. This *Handbook* will be useful for students, scholars, and practitioners of law, medicine, history, economics, sociology, politics, philosophy, education, public health, and social policy.

Bruce A. Arrigo is Professor of Criminology, Law, and Society in the Department of Criminal Justice and Criminology at the University of North Carolina – Charlotte. His recent collaborative works include *The Terrorist Identity* (2007), *Revolution in Penology* (2009), *The Ethics of Total Confinement* (2011), and *Introduction to Forensic Psychology*, 3rd edn (2012).

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In memory of Gil Geis –
His life was truly much more than ordinary:
He was a mentor, he was a teacher, and
throughout the learning he was, always and
already, the dearest of friends.

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Meda Chesney-Lind is Professor and Chair of Women's Studies at the University of Hawaii at Manoa. Her books include *Girls, Delinquency and Juvenile Justice* (Wadsworth, 1992), *The Female Offender: Girls, Women and Crime* (Sage, 1997), *Female Gangs in America* (Lakeview Press, 1999), *Invisible Punishment* (New Press, 2002), *Girls, Women and Crime* (Sage, 2004), and *Beyond Bad Girls: Gender Violence and Hype* (Routledge, 2008). She has just finished two edited collections: one on trends in girls' violence, entitled, *Fighting for Girls: Critical Perspectives on Gender and Violence* (2010) that was published by SUNY Press, and the other a collection of international essays entitled *Feminist Theories of Crime* published by Ashgate. *Fighting for Girls* (co-edited with Nikki Jones) won an award from the National Council on Crime and Delinquency for "focusing America's attention on the complex problems of the criminal and juvenile justice systems." Nationally recognized for her work on women and crime, her testimony before Congress resulted in national support of gender-responsive programming for girls in the juvenile justice system. Chesney-Lind is currently working with a joint CDC/NIJ project summarizing the data on the youth gang problem in the USA.

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Matthew R. Draper is an Associate Professor of Behavioral Sciences at Utah Valley University, where he has worked for four years. His teaching specialization is in the areas of psychotherapy theory and practice, the history of psychotherapy, and philosophy of the behavioral sciences. Matt's research and scholarship entail careful examinations of the philosophy and practice of psychotherapy, particularly the moral philosophy of psychotherapy, from a broadly hermeneutic and dialogic frame. Clinically, he has worked as a psychotherapist in a broad and diverse array of settings, from university clinics, to refugee treatment centers, to hospitals, to maximum and supermaximum prisons. Currently he maintains a private practice in Orem UT, where he works with members of various marginalized groups like Mormon fundamentalists, those working through probation or parole, those struggling with sobriety, and immigrants trying to find their way in the USA. His philosophy of psychotherapy engages the whole Being from an engaged and compassionate frame. In his personal life Matt lives with his beloved wife and three children in Springville. He would like to thank Matt Andersen for his indispensable help with finding articles, writing summaries, and formatting.

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Harry Wu is the Executive Director of the Laogai Research Foundation and a human rights activist. In 1957, the Chinese Communist Party (CCP) labeled Mr. Wu as a "Counter-revolutionary Rightist." He was arrested in 1960 and subsequently spent 19 years inside China's *Laogai* camp system. He was released in 1979, having survived dangerous working conditions,

starvation, and physical abuse. Mr. Wu came to the USA in 1985 as a visiting professor at University of California, Berkeley, and later, a visiting scholar at the Hoover Institute, Stanford University. After testifying before the US Congress about the *laogai* system, he established the Laogai Research Foundation (LRF) in 1992. During his final trip to China in 1995, Mr. Wu was apprehended at the Chinese border and arrested for "stealing state secrets." Having gained American citizenship years earlier, however, he was exiled from China before being required to serve yet another 15-year sentence. Mr. Wu has received numerous awards for his activity; he has been nominated as a candidate for the Nobel Peace Prize. In 2008, his research foundation established the Laogai Museum to raise public awareness of the *laogai* and further the goal of promoting human rights advocacy.

Foreword
Classicide in Communist China
Harry Wu

The Routledge Handbook of International Crime and Justice Studies is about recognizing the problems that come from investing in crime and punishment, and about recognizing the possibilities of what could be when investing in justice and freedom. What is needed to mobilize and activate these recognitions is self-in-society transformation. Mr. Wu underwent (and continues to undergo) this transformation. Mr. Wu's personally-moving, historically-embedded, and harm-producing description of "classicide" in Communist China reveals these recognitions and transformations. His experiences in the *laogai*, his release, his political dissent, and his current advocacy on behalf of all those who remain existentially, materially, and corporeally confined, are all captivating in their effects. These effects capture in imagination, through words, and in practices, the culturalizing of a liberated China that Mr. Wu seeks to dignify, honor, and affirm. For Mr. Wu, this is a revolution in the making for a people yet to be.

Although excited by the opportunity to share my perspective, I felt slightly apprehensive when I received the request from Dr Bruce A. Arrigo and Ms. Heather Y. Bersot to write the *Handbook's* Foreword. Due to the fact that I had been sentenced to life in *laogai* after graduating from the Geology Department of Beijing Geology College in 1960, I had spent much of my adulthood far removed from the demands of academic writing. In fact, during the 19 years I spent in the labor camp, I had virtually no access to pens, papers, or books. The only books that I owned as a prisoner, among them *Les Misérables*, were taken from me in 1966. Prison guards subsequently burned these books in front of me and then beat me until my left arm was broken. From this time until 1979, the year I was released from *laogai*, I was totally cut off from all books.

In light of my limited access to educational materials during these years of intense struggle, I felt somewhat unprepared to write a piece for an academic publication. Although I have since worked at venerable institutions, spent countless hours researching the *laogai* system, and received several honorary PhDs, my background differs significantly from those who have earned a PhD in their respective field. Nevertheless, I think that my first-hand account of life in a *laogai* could help advance understanding of this pressing issue in academic circles.

A new vocabulary

In 1993, a *Washington Post* reporter asked me: "What do you want to do?"

I said: "I want to see the word 'LAOGAI' in every dictionary. I want to see the *laogai* system ended."

Since this interview 20 years ago, I have often wondered why the word "gulag" is widely understood to refer to the Soviet labor camp system, while the word "laogai" remains largely unfamiliar to the educated public. Does China not have a repressive communist government? Has China not tortured and murdered its own people? I am unable to think of a compelling explanation for this gap in understanding.

Laogai is a normal word in China. Millions of people have been incarcerated in *laogai*, and the system continues today. People use this word instead of jail or prison. Everyone understands that this word refers to the Communist Party's prison system, which is designed to control people by using so-called "reform through labor."

In addition to the word "laogai," I am perplexed as to why the word "classicide" is not a part of the popular lexicon. In fact, after years of reflection, I think it is equally necessary to add the word "classicide" to standard dictionaries. Moreover, as the operation of the *laogai* camps served as a primary means through which the Party conducted its classicide, an understanding of this campaign of systematic persecution is essential to comprehending the legacy of the *laogai*.

The roots of the practice of classicide in China can be traced back to Mao's lie that his Communist Revolution would save lives and make everyone rich. In order to achieve this goal, Mao asserted that China would first have to abolish two classes: the landlord class and the capitalist class. The resulting violent purges ended in the deaths of millions. Subsequent Maoist policies caused the deaths of an estimated 65 million Chinese people during peacetime. In light of the scale of suffering inflicted during communist purges, we should recognize Mao's systematic persecution of "class enemies" in the same way that we acknowledge Hitler's genocidal persecution of the Jews.

The roots of China's classicide

In order to consolidate power, Mao Zedong implemented a nation-wide ideology aimed at eradicating those who previously had held power in China. According to this theory, society is composed of different classes of people who can be divided into two major groups: the exploiting class and the exploited. Mao delineated these two groups so that he could more clearly classify those who held power in pre-Communist China, members of the so-called exploiting class. In order to identify such people, Mao launched a political campaign to determine each person's political and social status. This campaign entailed determining an individual's class status based on the amount of land owned, capital controlled, property held, and income earned (as well as the situation of their family members). Everyone was subsequently designated as a member of the landlord class, the capitalist class, the rich peasant class, the middle peasant class, or the poor worker and peasant classes.

The poor classes were praised for their humble way of life and work ethic. As such, they willingly supported the Communist Party. Meanwhile, the landowners and capital owners – the wealthy, the intellectual elite, and the remnants of Chiang Kai-shek's Nationalist government – were demonized and persecuted as "black classes." Not only did the government seize their property, they were also sent to perform the most difficult and dangerous manual labor in the countryside. Some of these people were beaten to death during various political movements, and many were sent to the *laogai* – China's forced labor prison system.

The Communist Party proclaimed that "class struggle" was necessary to promote social development and that the ensuing violence was necessary to establish a proletarian socialist state. According to research, there were around 20 million members of the landlord and rich peasant and capitalist classes nationwide in 1949. By the end of the 1970s, when the Cultural Revolution had ended, less than 10 percent of this class remained.

"Rightists" and "black classes" under Mao

I was sent to *laogai* as a result of my background and comments I made at a student political meeting held at my university. Specifically, I criticized the Soviet suppression in Budapest in 1956 and disagreed with the Communist Party members' treatment of common people as second-class citizens. The fact that I was a Catholic in a country that frowned upon religion, particularly Christianity, provided additional justification for my persecution. In the end, authorities labeled me "bourgeoisie-counterrevolutionary-rightist" and sentenced me to *laogai* in 1960.

Mao Zedong had stipulated that 10 percent of intellectuals must be "Rightists," which meant that at least two people in my university class had to wear this label. Conveniently, only two others among the 30 students had a negative class background like mine. Unfortunately for my fellow classmates and citizens who were members of the "black classes," a group that managed to avoid persecution during this "Anti-Rightist" campaign, Mao targeted the rest of the exploiting class during the horrors of the Cultural Revolution.

Persecution of the "black classes" raged throughout the Cultural Revolution. On August 18, 1966, in Beijing, Mao Zedong unleashed the Cultural Revolution when he directly called on the "Red Guards" to "make revolution." Under Mao Zedong's direction, the Red Guards incited violence and social chaos. These soldiers of the revolution, mainly comprised of Chinese youth, terrorized class enemies while waving a book entitled, "Revolutionary Quotations of Mao Zedong." Although this campaign began in schools, it quickly spread to the streets, where these bands of angry youths annihilated "class enemies," the remaining members of the exploiting class. From August 18 to the end of September 1966, 1714 of the "five black elements" were beaten to death. However, there are no statistics indicating how many were killed or injured, how much property was confiscated, or how many were sent off to the *laogai*. This kind of annihilation was carried out throughout the country.

Only in the 1980s did the CCP make new policies to remove the "hats," the term for the labels given to different classes of society. This change, however, came too late; nearly all members of the landlord and rich peasant classes in the countryside had been exterminated during the preceding 30 years. To this day, no one has been put on trial for these atrocities.

Classicide as a legacy of the Chinese Communist Party

Since the establishment of the People's Republic of China (PRC) in 1949, China has known only one form of government: the authoritarian communism of Mao. Although China has undergone some 30 years of major social and economic transformation, the fundamental system of dictatorship established by Mao has not changed. Why is this? I propose that it is because China's communist leaders are deeply afraid of relinquishing power. As notions of freedom, democracy, and human rights are antithetical to their one-party dictatorship, they see meaningful political reform as a threat to their monopoly on power.

The Party of Xi Jinping, Hu Jintao, Jiang Zeming and Deng Xiaoping is the Party of Mao Zedong. We cannot just forget the crimes committed against humanity over the course of its 64-year history. The world rightfully remembers the horrors of the Holocaust, where around

12 million were killed. Many in the West, however, do not realize that systematic persecution took place on an even greater scale in the PRC. Under Mao's reign, scholars estimate that 65 million people died of unnatural causes – many of whom were killed because of their class background.

"Genocide," as defined by the United Nations, "involves acts committed with the intent to destroy a national, ethnic, racial or religious group." Importantly, acts of genocide are not limited to killing. Rather, genocide also encompasses mental harm and restrictions on people's rights and freedoms. Although the victims of Mao's purges were targeted for their class background, the brutal and widespread persecution they endured deserves the same degree of international recognition accorded to victims of genocide. Moreover, considering that the political party that perpetrated this classicide continues to govern China, it is imperative that we acknowledge these horrific crimes. Hopefully, increased international recognition will prompt the Chinese people to directly confront the harsh truths of the past, the reality of the present, and the prospects for change in the future.

The *laogai* as the machinery of Chinese repression

Tyrannical governments require a system of suppression to maintain power. Hitler had the concentration camps and Stalin had the Gulag. Similarly, since the dawn of the PRC, Chinese authorities have never hesitated to use forced labor prison camps in their efforts to maintain political control. In China, they are called the "laogai," the literal translation of which is "reform through labor." Over time, this word has come to stand for the regime's vast system of politically imposed slavery. *Laogai* forced labor prisons continue to serve as a vital tool in the Party's efforts to eliminate political opposition.

Mao and subsequent CCP leaders demanded that the *laogai* produce two kinds of "products": first, the prisoner himself – the "reformed socialist person." This extermination of "thought" is possibly the greatest invention of the CCP. The second kind of product refers to the agricultural, industrial, and consumer goods needed to fuel the nation's economy. "Thought reform," as CCP officials say, is: "The use of forced labor to reform the thinking of criminals and transform them into self-dependent, socialist new men." This is brainwashing! The CCP wants all prisoners, from thieves and murderers to political and religious "criminals," to abandon their political or religious beliefs, reform their incorrect social views, and live life according to communist rule. They must either learn to support the Party while in prison or never gain release. Should they dare to voice any public criticisms of the government, they could find themselves locked up in prison again.

Remembering the past for the sake of the future

Many Western academics choose to ignore the significance of the *laogai*, even though it has existed for more than 60 years. The Laogai Research Foundation estimates that, since 1949, almost 40–50 million people have been thrown into the *laogai*. However, all information related to the *laogai* is treated as a state secret, which means no outsiders know the true number of victims who have suffered under this brutal system.

Ignoring the *laogai*, however, could have devastating effects. Just as China's economy is now booming, Germany's economy expanded by 73 percent from 1933 to 1937, and most Germans agreed with Hitler's policies. Meanwhile, foreign businessmen cooperated with German companies. No nation saw any reason to boycott the 1936 Olympic Games in Berlin. Not until 1939, when Germany invaded Poland, did the world realize Hitler's intent. Further, only when

people were liberated from the concentration camps did the world began to fully understand the scale of this atrocity.

Thankfully, we have witnessed the end of the regimes of Hitler and Stalin. In China, however, the world's most extensive system of forced labor camps persists. We cannot condemn the atrocities committed in the camps of Hitler and Stalin and ignore the continuing brutality of the *laogai*. The USA never dreamed of doing business with the Soviet Union during the Cold War, especially in the fields of science and technology. Yet, business with China is ever increasing, even as the rising global power becomes a major security threat to the USA and other democratic nations.

Capitalism is growing widely and rapidly in China today. In 1978, Deng Xiaoping put aside the communist economic ideology in favor of adopting a capitalist system. However, this was never intended to resemble Western capitalism; it is capitalism under the limitations of a one-party state. As the government controls the land and the market, this market-friendly "communist" regime is not bad for business. Meanwhile, cooperation with foreign companies is at an all-time high and the economy's growth rate is holding strong. Unfortunately, the leadership in Beijing is not only using this money to strengthen its control over the Chinese people, it is also giving China unmatched bargaining power in its foreign relations.

We now know that capitalism does not automatically give rise to democracy and freedom. In today's China, those with wealth are largely those with political power. Conveniently, the flag of "class struggle" is no longer raised. Having eliminated a large portion of the nation's intellectuals and capitalists, Communist Party members and their offspring have filled the void created by decades of slaughter. Moreover, class divisions in Chinese society have become increasingly apparent. The working class, held up on a high pedestal throughout Mao's reign, is in fact struggling to get by as Chinese government officials get rich from corrupt business deals. Ironically, this new China has been built upon *ideas* ostensibly detested by Mao Zedong.

China's new leader, Xi Jinping, will not change the existing political system. Have we ever heard Deng Xiaoping, Jiang Zemin or Hu Jintao publicly condemn Mao Zedong, who died back in 1976? No, because China is not a "former" communist country. Modern China remains under the firm control of the Chinese Communist Party. Although the Party has enacted market reforms, its core ideology is incompatible with freedom and democracy. The continued persecution of political activists and the recent tide of Tibetan self-immolations clearly demonstrate that there has been no meaningful improvement of freedom of expression, assembly, or religion. In fact, the situation is getting worse.

The PRC is now facing an enormous political, ideological, social and economic crisis. At this critical moment, the people of the world, and particularly the Chinese people, must realize that if China wants to become a free, democratic, and prosperous nation, it must have a clear understanding of its own dark history. Such collective reflection is necessary in order to ensure that we do not repeat the violence of the past. Only after learning from history can the Chinese people know what must be rebuilt; only then can they know how to move forward.

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Introduction
Recognizing and transforming International Crime and Justice Studies

Bruce A. Arrigo and Heather Y. Bersot

We live, all of us, at a time when the global perils of crime and the world-wide promises of justice compete for recognition. This notion of recognition is not new; after all, Plato's (2008) "Allegory of the Cave" (if anything) is a metaphor about the existential and material captivity born of the appearances through which meaning is made, choices are discerned, judgments are reached, and actions are undertaken (Arrigo 2012). Interestingly, the landscape of (Western) philosophy, with astonishing frequency, is populated by this captivity *motif* and its manifest "shadows" (Plato's appearances cast on the cave's wall by the fire's light) that limit perception, restrain thought, and govern behavior (Arrigo 2011).

Consider, for example, how the shadow is historicized in Hegel's (1979) master/slave dialectic; is internalized in Freud's (1965) and interpersonalized in Jung's (1976) psychoanalytic formulations; is culturalized in the Frankfurt School's critiques of capital logic (Marcuse 1955), in freedom (Fromm 1994), and in the mass-produced culture industry (Adorno and Horkheimer 2002); is corporealized in existential phenomenology (Merleau-Ponty 1983) and hermeneutic ontology (Ricoeur 1970); and is de/re-textualized in various postmodernist analyses of educational (Freire 1970), political (Laclau and Mouffe 2001), legal (Unger 1987), and related life-world struggles (Bauman 1998). In each instance, release from the bondage that confines and constricts – whether self or other imposed; whether symbolically, linguistically, materially, or culturally enacted – longs for recognition and transformation.

So, one might ask, what is it that the shadow has problematized throughout its history as continuously revealed through its manifest landscape of appearances that bind and check? The answer is as simple as it is elusive. The subject of inquiry is the social person, the self that is both in and of society, and the project of human/social progress that longs for "revolutionary" transformation (Deleuze and Guattari 1984, 1987). This condition or state of revolution is the will-to-power about which Nietzsche (1968) wrote. When will is summoned, the inner life force of potentiality emerges (e.g., in personal growth, in collective change). When will is harnessed, the power that it unleashes is the human/social project of boundless and dynamic possibilities – in imagination, creativity, social relating, and culturally communalizing. This is the human/social project as movement (being) toward experimentation, innovation, and evolution; and as a body without stasis, predictability, categories, or other captivity-generating limits or denials. This is the human social project as becoming, always and already, revolutionary (Deleuze 1983).

When recognizing the perils of crime and the possibilities of justice internationally, one emergent, albeit arresting, critique asserts that the competition or struggle that is waged by the contemporary social person ensures a quality of captivity wherein perception, thought, and action are so narrowly, tightly, and rigidly conceived that embracing these recognitions (i.e., making meaning, discerning choice, reaching judgment, and undertaking action through any and all of them) guarantees the reproduction of a kind of madness (Arrigo *et al.* 2011). This is the madness of totalizing confinement – in image, meaning, and practice – for the self-in-society, and for the project of human/social progress (e.g., Young 2007; Beck 2009; Hardie-Bick and Lippens 2011). Indeed, the global appearances of crime and the world vistas for justice – often incomplete and fragmented, fictionalized and formulated, a-historicized and disembodied, sensationalized and trivialized, virtualized and serialized – remind us that the bondage and repression to which Plato alluded troublingly endure for the social person of today. This is the in-and-of-society self as criminological educator, learner, and policy-maker; as institutional expert, treatment specialist, or community activist; as police, court, correctional worker or manager; as system user, accuser, or abuser; and as industry regulator, decider, or executor. Captivity, it seems, is ubiquitous in its internationalism, its cosmopolitanism.

To recognize this captivity is to acknowledge that only *traces* of (partial stories about) and *signs* for (bounded meanings regarding) law and crime, justice and community, freedom and punishment, rights and responsibilities, duties and interests, recovery and restoration, being and becoming, etc., currently exist (e.g., Kevelson 1988; Young 1997; West 2004; Arrigo *et al.* 2005; Carlen 2008). These stories and meanings are no more than whispers about and glimpses of human/social progress, and they presently restrict sense-making, politicize choice, and organize behavior in fearfully dangerous and desperately vigilant harm-intensifying ways (O'Malley 2004; Lippens and Crewe 2009; Simon 2009). Indeed, it is this consciousness, hailing, and branding that "order things" (Foucault 1966); that render the in-and-of-society self as disciplined, domesticated, and docile (Foucault 1977). The forces of will (i.e., the cognitive maps) that settle upon these traces and signs reduce/repress the horizon of perceptions, thoughts, and actions for, by, and about the social person to fixed and circumscribed constructions (i.e., images, meanings, and practices) for and about crime and justice (Arrigo 2011; 2012). Regrettably, the summary representations that follow from these portraits and partialities finalize being (Bahktin 1982) and forestall becoming (Deleuze 1983). Moreover, when this ordering, categorizing, and rendering of reality is nurtured or otherwise maintained, it ensures bad faith (Sartre 1956) and false consciousness (Marx 1964). Overcoming both of these conditions (i.e., self-deception and "escape" from freedom; hegemony's otherizing and reification's fetishizing), and the pseudo-selves and social façades that support and sustain their limit-setting and denial-imposing shadows (i.e., the "crimes" of self-deception, escaping freedom, otherizing, and fetishizing), is a revolution that awaits recognition (e.g., Arrigo and Milovanovic 2009). This is a revolution that has the power to transform, both dynamically and productively, the criminological shadow.

This *Handbook* begins the insurgent task of recognition and transformation in international crime and justice studies. At issue are the human/social forces, intensities, flows and assemblages (i.e., the conditions of control) that nurture the consciousness, the being, of bad faith and that fuel the presence, the embodying, of false consciousness. The iterative reproduction of this consciousness and presence is the criminological shadow normalized. How does this normalization occur?

The normalization of the criminological shadow – of image, meaning, and practice that inhabit self-deception, otherizing, and fetishizing – depends on several interdependent and interactive conditions of control. These forces, intensities, flows, and assemblages are symbolic, linguistic,

and material in essential composition. The dominant forms that these conditions assume tell us a great deal about the contemporary status of the criminological panorama worldwide. At their most manifest level, the conditions of control include forms of *consumerism* (the consumption of preferred images/symbols for and about crime and justice), *politics* (the telling of privileged meanings and the creating of "master" discourses for and about crime and justice), and *technology* (the manufacturing of prevailing bodies of lived/practiced truth for and about crime and justice). The globalized reproduction and circulation of these dominant forms assure that the criminological shadow is culturalized internationally. This cosmopolitanism is bad faith and false consciousness held captive by a faint aesthetic (distorted images for and about crime and justice), a fictionalized epistemology (unfinished stories for and about crime and justice), and a fragmented ethic (partial histories of embodied truth and progress for and about crime and justice). Again, it would seem, as if captivity is ubiquitous.

The specific Parts of the *Handbook* intend to communicate that the forms of consumerism, politics, and technology that constrain and constrict, indeed, are manifold. These forms include, among others, the narratives of theory, identity, and societal construction; the systems of policing, law, punishment and corrections; the industries about crime and the enterprises on behalf of justice; the hazards, conflicts, transitions, and/or responsibilities in environmental and public health risk management and in state and political violence; and the trade and commerce in colonialism, nationalism, and even globalism. In each of these instances, chapters question (in unique although complementary ways) the perils of crime and the possibilities of justice, especially when their appearances or shadows confine and foreclose the social person's productive, dynamic, and untapped potential. Again, this is the human/social project awaiting critical recognition and revolutionary transformation (Delanty 2009; Polizzi and Draper 2009; Arrigo *et al.* 2011).

The attention that the *Handbook* draws to consumerism, politics, technology – including their globalized cultural reproductions – is deliberate; thus, these notions warrant further, although admittedly brief, philosophical and pedagogical clarification. *Consumerism* is a reference to the topography of the unconscious. This is the realm or sphere of influence wherein symbols for crime and about justice register psychically or as pictures in our minds. These pictures or images, once put into language, communicate and capture a particular aesthetic sensibility for, by, and about the social person. In other words, these images, when perceived and spoken of as such, image-craft (i.e., symbolize) the in-and-of-society self from a particular point of view. Many of the *Handbook*'s chapters probe the landscape of crime and justice and the visions (i.e., the symbols about them) that we consume globally.

Politics is a reference to the unconscious image made thematic – to the symbolization put into words, spoken of, and written about as a "text." This is the realm or sphere of influence wherein narratives for crime and about justice abound as they compete in the marketplace of ideas for recognition. The coherence of these marketplace narratives suggests that knowledge abounds; however, favored discourses (e.g., evidenced-based criminology; the digital surveillance and policing of risk; the threat assessment science of offender profiling, institutional corrections, and offender treatment; and the actuarial forecasting of community reentry, recovery, and resocialization) govern the epistemological terrain. These texts narrate (write) the in-and-of-society self from within a particular perspective, from within a preferred (and therefore circumscribed) logic and language. Much is left out, deferred, or dismissed in these renditions of human/social progress. The social person is caricaturized and de-realized when only these "performances" are cyclically maintained. Many of the *Handbook*'s chapters examine and critique the dominant voices, stories, and meanings for and about crime and justice studies internationally that write the history of both, authoritatively, incompletely, and therefore exclusively.

Technology is a reference to the stories of crime and about justice that are breathed in and exhaled as lived history, as embodied practice. This is the realm or sphere of influence wherein bodies of knowledge, regimes or truth, and discursive formations are inhabited. This is the social person taking up residence (perceiving, making meaning, and acting) from within a *dispositif* or apparatus that "disciplines" the social person vis-à-vis the apparatus' own (ethical) image. These are the devices, mechanisms, and techniques of crime control and justice-making that exact compliance, administer conformity, and render order, existentially, corporeally, and materially. Many of the *Handbook*'s chapters specify and/or critique the bodies of knowledge (i.e., the devices of surveillance, the mechanisms of inspection, and the techniques of regulation) in crime and justice studies internationally that function as the embodied machinery of contemporary civilization. These apparatuses manage risk, manufacture the in-and-of-society self, and often (and regrettably) certify the human/social project of only utility, efficiency, and obedience.

The Routledge Handbook of International Crime and Justice Studies recognizes and transforms the global perils of crime and the worldwide promises of justice. It does so through words, through comprehensive chapters that examine and dissect the key criminological, legal, and penological controversies of our fear-ridden and desperate-driven era. Speaking "true" words (Freire 1970) is how a revolution in-the-making begins. This is how release from the shadows that bind and check one and all commences. Chapters are authored by a distinguished collection of experts spanning the disciplines of law, medicine, history, economics, sociology, politics, philosophy, education, public health, and social policy. And, while no one volume can solve the problems that the world confronts in the digital age of global interconnectivity and information-only redundancies, this *Handbook* takes these problems on directly, cogently, and insightfully. This is how will is (and should be) productively and dynamically mobilized in the service of power, being and becoming, and the overcoming of bad faith and false consciousness normalized and culturalized globally.

References

Adorno, T. and Horkheimer, M. (2002) *Dialectic of Enlightenment*, Stanford, CA: Stanford University Press.
Arrigo, B. A. (2011) "Madness, Citizenship, and Social Justice: On the Ethics of the Shadow and the Ultramodern," *Law and Literature*, 23(3): 404–441.
Arrigo, B. A. (2012) "The Ultramodern Condition: On the Phenomenology of the Shadow as Transgression," *Human Studies: A Journal for Philosophy and the Social Sciences*, 35(3): 429–445.
Arrigo, B. A. and Milovanovic, D. (2009) *Revolution in Penology: Rethinking the Society of Captives*, Lanham, MD: Rowman and Littlefield.
Arrigo, B. A., Milovanovic, D. and Schehr, R. C. (2005) *The French Connection in Criminology: Rediscovering Crime, Law, and Social Change*, New York: SUNY Press.
Arrigo, B. A., Bersot, H. Y. and Sellers, B. G. (2011) *The Ethics of Total Confinement: A Critique of Madness, Citizenship, and Social Justice*, New York: Oxford University Press.
Bakhtin, M. (1982) *The Dialogic Imagination: Four Essays*, Austin, TX: University of Texas Press.
Bauman, Z. (1998) *Globalization: The Human Consequences*, Oxford: Blackwell.
Beck, U. (2009) *World at Risk*, Cambridge: Polity Press.
Carlen, P. (2008) *A Criminological Imagination: Essay on Justice, Punishment, Discourse*, Aldershot: Ashgate.
Delanty, G. (2009) *The Cosmopolitan Imagination: The Renewal of Critical Social Theory*, New York: Cambridge University Press.
Deleuze, G. (1983) *Nietzsche and Philosophy*, New York: Columbia University Press.
Deleuze, G. and Guattari, F. (1984) *Anti-Oedipus: Capitalism and Schizophrenia*, Minneapolis: University of Minnesota Press.
Deleuze, G. and Guattari, F. (1987) *A Thousand Plateaus: Capitalism and Schizophrenia*, Minneapolis: University of Minnesota Press.

Foucault, M. (1966) *The Order of Things: An Archeology of the Human Sciences*, New York: Vintage.

Foucault, M. (1977) *Discipline and Punish: The Birth of the Prison*, New York: Pantheon.

Freire, P. (1970) *Pedagogy of the Oppressed*, New York: Continuum.

Freud, S. (1965) *The Interpretation of Dreams*, New York: Avon Books.

Fromm, E. (1994) *Escape from Freedom*, New York: Henry Holt and Company.

Hardie-Bick, J. and Lippens, R. (eds.) (2011) *Crime, Governance, and Existential Predicaments*, Basingstoke: Palgrave Macmillan.

Hegel, G. F. W. (1979) *Phenomenology of Spirit*, New York: Oxford University Press.

Jung, C. (1976) "Aion: The Phenomenology of the Self," in J. Campbell (ed.) *The Portable Jung*, New York: Viking Penguin.

Kevelson, R. (1988) *The Law as a System of Signs*, New York: Springer.

Laclau, E. and Mouffe, C. (2001) *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, 2nd edn, New York: Verso.

Lippens, R. and Crewe, D. (eds.) (2009) *Existential Criminology*, New York: Routledge-Cavendish.

Marcuse, H. (1955) *Eros and Civilization*, Boston: Beacon Press.

Marx, K. (1964) *The Economic and Philosophical Manuscripts of 1844*, New York: International Publishers.

Merleau-Ponty, M. (1983) *The Structure of Behavior*, Bloomington, IN: Indiana University Press.

Nietzsche, F. (1968) *The Will to Power*, ed. W. Kaufmann, New York: Vintage Books.

O'Malley, P. (2004) *Risk, Uncertainty, and Government*, London: The Glasshouse Press.

Plato (2008) *Republic*, trans. R. Waterfield, New York: Oxford University Press.

Polizzi, D. and Draper, M. (eds.) (2009) *Transforming Corrections: Humanistic Approaches to Corrections and Offender Treatment*, Durham, NC: Carolina Academic Press.

Ricoeur, P. (1970) *Freud and Philosophy: An Essay on Interpretation*, New Haven, CT: Yale University Press.

Sartre, J-P. (1956) *Being and Nothingness: An Essay on Phenomenological Ontology*, New York: Philosophical Library Press.

Simon, J. (2009) *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*, New York: Oxford University Press.

Unger, R. (1987) *False Necessity*, New York: Cambridge University Press.

West, R. L. (2004) *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law*, Aldershot: Ashgate.

Young, A. (1997) *Imagining Crime*, London: Sage.

Young, J. (2007) *The Vertigo of Late Modernity*, London: Sage.

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Part I
Theory, culture, and society
The narratives of crime and justice

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1

Four currents of criminological thought

Bruce DiCristina, Martin Gottschalk and Roni Mayzer

Scholarly views on crime, criminals, and responses to crime have varied markedly over the past three centuries, and this continues to be the situation today in the field of criminology. Through the work of researchers from many nations, criminology began to emerge as a secular field of study during the eighteenth century and was well established by the late-nineteenth century. Over the course of its development, it has maintained a multidisciplinary orientation drawing on the work of philosophers, biologists, psychologists, sociologists, historians, and those working in other disciplines as well (e.g., economists).

   The aim of this chapter is to provide a sketch of four broad currents of criminological thought: (1) the classical tradition; (2) biological/psychological paradigms; (3) mainstream sociological perspectives; and (4) critical criminology. All of these currents, in one form or another, continue to flow through the field of criminology. Each one consists of multiple perspectives and has changed form over time as new theories have emerged and as established theories have lost their appeal. Although these currents entail different and sometimes conflicting reality-claims, they also intersect at times and, hence, are not mutually exclusive.

The classical school: a wellspring of secular criminology

The eighteenth century was a time of rapid change in Western societies. The Enlightenment reached its peak, and with it there was a fundamental shift in intellectual life as secular inquiry increasingly replaced religious thought. The American and French Revolutions, which occurred in the latter half of the century, marked an important change in political beliefs and institutions, with hereditary monarchies giving way to more democratically-based republics. Moreover, modern capitalism was taking form and the Industrial Revolution was beginning to emerge, two closely associated phenomena that entailed a major transformation in class relations and in the material conditions of social life. It was in this context that the classical school of criminology emerged as arguably the first distinct branch of criminology.

   At its inception, the classical school was shaped by the work of scholars from several nations. In his widely read publication, *An Essay on Crimes and Punishments* ([1764] 1819), the Italian scholar Cesare Beccaria integrated elements of Enlightenment thought to establish what would later be labeled the "classical school." Twenty-five years after the publication of this work, the English philosopher Jeremy Bentham, in *An Introduction to the Principles of Morals and Legislation*

([1789] 1948), developed a similar theoretical framework that increased the precision of this school and furthered its popularity. Of course, before Beccaria and Bentham, other Enlightenment intellectuals, including the Scottish philosopher Francis Hutcheson and the French *philosophe* Montesquieu, began to set the foundation for the classical school (see Beirne 1993).[1] Today, nearly two and a half centuries after the appearance of Beccaria's *Essay*, the imprint of these scholars still can be seen in contemporary economic, rational choice, and deterrence theories.

Guided by the utilitarian principle and, to some extent, social contract reasoning, the classical school encouraged a secular understanding of crime and punishments designed to deter offenders. The secular content of their work represented a significant break from the theological mode of thought that was still common during the eighteenth century. Indeed, Montesquieu, Beccaria, and Bentham had one or more publications condemned by the Roman Catholic Church and placed on its *Index Librorum Prohibitorum*.

Beccaria's *Essay* represents the cornerstone of the classical school and embodies a combination of utilitarianism and social contract theory.[2] Although elements of utilitarianism can be found in the writings of the Greek philosopher Epicurus (see Scarre 1994), it gradually evolved into a distinct branch of philosophy during the seventeenth and eighteenth centuries. Bentham was one of the primary architects of utilitarianism, but the utilitarian principle, in one form or another, had been proposed prior to his work. Utilitarians assert that actions and social arrangements should be judged according to the extent to which they increase happiness (pleasure) and decrease unhappiness (pain); if they generate a net increase in pleasure or a net decrease in pain, they have "utility" and are acceptable. A variation of this principle was proposed by Hutcheson in 1725. At that time, he suggested that our "moral sense" encourages conduct that is oriented toward "the greatest Happiness for the greatest Numbers" (Hutcheson [1725] 2004: 125). Later in the eighteenth century, both Beccaria ([1764] 1819: xi) and Bentham ([1789] 1948: 1–7) expressed their support for this principle.

In view of the utilitarian principle, the classical school suggests that a just criminal justice system is one that effectively pursues "the greatest happiness for the greatest numbers." In other words, the criminal justice system should serve the interests of the general public; it should not be designed to support only the interests of a ruling minority (e.g., a royal family), although it may support their interests to the extent that they are connected to the interests of the general public. Moreover, the term "crime," especially following the logic of Bentham, should be reserved for acts that cause substantially more pain than pleasure for the members of a society. In this connection, a deviant act that causes a net increase in pleasure should not be punished as a crime; and a punishment that causes a net increase in pain, a real possibility if "all punishment in itself is evil" (Bentham [1789] 1948: 170), is unacceptable.

Much like utilitarianism, elements of social contract theory date back to ancient Greek philosophy (see Plato's "Crito") and were later developed with greater clarity during the seventeenth and eighteenth centuries, primarily through the work of Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. Hobbes, Locke, and Rousseau offered different conceptions of "the state of nature" and supported different forms of government, but each of these theorists suggested that it is reasonable for individuals to exchange some of their liberties for the security and other benefits that can be gained by living with others in a society under its government. It is argued that without this agreement (the social contract) and the mechanisms to enforce it (e.g., penal laws), individuals would be subject to coercion from others that would be more oppressive than the terms of the exchange. Within the framework of Hobbes's theory, it would be a situation "where every man is enemy to every man" (cited in Ebenstein 1962: 368).

Although social contract reasoning was excluded from Bentham's work, it has a prominent place in Beccaria's theory, where it is used to help justify punishment. According to Beccaria's

viewpoint, a government based on a just social contract has the right to impose punishments on individuals who violate it (that is, break the laws of the society). However, given the utilitarian logic embedded in Beccaria's work and the classical school in general, the right to punish is constrained by the utilitarian principle; it is dependent on whether the social contract is acceptable according to utilitarian standards. If the exchange of liberties for security is not geared toward "the greatest happiness for the greatest numbers," the social contract is unacceptable and punishment, at least in some cases, will be unjust. Combining utilitarian and social contract reasoning, Beccaria proceeds to provide a list of requirements that need to be met for punishment to be acceptable. For Beccaria ([1764] 1819: 160), "it should be public, immediate, and necessary, the least possible in the case given, proportioned to the crime, and determined by the laws." Bentham ([1789] 1948) agrees with most of these requirements but presents a more extensive list. For both of these authors, the requirements they propose are rationalized by a particular theory of human nature and crime.

According to the traditional interpretation of their work, which still may be the most popular in the field of criminology, the theorists of the classical school assume that humans are hedonistic, rational, and free. The suggestion that people are hedonistic, that we are driven by a desire to maximize pleasure and minimize pain, is clearly evident in the literature of the classical school. Bentham ([1789] 1948: 1), for instance, implies that pleasure and pain "determine what we shall do." These sensations are our "masters": "They govern us in all we do, in all we say, in all we think" (ibid.: 1). Likewise, the suggestion that people are rational – that to some extent, prior to acting, we weigh the amount of pleasure that may be derived from a particular action against the amount of pain that may be suffered – is evident in the literature of this school. Bentham, again, offers a useful example: "Men calculate, some with less exactness, indeed, some with more: but all men calculate. I would not say, that even a madman does not calculate" (ibid.: 188).

But what about the assumption that humans have free will, that we freely choose between different courses of action? Is this truly an assumption of the classical school? Different opinions exist on this issue, although currently perhaps the most persuasive position is to exclude this assumption from the original framework of the classical school (see Beirne 1993). Both Beccaria and Bentham appeared to embrace some degree of determinism. Consider, for instance, Bentham's comments on pleasure and pain governing us and determining what we do. If they "determine what we shall do," can we have free will?[3]

Excluding the assumption of free will, the core proposition regarding human behavior embodied in the works of the classical theorists may be described in the following terms: An individual will engage in a course of action that is expected to bring the greatest pleasure (or least pain), even if it is a criminal action. In this interpretation, the action is compelled by the person's innate hedonistic disposition and learned "expectations." Bentham ([1789] 1948: 179n2; emphasis in original) refers to "expectation of the profit (pleasure)" as "the *impelling* motive" and "expectation of the punishment (pain)" as "the *restraining* motive." These expectations of pleasure and pain vary in their accuracy and may be shaped by many different variables. For Bentham ([1789] 1948: 173), these variables include degrees of "infancy," "insanity," and "intoxication." But more importantly, since the work of Beccaria, the classical school has advocated the development of a carefully calculated system of punishments to shape these expectations and deter crime. If punishment can be used to give us the impression that criminal behavior will cause us more pain than pleasure, we should be compelled by our hedonistic disposition to avoid such behavior. And recall, for classical theorists, this impression must be made in a way that is consistent with the utilitarian principle.

For Beccaria ([1764] 1819), punishment should be public, certain, and swift. To create an expectation that pain follows from the commission of a crime, it is useful for punishment to be public, to occur in such a way that people see the suffering of offenders. If it is hidden from view, people may overlook or misjudge the pain that accompanies a given criminal act. Beccaria suggests that this is a drawback of prisons and the transportation of offenders to societies they have "never offended" (ibid.: 77). Beccaria also emphasizes that certain punishment is preferable to severe punishment, for "[t]he certainty of a small punishment will make a stronger impression than the fear of one more severe, if attended with the hopes of escaping" (ibid.: 93). Where punishment is uncertain, people are more likely to possess little or no expectation of pain when considering an offense. Regarding Beccaria's discussion of the swiftness of punishment, we find an excellent example of his general line of reasoning. In his words:

> The smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of *crime* and *punishment*; so that they may be considered, one as the cause, and the other as the unavoidable and necessary effect.
>
> (ibid.: 75; emphasis in original)

Overall, public, certain, and swift punishment is presented as an effective means for creating among a population an automatic tendency to associate pain with the commission of a crime. Beccaria implies that ideally "the seducing picture of the advantage arising from the crime should instantly awake the attendant idea of punishment" (ibid.: 76).

But this is not all. For Beccaria ([1764] 1819) and the classical school more generally, punishment also should be proportionate and "the least possible in the case given."[4] These proposals reflect the efforts of Enlightenment scholars to moderate the severity of eighteenth-century punishments, and they were present to some degree in works that appeared prior to those of Beccaria and Bentham (e.g., Montesquieu [1748] 1899: 83–85, 89–91; also see Hutcheson 1755, cited in DiCristina 2012: 23–30). Regarding the proportionality of punishment, Beccaria ([1764] 1819: 28, 32) argued that a "fixed proportion between crimes and punishments" is important for the purposes of deterring serious offenses: "If an equal punishment be ordained for two crimes that injure society in different degrees, there is nothing to deter men from committing the greater as often as it is attended with greater advantage." On the need for punishment to be "the least possible," he noted that excessive punishments can prompt an offender to commit other crimes in an effort to avoid punishment for the first, and they also can make the public less sensitive to suffering (ibid.: 93–94). Remaining true to the logic of utilitarianism, Beccaria then concludes:

> That a punishment may produce the effect required, it is sufficient that the *evil* it occasions should exceed the *good* expected from the crime, including in the calculation the certainty of the punishment, and the privation of the expected advantage. All severity beyond this is superfluous, and therefore tyrannical.
>
> (ibid.: 94; emphasis in original)

In the beginning, especially as it appeared in the work of Beccaria, the classical school was applauded by many prominent scholars (e.g., Voltaire and Helvetius) and political leaders (e.g., Catherine the Great of Russia, Maria Theresa of Austria, and Thomas Jefferson of the United States). Yet it also has had many critics over the past two centuries. The Catholic Church criticized the secular orientation of the classical school. Immanuel Kant ([1797] 1965) opposed its utilitarian directive to use punishment of an individual as a means for pursuing the greatest

happiness rather than as an end in itself. Marxists, as well as other critical theorists, have described it as an essentially conservative framework oriented toward the preservation of the existing social order and its class structure. In addition, researchers who favor empirical science have been critical of the classical school's initial lack of empirical inquiry regarding the possible causes of crime, a criticism that does not apply to the contemporary forms of classical thought in criminology.

Despite its lengthy list of critics, the classical school established an influential current of criminological thought that remains strong in the field today. Although it emerged during the eighteenth century and may have reached its peak during the early nineteenth century, neo-classical thought can be found flowing through several contemporary perspectives including the economic approach to crime (e.g., Becker 1968), rational choice theory (e.g., Cornish and Clarke 1986), modern deterrence theory (e.g., Stafford and Warr 1993), and even among the micro-level assumptions of routine activity theory (e.g., Cohen and Felson 1979).[5]

Biological and psychological paradigms of criminology

Nicole Rafter (2004) makes a distinction between criminological thought and the academic discipline of criminology, and argues that the former was ushered in with investigations into moral insanity. In contrast, Marvin Wolfgang credits Lombroso with "shifting focus from metaphysical, legal, and juristic abstraction . . . to a scientific study of the criminal and the conditions under which he commits crime" (1972: 390). Still others have traced the origins of scientific criminology to Franz Joseph Gall (Critchley 1965; Savitz *et al.* 1977). Setting aside the effort to pin down an artificial starting point for criminology, we can nonetheless assert that criminology as an empirical study is deeply entwined with late-eighteenth-century and early- and mid-nineteenth-century biological and psychological investigations into criminal behavior. Moreover, in these criminological investigations, there is no clean division between biology and psychology. What distinguished this criminological current from the classical school, in addition to its methodological empiricism, was the search for individual level differences between criminals and non-criminals.

While reading a person's character in their facial features is an ancient art, one effort that is generally seen as interstitial between the spiritual and scientific studies of crime was physiognomy. The most well-known practitioner of this pseudoscience was Johan Caspar Lavater ([1775–1778] 1840). Although Lavater, who was trained as a pastor, maintained the scientific status of physiognomy, his interpretations of facial features never escaped his religious background. Another early contribution to criminological thought that had biological and psychological underpinnings was the investigation into moral insanity by physicians like Benjamin Rush, Philippe Pinel, and James Cowles Prichard (Rafter 2004). Although Rush's thought, like Lavater's, was influenced by his religious background, the study of moral insanity, nevertheless, evolved into a largely secular and empirical approach to criminal behavior. In large part, this last observation explains Rafter's claim that this early precursor to what "we today call psychopathy" (ibid.: 981) constitutes the origins of criminological thought. One also sees here the early influence of both American and European scholars on the development of criminology as Rush was an American, Pinel was French, and Prichard was an Englishman.

Moral insanity derives from work originally done by Pinel ([1801] 1962), who in the first decade of the nineteenth century outlined a condition in which patients showed no signs of hallucination or psychosis, but, nonetheless, were given to lashing out violently. Pinel called this condition *manie sans délire*. Benjamin Rush (1812) also described cases in which the sufferer showed no indications of psychosis, but who were morally "deranged." Later, J. C. Prichard gave us the term "moral insanity" and defined the condition as follows:

> This form of mental derangement has been described as consisting in a morbid perversion of the feelings, affections, and active powers, without any illusion or erroneous conviction impressed upon the understanding: it sometimes co-exists with an apparently unimpaired state of the intellectual faculties.
>
> (1835: 12)

Whitlock (1982) notes that, although moral insanity has frequently been identified with the modern notion of psychopathy, there are excellent grounds upon which to reject this equivalency. Specifically, many of the cases documented by Pinel and Prichard fail to match the modern clinical description of psychopathy, nor do their "general delineations of the disorder conjure up the picture of present-day psychopathy" (ibid.: 57). Toch (1998), among others, has also questioned the appropriateness of likening the two.

Near the turn of the nineteenth century the German neuroanatomist Franz Joseph Gall ([1825] 1835), along with his countryman and disciple Johann Gaspar Spurzheim (1815), introduced phrenology.[6] While Spurzheim popularized phrenology through his publications and lectures, Gall is generally credited with the field's creation. Like physiognomy, phrenology sought to identify character traits through external markers. However, where the former looked largely at the individual's face for those indicators (though the whole body might be studied), the latter sought them in the bumps on people's heads. According to Gall, each of the "faculties" of mind corresponded to their own mental organ. These mental organs were localized areas of the brain which were larger or smaller depending on their development. Further, the skull covering these mental organs would reflect this physical development. Thus, one could identify which faculties of mind characterized a person by palpating that person's skull. In the relationships hypothesized between mental faculties and brain/cranial topography, phrenology was another early criminological endeavor bridging biology and psychology. Phrenology achieved remarkable popularity in parts of Europe and the United States of America in the mid-1800s, before eventually falling out of favor (Rafter 2005).

Another body of criminological thought that had trans-Atlantic influence and sought to identify criminal propensity via external indicators was the criminal anthropology of Cesare Lombroso (1895–1896). Lombroso's work from the 1870s gave birth to the Italian school of criminology and still holds an important place in the history of the field. Lombroso was influenced by the positivism of August Comte, as well as evolutionary theory. While his work underwent considerable change over time (see Lombroso 2006), Lombroso's original suggestion was that criminality resulted from a congenital disadvantage. Those who possessed this disadvantage were called "atavists," individuals who were evolutionary throwbacks to a more primitive form. It was hypothesized that the primitive character of these atavists would manifest itself through stigmata such as excessively large (or small) ears, prominent cheekbones, receding chins, and long arms. Over time Lombroso reduced his estimate of the number of born criminals who were atavists and modified his classification scheme to incorporate a continually varying range of criminal types. Ultimately, Lombroso's criminal anthropology was discredited by several factors, most notably empirical shortcomings and odious political associations that followed in the wake of World War II.

While Lombroso's work provided theoretical impetus to fellow Italians Enrico Ferri and Raffaele Garafolo, a number of American theorists were also interested in the use of gross morphological features to identify criminality. The most prominent attempt in this direction during the middle decades of the twentieth century was William H. Sheldon's somatotyping (Sheldon *et al.* 1949). Sheldon did not invent the idea that one's body type corresponded to one's personality, temperament, or character, but he popularized it with his constitutional

psychology. In Sheldon's system, there were three paradigmatic body types – ectomorphs, endomorphs and mesomorphs – with actual bodies manifesting admixtures of each. Ectomorphs were skinny and intelligent, endomorphs were soft and round with cheerful and friendly dispositions, and mesomorphs were muscular and athletic with assertive or aggressive temperaments. According to Sheldon, criminals tended toward mesomorphy. However, with the work of Sheldon, criminology's flirtation with physical appearance and the external markers of criminality was effectively coming to a close. At the time of this writing one of the few criminological efforts concerned with external markers of criminality involves MPAs (minor physical anomalies). MPAs are minor, nearly unnoticeable physical characteristics like low set ears or furrowed tongues which can result from problems in fetal development and may be related to delinquency (Raine 2002).

Before body type theories largely disappeared from the intellectual landscape, another pair of Americans, Sheldon and Eleanor Glueck, also mined this intellectual terrain. However, the Gluecks incorporated a much broader array of explanatory variables in their investigations (Laub and Sampson 1991). The growing diversity manifested in the work of the Gluecks reflected a larger trend that was taking place in biological and psychological criminology between the late 1800s and the end of World War II; a trend that mirrored changes that had taken place in the groundbreaking Italian school. Lombroso's emphasis on physical appearance and the evolutionary retrogression of criminals was scaled back over the course of his career, and greater weight was placed on criminogenic factors that were unobservable and/or environmental in origin. Lombroso's intellectual progeny, Enrico Ferri and Raffaele Garofalo, embraced this movement more completely; Ferri ([1901] 1913) by adopting a more thoroughly interdisciplinary approach and Garofalo ([1905] 1914) by emphasizing what he called the "psychic anomalies" that caused crime. Garofalo continued to adhere to the idea of criminals as atavists – in fact, maintenance of the Lombrosian notion of the born criminal was intimately tied to Garofalo's effort to define "natural crime" as well as his proposed criminal justice policy expedients of ridding society of its born criminals through execution and isolation – but, in contrast to the criminal anthropology of Lombroso's early work, he failed to consistently maintain the existence of external markers as symptomatic of this atavism. Rather, he championed a criminal psychology that would uncover the primitive sentiments and moral character of the born criminal.

Charles Goring's highly influential *The English Convict* (1913) did much to help bring the era of criminal anthropology to a close while also contributing to the gathering momentum behind research into feeblemindedness as well as the heritability of criminal behavior. In recent decades, research into the latter issue has typically taken the form of twin and adoption studies, with the former often coming from Scandinavian countries like Denmark that have extensive record-keeping programs that make this research possible. However, much of the earliest work on the heritability of crime came from America. Among the most important of the American theorists who had abandoned the search for criminality's external markers and were focused on this more fundamental and general question was Robert Dugdale. In 1877, Dugdale published *The Jukes*, which investigated how much crime "results from heredity" and "how much from environment" (1970: 12). By examining the criminal genealogy of the pseudonymous "Jukes," Dugdale claimed to have found an unusually high degree of pauperism, prostitution, and other forms of criminality within this family and extending over many generations. While Dugdale certainly attributed much criminality to heredity, he gave greater weight to environmental influences than is typically recognized in the secondary criminological literature.

Another American working in much the same vein as Dugdale married the genealogical study of criminality to Goring's concern for feeblemindedness. Henry H. Goddard's (1921) study of the "Kallikak" family is among the most famous contributions to the criminological literature

from the early decades of the twentieth century. In addition to his importance to criminology, Goddard profoundly influenced intelligence testing in America through his introduction of the Binet-Simon scale. He also left a lasting imprint on the English lexicon by coining the term "moron." In contrast to Dugdale, Goddard, in his study of the "Kallikaks," was influenced by Mendelian genetics as well as by the conviction that it was feeblemindedness, and not criminality, that was inherited:

> The formerly much discussed question of the hereditary character of crime received no solution from the Jukes family, but in light of present-day knowledge of the sciences of criminology and biology, there is every reason to conclude that criminals are made and not born. The best material out of which to make criminals, and perhaps the material from which they are most frequently made, is feeble-mindedness
>
> (Goddard 1921: 53–54)

Ultimately, Goddard and other early-twentieth-century investigators of the heritability of intelligence helped to contribute to the eugenics movement in America, and despite empirical opposition to the relationship between intelligence and criminality by William Healy (1915), as well as Goddard's own eventual reversal regarding the unchanging character of intelligence, work like his and Goring's initiated an enduring tradition of research into the relationship between intelligence and criminality (see Hirschi and Hindelang 1977; Lynam *et al.* 1993; Ellis and Walsh 2003).

Like intelligence, personality characteristics have often been thought of as unchanging and have provided a core around which a long tradition of psychologically informed criminology has accumulated. In fact, one of the few theories in which personality was thought to be highly malleable and molded by early childhood experiences was Sigmund Freud's psychoanalytic perspective. While having a highly diffuse influence in the field of criminology,[7] the Freudian perspective in this arena is perhaps most closely associated with August Aichorn (1925). Nonetheless, most personality theories of crime assume their unchanging character and one of the best-known of these was proposed by Hans Eysenck. Eysenck suggested that in addition to a general intelligence factor, three other higher order personality factors composed temperament. With respect to intelligence, Eysenck accepted that it plays a role in causing criminal behavior, but he concluded that "its contribution is probably smaller than one might have thought" (Eysenck and Gudjonsson 1989: 50). Instead, he identified three other factors – extraversion, neuroticism and, later, psychoticism – that played a more prominent role. Each of these factors lies on a continuum with extraversion representing a need for stimuli, neuroticism being the responsiveness to stressful events, and psychoticism referring to emotional sensitivity. According to Eysenck, criminals ought to be characterized by greater extraversion, neuroticism, and psychoticism. Of the three higher-order dimensions of personality, psychoticism has received the greatest empirical support with respect to its relationship to criminal and anti-social behavior (Cale 2006).

Another long-running area of interest among psychological researchers concerned with the relationship between personality and crime is the study of psychopathy. It was previously mentioned that disagreement exists about whether moral insanity is psychopathy's intellectual progenitor. Similarly, confusion exists at the current time between psychopathy and Antisocial Personality Disorder (Arrigo and Shipley 2001). However, one does not need to arbitrate these definitional debates to trace the modern clinical description of psychopathy to the American psychiatrist Hervey Cleckley (1941). Cleckley listed 16 characteristics of psychopaths, including things like egocentrism, lack of guilt/remorse, superficial charm, and shallow affect. Of course,

Cleckley recognized that many psychopaths were not criminal. In fact, he saw that a person with this disorder could be quite successful. He maintained, however, that such non-criminal psychopaths were just more skillful at masking their underlying pathology. Later the Canadian Robert Hare (1991) developed a checklist (PCL-R) for use in diagnosing psychopathy.

These days, much interest within the field of criminology is directed toward developmental and life-course theories. In contrast to the search for personality differences, which are presumed to be stable over time, these traditions are explicitly designed to look at continuity as well as change over the life course. Included in this framework is the recognition that different factors might explain delinquent or criminal behavior at different life stages. For example, it is likely that family management might be particularly useful for explaining delinquent behavior during childhood whereas peer relations become more critical during adolescence and employment more central to adulthood.

Interest in within-individual patterns of criminal behavior began to gain momentum in the 1980s with the work of Alfred Blumstein and colleagues on a panel for the US National Research Council (see Blumstein and Cohen 1987; Blumstein *et al.* 1986). This endeavor popularized the terms "criminal career" and "career criminal"; the former recognizing that all offenders commit crime for some period of time (their criminal career), the latter indicating the chronicity of some offenders (career criminals). The panel looked not only at whether individuals participated in crime and how frequently but also at parameters such as onset, desistance, and seriousness of offending. The criminal career paradigm highlighted the need to study individuals over time and sparked a debate about the importance of longitudinal versus cross-sectional research (for one counter-argument, see Gottfredson and Hirschi 1986). To date, the use of longitudinal studies from a number of countries including England, the United States, Canada, Sweden, and New Zealand have played major roles in the establishment of the developmental perspective. Representative here are David Farrington's involvement with the Cambridge Study in Delinquent Development (Farrington 1995), Laub and Sampson's follow-up work on a sample originally collected by the Gluecks (Laub and Sampson 2003), Terence P. Thornberry's Rochester Youth Development Study, David Huizinga's Denver Youth Survey, and Rolf Loeber's Pittsburgh Youth Survey (Thornberry *et al.* 2004).

One of the best-known developmental theories in recent years comes from Terrie Moffitt (1993), who suggested that there are two distinct patterns of offending. Most individuals who commit crime engage in an "adolescent-limited" pattern of offending that stems from a desire to engage in behaviors that are perceived to be mature. For a small minority of "life course persistent" offenders, however, juvenile delinquency is just a snapshot within a lifetime of antisocial activity. This propensity to commit crime is attributable to a combination of neurological deficits and a risky home environment that, nested together, negatively affect the ability to build relationships with peers and perform well at school. Together, Terrie Moffitt and Avshalom Caspi have spearheaded the Dunedin Longitudinal Study involving a birth cohort from New Zealand and have produced numerous publications on the development of antisocial behavior (e.g., Caspi *et al.* 1996), as well as on gene–environment interactions (e.g., Caspi *et al.* 2002). Here, however, we find ourselves coming full-circle in synchrony with the evolution of the Italian school of criminology.

In contrast to Lombroso's criminal anthropology and Garofalo's criminal psychology, Enrico Ferri developed a criminal sociology which encompassed a wide-ranging set of variables from multiple disciplines. Likewise, criminologists like Moffitt and Caspi have moved in the direction of a biopsychosocial criminology. There is a rapidly expanding literature regarding molecular genetics and crime (see Beaver 2009) that Caspi and Moffitt have contributed to with their findings involving the MAOA gene (Caspi *et al.* 2002). Like many other researchers (see Raine

and Yang 2006), neurology also has a prominent role in their thinking regarding criminal behavior. Finally, like most criminologists over the last century, Caspi and Moffitt place a tremendous amount of importance on the influence that social factors play in the creation of crime; a topic to which we now turn.

Mainstream sociological perspectives on crime

While biological and psychological theories of criminal behavior focus attention on the effects of biological and psychological traits, the theories outlined in this section, mainstream sociological perspectives on crime, give priority to the effects of the social environment. These perspectives include the ecology of crime (social disorganization theories), learning theories, anomie/strain theories, control theories, labeling theories, and general conflict theories.[8] The following overview, although brief, notes the proposed criminogenic effects of macro-level cultural and social structural conditions and, to some extent, micro-level social interactions.

Sociological research on crime dates back to at least the early-nineteenth-century work of Adolphe Quetelet ([1831] 1984) and André-Michel Guerry ([1833] 2002), researchers who have been described as the "great founders of criminal statistics" (Ferri [1901] 1913: 72).[9] Quetelet was a Belgian scholar with a background in the natural sciences (mathematics and astronomy), while Guerry was a French researcher with a background in law. Not only did they provide groundbreaking statistical analyses of crime and other "moral" phenomena (e.g., education), they examined the spatial distribution of these phenomena across different geographical areas (e.g., regions of France). Their work thus represents an important forerunner to the ecological research that developed in the United States during the early-twentieth century. At the University of Chicago, Robert Ezra Park (1936), Ernest W. Burgess ([1925] 1968), and others developed the human ecology paradigm, a framework that ultimately guided the criminological research of Clifford R. Shaw and Henry D. McKay.

Shaw and McKay's *Juvenile Delinquency and Urban Areas* (1942) provided a model for twentieth-century ecological research and is the centerpiece of the social disorganization tradition in criminology. In this work, they examine the geographical distribution of male juvenile delinquents in Chicago. They note that some areas had significantly higher rates of male delinquents than other areas and explain these differences in terms of area characteristics. Shaw and McKay suggest that delinquency is more likely in socially disorganized communities, areas characterized by "differential systems of values" and "differential social organization" (ibid.: 164–183). The presence of "conflicting systems of values" (including deviant subcultures), combined with the ineffectiveness of conventional institutions (e.g., families) to fulfill their traditional functions, are said to provide youth with more motivation, opportunities, and freedom to engage in deviant behaviors.[10] Since the work of Shaw and McKay, many researchers have helped preserve the ecology of crime as a mainstream sociological perspective in criminology – among them are Robert J. Bursik, Jr. (1984), Rodney Stark (1987), and Robert J. Sampson and his colleagues (e.g., Sampson and Groves 1989; Sampson *et al.* 1997).

As part of their argument, Shaw and McKay (1942) pointed out that "traditions of delinquency" are learned by many youth in disorganized communities.[11] This general idea, the notion that many people learn offensive behavior through their interactions with others, existed well before Shaw and McKay's work and is a core contention of another sociological perspective on crime: learning theories. During the late-nineteenth century, Gabriel Tarde – a French magistrate and, toward the end of his career, a professor of philosophy – offered an extensive analysis of this idea in his writings on imitation. Tarde ([1903] 1912: 322) concluded, "All the important acts of social life (including criminal acts) are carried out under the domination of

example." Several decades later, Edwin H. Sutherland, a graduate of the University of Chicago who had been influenced by the paradigm of symbolic interactionism, accepted the general contention that "criminal behavior is learned" and constructed his theory of "differential association," a theory that has had a significant effect on the course of the learning perspective in criminology. In his *Principles of Criminology*, Sutherland summarized his "principle of differential association" as follows: "*A person becomes delinquent because of an excess of definitions favorable to violation of law over definitions unfavorable to violation of law*" (1947: 6; emphasis in original). Although his theory offers a relatively simple description of the learning process, its imprint on the development of later learning theories is apparent. These theories include Daniel Glaser's (1956) "theory of differential identification" and Ronald L. Akers's "social learning theory" (see Akers and Sellers 2009). Akers's theory is especially noteworthy in that it explicitly lists "imitation," "differential association," and "definitions" among its four core explanatory concepts. The fourth core concept of Akers's theory is "differential reinforcement," which focuses attention on the possible effects of "anticipated or actual rewards and punishments" (ibid.: 91–92). In Akers's theory, one thus finds a trace of Tarde, a heavy dose of Sutherland, and some consideration of the learning principles posited by behavioral psychologists. One might also note an element of the classical school.

Returning once again to nineteenth-century French scholarship, one finds the foundation for the development of anomie/strain theories. In his theory of "anomic suicide," Émile Durkheim ([1897] 1951), a prominent French sociologist, argued that humans have naturally insatiable desires that need to be limited by society.[12] If these innate desires lack social regulation, they simply cannot be satisfied and will cause people to become very frustrated. Durkheim concluded that people who experience such frustration may turn it against themselves (suicide) and/or others (e.g., homicide). This line of argument was later modified and extended by American sociologist Robert K. Merton. In his article on "Social Structure and Anomie," Merton (1938) maintained that the culture of the United States places a heavy emphasis on material success (wealth) and encourages people in all economic classes to pursue this goal. However, at the same time, its social structure provides the middle and upper classes with more opportunities than the other classes to improve their economic position through legitimate means. Accordingly, Merton suggests that these cultural-structural conditions exert more "pressure" on members of the working and lower classes to deviate from legitimate means and/or cultural goals; that is, the members of these classes are more likely to resort to illegitimate means to acquire wealth ("innovation") or to pursue some other deviant adaptation (i.e., "ritualism," "retreatism," or "rebellion"). In both Durkheim's theory and Merton's, it is the disjunction between goals and means that prompts deviance. Since the mid-1900s, this line of argument has been revised and extended by a number of criminologists. A version of this argument is central to Albert K. Cohen's (1955) theory of delinquent subcultures, Richard A. Cloward and Lloyd E. Ohlin's (1960) theory of "differential opportunity," Steven F. Messner and Richard Rosenfeld's (2001) "institutional-anomie theory," and Robert Agnew's (2006) "general strain theory."

Whereas anomie/strain theories generally focus on social conditions that "pressure" individuals to deviate from the rules of society, control theories emphasize forces that tie people to conventional society and a conforming pattern of behavior. Although an early control theory can be found in the work of Durkheim ([1897] 1951),[13] the perspective did not clearly establish itself as a distinct tradition in criminology until the mid-1900s. At that time, several control theories were proposed (e.g., Sykes and Matza 1957; Nye 1958; Matza 1964; Reckless 1967; Hirschi 1969), with Travis Hirschi's social bond theory perhaps best representing this tradition. In *Causes of Delinquency*, Hirschi (1969: 16) assumes that "delinquent acts result when an

individual's bond to society is weak or broken." This bond, according to Hirschi, is comprised of four elements: "attachment," "commitment," "involvement," and "belief." Attachment refers to a person's level of "sensitivity to the opinion of others"; commitment, the "rational" element of the bond, represents the "investment" an individual has in "conventional lines of action" – that is, the potential costs of deviant behavior (e.g., the loss of one's reputation or career); involvement is simply the amount of time and energy an individual devotes to "conventional activities"; and belief refers to "the extent to which people believe they should obey the rules of society" (ibid.: 16–26). As these elements of the bond weaken, the probability of delinquent behavior is said to increase. Since the original publication of Hirschi's social bond theory, the control theory tradition has continued to evolve. Most notably, Michael R. Gottfredson, in collaboration with Hirschi (Gottfredson and Hirschi 1990), presented a self-control theory that has stimulated much interest; and soon after the publication of their theory, Robert J. Sampson and John H. Laub (1993) presented an "age-graded theory of informal social control" that gives priority to patterns of change in social bonds across the life-course of an individual.

The next two perspectives on crime, labeling and general conflict theories, represent points of intersection between mainstream sociological theorizing and critical criminology. Like the paradigms of critical criminology, these theories, with one or two exceptions, prompt researchers to reflect upon the interests and viewpoints that shape the construction and application of penal laws. They suggest that the examination of crime rates and criminals alone results in partial and seemingly distorted criminological knowledge.

The labeling perspective subsumes "social reaction theory" and comprises much of the interactionist tradition in criminology. Like Sutherland's theory of differential association, labeling theories are rooted primarily in the sociological paradigm of symbolic interactionism and, thus, call for a careful inquiry into the origins and effects of the meanings people attach to themselves, their actions, and the world around them. During the first part of the twentieth century, the labeling perspective was established in the United States through Frank Tannenbaum's ([1938] 1951) critique of "the dramatization of evil" and Edwin M. Lemert's (1951) theory of "primary and secondary deviation." Both of these theorists concluded that defining and treating someone as "evil" may push that individual to accept a deviant social status and a deviant role; in other words, it may drive the person to commit more, and more serious, offenses.[14] However, it is Howard S. Becker's *Outsiders* ([1963] 1973) which, perhaps more than any other work, has come to represent the labeling perspective. Becker emphasized that both deviant people and deviant behavior are symbolically "created by society": "The deviant is one to whom that label has successfully been applied; deviant behavior is behavior that people so label" (ibid.: 8–9). In other words, deviance, in this framework, is not a property found in some behaviors but not others; rather, it is a social construct. Hence this orientation suggests that an adequate understanding of deviance requires an examination not only of people who have been labeled deviant but also of the interests and viewpoints of people who construct the law ("rule creators") and apply the law ("rule enforcers"). Following Becker, variations of this perspective have been presented by Leslie T. Wilkins (1964), Edwin M. Schur (1971), and John Braithwaite (1989). Braithwaite, an Australian scholar, has captured the attention of many contemporary criminologists with his "theory of reintegrative shaming," a theory that supports the "restorative justice" movement.

Conflict between different groups in a society is a component of most mainstream sociological perspectives in criminology. It is acknowledged in social disorganization theories (e.g., Shaw and McKay 1942), learning theories (e.g., Sutherland 1947), anomie/strain theories (e.g., Cohen 1955; Cloward and Ohlin 1960), and labeling theories (e.g., Tannenbaum [1938] 1951). Moreover, the suggestion that such conflict must be studied to develop an acceptable

understanding of crime has existed since at least the mid-1800s (e.g., Engels [1845] 1887). Because most paradigms of critical criminology incorporate conflict (e.g., class conflict) as a key explanatory variable, this topic receives more attention in the next section. However, there are several general conflict theories of crime that seemingly reside on the border between mainstream criminology and critical criminology, and it seems fitting to mention a few of these theories at this time.

In the first half of the twentieth century, Thorsten Sellin (1938), a criminologist who was born in Sweden and eventually settled in the United States, presented a theory of "culture conflict." In this theory, culture conflict contributes to crime when a person cannot follow the "conduct norms" of his/her cultural group without violating the law (i.e., the conduct norms of the dominant cultural group). Sellin notes that this kind of conflict is experienced by immigrants, indigenous groups that have been colonized, and members of distinct subcultures that have evolved out of a single culture through a natural process of social differentiation. Twenty years later, George B. Vold (1958) constructed a "group conflict theory" that focuses on conflicting group "interests" rather than conduct norms. He points out that competing interest groups struggle to control the law and law enforcement. The interests of the groups that win in this competition are then maintained by the law. Yet, this law may stand in direct opposition to the interests of the groups that failed in their efforts and, consequently, their members and their customary behavior patterns may be defined as criminal.[15] Following the work of Vold, a series of conflict theories were presented that further elaborated this perspective and moved it in a more critical direction. In this connection, the work of Austin T. Turk (1969), Richard Quinney (1970), William Chambliss and Robert Seidman (1971), Steven Box (1983), and Jeffrey H. Reiman ([1979] 2007) are among the most noteworthy.

As noted in the discussion of biological/psychological theories, some scholars support the integration of two or more perspectives into a single framework. Theory integration allows theorists to take advantage of the strengths of different theories, and it is relatively common. In this connection, several theories referred to in this section may be described as intra-disciplinary integrated theories. For instance, Shaw and McKay's (1942) social disorganization theory includes propositions from both learning and control theories; Cloward and Ohlin's (1960) differential opportunity theory is an anomie/strain theory that also draws on learning theory; and Braithwaite's (1989) theory of reintegrative shaming includes views found in not only labeling theories but also learning and control theories. Although not mentioned above, Charles R. Tittle's (1995) "control balance" theory also represents an effort at theory integration that combines several perspectives mentioned in this section. In short, the perspectives outlined here are not mutually exclusive. Some of their claims may be incompatible, but there is considerable room for integration, and such integration has been occurring for many years.

To the extent that mainstream sociological perspectives on crime overlook biological and psychological traits that shape our behavior in important ways, they will be judged inadequate by researchers working in the biological/psychological traditions. To the extent that they overlook or help maintain an ideology that supports an inequitable distribution of wealth, power, and prestige, they will be opposed by critical criminologists, whose views constitute the final current of criminological thought to be explored in this chapter.

The opposing currents of critical criminology

The label "critical criminology" is relatively new (a creation of the late-twentieth century), but its spirit, its core orientation, extends back to late-eighteenth-century anarchism and nineteenth-century Marxism. Today, while retaining important elements of these earlier traditions, it has

become quite diverse including frameworks of contemporary feminism, critical race theory, peacemaking criminology, left realism, postmodernism, and a variety of other perspectives.[16] Although it is difficult to identify a clear unifying theme among these frameworks, they tend to be guided by the interrelated goals of enlightenment and emancipation. Borrowing the words of Raymond Geuss (1981: 55): "Critical theories aim at emancipation and enlightenment, at making agents aware of hidden coercion, thereby freeing them from that coercion and putting them in a position to determine where their true interests lie."

Regarding the goal of enlightenment, critical theorists maintain that official knowledge, such as the "facts" constructed by a government agency, are often conjectures or distortions of reality that reinforce inequitable social arrangements. Enlightenment thus involves the critique of ideological reality-claims and the provision of alternative conceptions of reality. Some critical theorists argue that their descriptions and theories are in close correspondence to the world out there; they maintain that the knowledge they produce is simply more accurate than the knowledge produced by criminal justice agencies and mainstream criminologists. Other critical theorists are more skeptical; they reject bold reality-claims and instead direct their efforts at specifying the conjectural and biased nature of official claims. Either way, the objective is to undermine belief systems that reinforce oppressive social arrangements. For critical theorists in the field of criminology, enlightenment is pursued by studying the extent to which power is unevenly distributed across different segments of society, by examining ways in which the more powerful segments shape, interpret, and apply criminal law and criminological knowledge, and by assessing the extent to which the law, law enforcement, and criminology help maintain an uneven distribution of power and other valued resources (e.g., wealth).

On a methodological level, the goal of enlightenment may be pursued through multiple research techniques. The methods of the natural sciences – such as the quantification of observations, statistical analyses, and the use of experimental and quasi-experimental designs – do not have a privileged standing among critical theorists and frequently are looked upon with suspicion.[17] They represent one set of methods among many that may lead to enlightenment or, conversely, may be used to conceal or rationalize oppression. Upon considering the limitations and misuse of these methods, many critical theorists take a different approach in their inquiries. For example, they may utilize interpretive methods, approaches that do not conform to positivist expectations regarding measurement and generalizability; or they may adopt a more philosophical orientation in which logic (reason) holds more weight than the available empirical data, much of which is highly speculative. Nonetheless, critical theorists, historically, have expressed some support for utilizing the methods of the natural sciences when studying social phenomena. The Russian anarchist Peter Kropotkin ([1905] 1975: 118), for instance, attempted "to show the intimate, logical connection which exists between the modern philosophy of natural sciences and anarchism" and "to put anarchism on a scientific basis."

For critical theorists, the goal of enlightenment, as Geuss suggests, is closely connected to the pursuit of emancipation. Critical theorists do not pursue knowledge for its own sake. Efforts to critique a given reality-claim or to discover a fact, typically, are undertaken in an attempt to liberate some segment of society. An ideological belief, such as the idea that some inequitable social arrangement is natural and inevitable, can pacify a subpopulation to the extent that it never even attempts to free itself. Similarly, a lack of knowledge regarding the structure of an oppressive institution can deprive a struggling subpopulation of what it must do to liberate itself. For critical criminologists, emancipation generally involves efforts to change not only the laws and criminal justice system but also fundamental components of the dominant culture and social structure of a society. For instance, Marxists support an economic transition from capitalism to

communism; feminists seek the abolition of patriarchal institutions; and critical race theorists pursue the elimination of racism and racist social arrangements.

In summary, the combined concern for enlightenment and emancipation, perhaps as much as anything else, represents the spirit of critical criminology, a spirit that helps unite a diverse set of viewpoints. A brief look at a few of these viewpoints will illustrate the kind of diversity that exists in critical criminology.

Historically, anarchist views on law, crime, and punishment may represent the first distinct stream of critical criminological thought. For over two centuries, anarchists have viewed the institutions of law and punishment as instruments of domination (see Godwin [1798] 1985; Kropotkin 1886; Goldman [1917] 1969).[18] However, Marxism, which emerged soon after modern anarchism, ultimately had a greater influence on the development of critical criminology. Marxist criminology is rooted in the worldview of Karl Marx and his associate Frederick Engels, two German scholars who ended up spending much of their lives in England. In their writings, they provide an elaborate critique of capitalism, describing it as an oppressive economic system that is especially detrimental for the working class (the proletariat). Marx and Engels argued that in a capitalist economy, workers are exploited, alienated, and in fundamental conflict with the ruling class (the bourgeoisie). Accordingly, when examining capitalist societies, Marxist criminologists look for ways in which the laws and systems of punishment support the interests of the ruling class over those of the working class. Likewise, they examine conditions of capitalism that may encourage and shape criminality in both classes.

In the works of Marx and Engels, there are few extensive examinations of crime, but they did not overlook this issue entirely. For example, in *The Condition of the Working Class in England in 1844*, Engels ([1845] 1887) described the demoralizing (criminogenic) effects of early industrial capitalism and the way in which workers and their families were victims of "social murder." Over twenty years later, in *Capital, Volume I*, Marx ([1867] 1915) argued that the emergence of capitalism depended in part on the theft of lands occupied by peasants, who were then controlled by "a bloody legislation against vagabondage." These and other works by Marx and Engels provided a few seeds of the Marxist tradition in criminology. During the early-twentieth century, this tradition grew little by little through the contributions of Willem A. Bonger ([1905] 1916), Evgeny B. Pashukanis ([1924] 1978), and Georg Rusche and Otto Kirchheimer ([1939] 2003). By the late-twentieth century, the Marxist tradition was extensively developed through the work many scholars, including Ian Taylor, Paul Walton, and Jock Young (1973), Richard Quinney (1980), David F. Greenberg (1981), and Michael J. Lynch and W. Byron Groves (1989). Although the status of Marxist theory in criminology has declined over recent years, for more than a century it stimulated research on the relationship between capitalism and crime, class and crime, and class biases in the content and administration of law. It also affected the development of several other branches of critical criminology, such as Marxist feminism, peacemaking criminology, and left realism.

While Marxist theorists focus on capitalism and the subjugation of the working class, feminists center their attention on the phenomenon of patriarchy and the subjugation of women.[19] There are several kinds of feminism and several developing forms of feminist criminology that comprise an important domain of critical criminology. A distinction commonly is drawn between radical, Marxist, socialist, and postmodern feminism, four separate yet intersecting currents of critical criminology.[20] From the various descriptions of feminist criminology (e.g., Chesney-Lind and Bloom 1997; Jurik 1999; Wonders 1999; Miller 2003; Flavin and Desautels 2006), a number of shared qualities can be identified. These qualities concern its knowledge, methods, and practical applications.

Feminist criminologists point out that women often are overlooked or misrepresented in the knowledge that is constructed by other criminologists. Criminology has been dominated by men throughout its history. The descriptions and theories produced by criminologists thus tend to reflect masculine interests and a masculine viewpoint. In this connection, feminist criminologists emphasize that gender is an important concept that warrants a prominent place in the literature of criminology. For instance, the examination of gender may be essential to adequately resolve the "gender-ratio problem" – that is, to explain the consistent over-representation of men in both official and unofficial crime statistics. Moreover, through the analysis of gender, feminists also focus attention on the "generalizability problem," the deficiency of many popular theories to adequately explain crime by women. These theories, typically, have been designed to explain crime by men, but do not include gender as a variable, and therefore are problematic when generalized to explain crime by women.

Regarding research methods and the application of criminological knowledge, feminist scholars again step outside common practices in the field of criminology. For example, they encourage rich descriptive (qualitative) studies on the lives and experiences of women who have been victims, have engaged in crime, and have been punished. Many feminists question mainstream quantitative research and the possibility of objective knowledge. They note that many variables are not readily quantifiable, and that quantification often results in superficial and misleading information. They also commonly emphasize that knowledge is socially constructed and not simply discovered through systematic observation. This is most evident among postmodern feminists, who acknowledge multiple images of reality and discredit the idea of absolute truth. Beyond this, the feminists of critical criminology challenge patriarchal beliefs and oppose patriarchal institutions, including oppressive family structures, economic structures, and political arrangements. In other words, they pursue fundamental changes in the culture and social structure of society to create equitable social arrangements for women.

Another developing branch of critical criminology is critical race theory (CRT), which focuses its attention on racism and the oppression of racial minorities. Critical race theory emerged during the 1970s as a form of legal scholarship and has since established itself in the fields of political science, sociology, and to some extent criminology. It has been shaped by traditional civil rights research, critical legal studies, and feminist theory. Over the past few decades, many scholars have contributed to its development, including Derrick Bell, Kimberlé W. Crenshaw, Richard Delgado, Charles R. Lawrence III, Mari J. Matsuda, and Patricia J. Williams. However, the spirit of this perspective goes back much further than the 1970s, arguably to the 1800s and the work of Ida B. Wells-Barnett,[21] W. E. B. Du Bois, and other scholars of this era (e.g., Frederick Douglass) (see Gordon 1999). Du Bois, it should be noted, was an African-American scholar who is now recognized as "a pioneer in sociological criminology" (Gabbidon 1996; 2001: 590).[22]

Critical race theorists maintain that racism is embedded in the economy, education, government, and other basic social institutions. They examine ways in which racism can reinforce inequitable distributions of wealth and power that favor the white population, especially white elites. They also view race as a social construct and, thus, reject the contention that there is some objective, intrinsic property that separates one race from another. From this viewpoint, "races are categories that society invents, manipulates, or retires when convenient" (Delgado and Stefancic 2001: 7). Accordingly, as suggested by Katherine K. Russell (1999), criminologists who embrace critical race theory hold that we must understand racism to adequately understand law, crime, and punishment; an examination of racism is necessary to understand how the criminal justice system supports white privilege. Such criminologists also encourage efforts to change the criminal justice system in ways that will address "historical and contemporary injustices" (Russell

1999: 180). As this implies, critical race theorists, much like Marxists, feminists, and other critical scholars, generally make their values explicit in their writings and, therefore, rarely engage in the struggle to appear value-neutral.[23]

Marxist criminology, feminist criminology, and critical race theory thus represent three branches of critical criminology and its opposition to domination based on class, gender, and race. But as noted above, these are not the only forms of critical criminology. Peacemaking, left realist, and postmodern theory and practice occupy a central place in critical criminology and currently may be more prominent than the Marxist tradition. The first of these, peacemaking criminology, incorporates elements of several traditions, including Marxism, feminism, and various religious traditions (e.g., Buddhism) (see Pepinsky and Quinney 1991). As described by Richard Quinney (1991: 4), it is a "nonviolent criminology of compassion and service" that "seeks to end suffering and thereby eliminate crime." Quinney holds that "crime is suffering," and that "love and compassion" are the means through which suffering can be reduced (ibid.: 3–4). Left realism – which emerged through the work of Jock Young, Elliott Currie, Walter S. DeKeseredy, to name a few – represents a response to the failure of some Marxist criminologists to give adequate attention to working- and lower-class victims of working- and lower-class crime.[24] Left realists devote special attention to the criminogenic effects of relative deprivation, and they stress that criminologists "should acknowledge the *form* of crime, the *social context* of crime, its trajectory through *time*, and its enactment in *space*" (Young 1997: 28; emphasis in original). Finally, postmodern criminology is noteworthy for its critique of privileged vocabularies and reality-claims regarding law, crime, and punishment. It seeks to identify hidden assumptions embedded in language and the ways in which they appear to constrain thoughts and actions. At the same time, postmodern criminology supports the expression of viewpoints that are routinely overlooked or discounted, particularly the narratives of disadvantaged populations. In criminology, the application of postmodern thought can be seen in the "constitutive criminology" of Stuart Henry and Dragan Milovanovic (1991) and the writings of Bruce Arrigo (see Arrigo 2003).[25]

Like the classical, biological/psychological, and mainstream sociological perspectives noted earlier, the various forms of critical criminology have been critiqued from multiple viewpoints. Interestingly, the relatively high level of optimism found in many critical theories is often referred to as one of their more significant shortcomings. Critical criminologists commonly challenge the idea that human behavior is shaped by an innate hedonistic impulse, a death instinct, or some comparable inherent antisocial inclination. Some of these theorists even suggest that normal humans are inclined to be altruistic, that we possess a "social instinct" that often is silenced by our environment (e.g., Bonger [1905] 1916). For this reason, some critics suggest that their theories are utopian and, if used as a guide for social policies, dangerous. In response, critical theorists may argue that the various pessimistic conceptions of human nature embraced by other currents of thought in criminology are actually ideological beliefs that help rationalize systems of domination. Such a response is instructive, for it brings us back to the common goals of critical criminology – enlightenment and emancipation.

Conclusion

This chapter has presented a sketch of four broad currents of criminological thought – the classical tradition, biological/psychological paradigms, mainstream sociological perspectives, and various critical criminologies. The emergence and development of these currents have been influenced by scholars from many nations, including Austria, Belgium, England, France, Germany, Italy, the Netherlands, Russia, Scotland, and the United States. Moreover, each of these currents can

be subdivided in numerous ways; the subdivisions noted represent only a handful of their more prominent dimensions. Finally, although the various currents of criminological thought entail competing reality-claims, they also intersect at key points and, historically, tend to be quite fluid, bending with changes in the social world and the emergence of new worldviews.

Discussion questions

1   Four currents of criminological thought were outlined. To what extent do they explicitly or implicitly draw upon each other? Discuss and provide examples.
2   What do the perspectives of critical criminology suggest about human behavior and free will?
3   Have criminologists made any significant discoveries regarding the causes of crime or the characteristics of criminals? Discuss and provide examples.

Websites

American Society of Criminology: asc41.com.
Critical Criminology Information and Resources: critcrim.org.
European Society of Criminology: esc-eurocrim.org.
International Society for Criminology: isc-sic.org.

Notes

1   In *A System of Moral Philosophy* ([1755] 2006), Hutcheson applies an early version of the utilitarian principle, argues in favor of deterrence, and opposes excessive punishment. These commitments became defining elements of the classical school of criminology. In *The Spirit of Laws* ([1748] 1899), Montesquieu provided important insights into the severity and proportionality of punishment that later would be echoed in the works of Beccaria and Bentham.
2   Although Bentham's views on crime and punishment include many of the points made by Beccaria, Bentham was more thoroughly utilitarian in his approach and, thus, excludes the social contract contentions that were embraced by Beccaria.
3   The fact that Beccaria and Bentham appear to apply a deterministic standpoint that opposes the assumption of free will closes much of the gap between the classical and positive schools of criminology. Since the late-1800s, the two schools have been separated in large part by the free will/determinism debate – with the classical school supposedly presupposing free will and the positive school determinism (see Ferri [1901] 1913). But, as Beirne (1993) persuasively argued, this distinction is difficult to defend and may not provide a sound basis for separating the two schools.
4   This, of course, does not exhaust all of the essential qualities of punishment from Beccaria's viewpoint. For instance, as noted above, he held that punishment should be "necessary" and "determined by the laws."
5   Routine activity theory has been classified as a form of environmental criminology (Cullen and Agnew 2006), but it is often associated with the classical school (e.g., Einstadter and Henry 2006; Akers and Sellers 2009; Bernard *et al.* 2010).
6   Gall did much of his work in Austria and later France, however, he was born in Baden.
7   Freud's greatest influence was perhaps felt in institutional settings during, roughly, the middle third of the twentieth century. As Sutherland and Cressey noted in 1955, "[a] large proportion of professional persons working with delinquents and criminals use some form of psychoanalytic theory in their explanations of criminality" (1955: 133).
8   As explained below, the labeling and conflict theories noted in this section reside on the border between mainstream criminology and critical criminology. We acknowledge that the term "mainstream," as it is used here, may extend beyond its customary usage in the field.
9   It also has been suggested that the work of Quetelet and Guerry led to the establishment of "criminology as a modern social science" (Lindesmith and Levin 1937: 655).

10 Shaw and McKay's (1942) data indicate that the presence of male delinquents in an area is correlated with the economic status of the area and the size of the ethnic/racial minority population. However, they discounted poverty as a direct cause of delinquency and, upon further analysis, concluded that there is little reason to believe that some ethnicities/races have a significantly higher propensity for delinquency than others.

11 According to Shaw and McKay (1942: 168), in the high delinquent rate areas, "traditions of delinquency can be and are transmitted down through successive generations of boys."

12 There is some ambiguity in Durkheim's work as to whether this assumption extends to women.

13 Hirschi (1969: 3) concluded that "Durkheim's theory is one of the purest examples of control theory." Indeed, Durkheim's theory of anomic suicide has elements of both an anomie/strain theory and a control theory in that anomie, as defined by Durkheim ([1897] 1951), refers to a lack of social regulation (i.e., social control) over naturally unlimited human desires.

14 "The young delinquent becomes bad because he is defined as bad" (Tannenbaum [1938] 1951: 17–18).

15 In contrast to the labeling perspective, Vold (1958: 213) also notes that the members of these weaker groups often "do not accept the definition of themselves, or their behavior, as criminal."

16 For more information on the breadth of critical criminology, see MacLean and Milovanovic (1997), Arrigo (1999), Schwartz and Hatty (2003), Einstadter and Henry (2006), Ross (2009), and DeKeseredy (2011).

17 For instance, the methods of the natural sciences are problematic when efforts are made to quantify variables that are not readily quantifiable, when important variables are excluded because they cannot be quantified, when data is recoded and reanalyzed with different statistical techniques until a desired relationship is "discovered," and when inadequate samples and control groups are utilized.

18 More recent anarchist analyses of crime and criminal justice can be found in the work of Harold Pepinsky (1978), Larry Tifft (1979), Dennis Sullivan (Tifft and Sullivan 1980), and Jeff Ferrell (1993). Moreover, a hint of anarchism, particularly its critique of punishment, exists in the literature of peacemaking criminology and penal abolitionism.

19 This does not imply that the only concern of feminists is the oppression of women. As Jody Miller (2003: 15) points out, "contemporary feminist scholars strive to be attentive to the interlocking nature of race, class, and gender oppression." Indeed, feminists have been concerned about multiple forms of oppression for many years. To cite one example, Harriet Martineau (1839), a founder of feminist sociology during the first half of the nineteenth century, was a strong supporter of both women's rights and the abolition of slavery.

20 Liberal feminism may be best viewed as a mainstream sociological perspective.

21 Wells-Barnett actively supported both African-American and women's rights (Lengermann and Niebrugge-Brantley 2000), and her research on lynching may be viewed as a precursor to the emergence of critical race theory (see Wells-Barnett [1894] 1969).

22 Du Bois's (1899: 249) critical orientation toward criminal justice is captured in the following statement: "[I]n convictions by human courts the rich always are favored somewhat at the expense of the poor, the upper classes at the expense of the unfortunate classes, and whites at the expense of Negroes."

23 This description of critical race theory has been based primarily on Taylor (1998), Gordon (1999), Russell (1999), and Delgado and Stefancic (2001).

24 Martin D. Schwartz and Suzanne E. Hatty (2003: xii) comment that "left realism was originally a response to British Marxists who excused inner-city violence and ignored victims of such crimes."

25 The list of "critical criminologies" presented in this section is neither mutually exclusive nor exhaustive. Beyond the divisions mentioned, critical criminology also includes penal abolitionism, green criminology, cultural criminology, and convict criminology. Moreover, the work of Michel Foucault (1979) has had a significant influence on this current criminological thought and may warrant its own distinct division.

References

Agnew, R. (2006) *Pressured into Crime: An Overview of General Strain Theory*, Los Angeles: Roxbury Publishing Company.

Aichorn, A. (1925) *Wayward Youth*, New York: Viking Press.

Akers, R. L. and Sellers, C. S. (2009) *Criminological Theories: Introduction, Evaluation, and Application*, 5th edn, New York: Oxford University Press.

Arrigo, B. A. (ed.) (1999) *Social Justice/Criminal Justice: The Maturation of Critical Theory in Law, Crime, and Deviance*, Belmont, CA: Wadsworth Publishing Company.

Arrigo, B. A. (2003) "Postmodern Justice and Critical Criminology: Positional, Relational, and Provisional Science," in M. D. Schwartz and S. E. Hatty (eds.) *Controversies in Critical Criminology*, Cincinnati, OH: Anderson Publishing Company.

Arrigo, B. A. and Shipley, S. (2001) "The Confusion over Psychopathy (I): Historical Considerations," *International Journal of Offender Therapy and Comparative Criminology*, 45: 325–344.

Beaver, K. M. (2009) "Molecular Genetics and Crime," in A. Walsh and K. M. Beaver (eds.) *Biosocial Criminology: New Directions in Theory and Research*, New York: Routledge.

Beccaria, C. ([1764] 1819) *An Essay on Crimes and Punishments*, 2nd American edn, Philadelphia: Philip H. Nicklin.

Becker, G. S. (1968) "Crime and Punishment: An Economic Approach," *Journal of Political Economy*, 76: 169–217.

Becker, H. S. ([1963] 1973) *Outsiders: Studies in the Sociology of Deviance*, New York: The Free Press.

Beirne, P. (1993) *Inventing Criminology: Essays on the Rise of 'Homo Criminalis,'* Albany, NY: State University of New York Press.

Bentham, J. ([1789] 1948) *An Introduction to the Principles of Morals and Legislation*, New York: Hafner Publishing Company.

Bernard, T. J., Snipes, J. B. and Gerould, A. L. (2010) *Vold's Theoretical Criminology*, 6th edn, New York: Oxford University Press.

Blumstein, A. and Cohen, J. (1987) "Characterizing Criminal Careers," *Science*, 237: 985–991.

Blumstein, A., Cohen, J., Roth, J. A., and Visher, C. A. (1986) *Criminal Careers and "Career Criminals,"* Washington, DC: National Academy Press.

Bonger, W. A. ([1905] 1916) *Criminality and Economic Conditions*, trans. H. P. Horton, Boston: Little, Brown, and Company.

Box, S. (1983) *Power, Crime, and Mystification*, London: Tavistock.

Braithwaite, J. (1989) *Crime, Shame and Reintegration*, Cambridge: Cambridge University Press.

Burgess, E. W. ([1925] 1968) "The Growth of the City: An Introduction to a Research Project," in R. E. Park, E. W. Burgess, and R. D. McKenzie (eds.) *The City*, Chicago: University of Chicago Press.

Bursik, R. J., Jr. (1984) "Urban Dynamics and Ecological Studies of Delinquency," *Social Forces*, 63: 393–413.

Cale, E. M. (2006) "A Quantitative Review of the Relations Between the 'Big 3' Higher Order Personality Dimensions and Antisocial Behavior," *Journal of Research in Personality*, 40: 250–284.

Caspi, A., McClay, J., Moffitt, T. E., Mill, J., Martin, J., Craig, I. W., Taylor, A., and Poulton, R. (2002) "Role of Genotype in the Cycle of Violence in Maltreated Children," *Science*, 297: 851–854.

Caspi, A., Moffitt, T. E., Newman, D. L., and Silva, E. A. (1996) "Behavioral Observations at Age 3 Years Predict Adult Psychiatric Disorders: Longitudinal Evidence from a Birth Cohort," *Archives of General Psychiatry*, 53: 1033–1039.

Chambliss, W. and Seidman, R. (1971) *Law, Order, and Power*, Reading, MA: Addison-Wesley.

Chesney-Lind, M. and Bloom, B. (1997) "Feminist Criminology: Thinking about Women and Crime," in B. D. MacLean and D. Milovanovic (eds.) *Thinking Critically about Crime*, Vancouver: Collective Press.

Cleckley, H. (1941) *The Mask of Sanity*, St. Louis, MO: C. V. Mosby.

Cloward, R. A. and Ohlin, L. E. (1960) *Delinquency and Opportunity: A Theory of Delinquent Gangs*, Glencoe, IL: The Free Press.

Cohen, A. K. (1955) *Delinquent Boys: The Culture of the Gang*, New York: The Free Press.

Cohen, L. E. and Felson, M. (1979) "Social Change and Crime Rate Trends: A Routine Activity Approach," *American Sociological Review*, 44: 588–608.

Cornish, D. B. and Clarke, R. V. (eds.) (1986) *The Reasoning Criminal*, New York: Springer-Verlag.

Critchley, M. (1965) "Neurology's Debt to F.J. Gall (1758–1828)," *British Medical Journal*, 2: 775–781.

Cullen, F. T. and Agnew, R. (2006) *Criminological Theory: Past to Present*, 3rd edn, Los Angeles: Roxbury Publishing Company.

DeKeseredy, W. S. (2011) *Contemporary Critical Criminology*, London: Routledge.

Delgado, R. and Stefancic, J. (2001) *Critical Race Theory: An Introduction*. New York: New York University Press.

DiCristina, B. (ed.) (2012) *The Birth of Criminology: Readings from the Eighteenth and Nineteenth Centuries*, New York: Wolters Kluwer.

Du Bois, W. E. B. (1899) *The Philadelphia Negro: A Social Study*. Philadelphia, PA: University of Pennsylvania Press.

Dugdale, R. L. (1970) *The Jukes*, New York: Arno Press & The New York Times.

Durkheim, É. ([1897] 1951) *Suicide: A Study in Sociology*, trans. J. A. Spaulding and G. Simpson, New York: The Free Press.

Ebenstein, W. (ed.) (1962) *Great Political Thinkers: Plato to the Present*, 3rd edn, New York: Holt, Rinehart, and Winston.

Einstadter, W. J. and Henry, S. (2006) *Criminological Theory: An Analysis of Its Underlying Assumptions*, 2nd edn, Lanham, MD: Rowman and Littlefield.

Ellis, L. and Walsh, A. (2003) "Crime, Delinquency and Intelligence: A Review of the Worldwide Literature," in H. Nyborg (ed.) *The Scientific Study of General Intelligence: A Tribute to Arthur Jensen*, Amsterdam: Pergamon.

Engels, F. ([1845] 1887) *The Condition of the Working Class in England in 1844*, trans. F. K. Wischnewetzky, New York: John W. Lovell Company.

Eysenck, H. J. and Gudjonsson, G. H. (1989) *The Causes and Cures of Criminality*, New York: Plenum.

Farrington, D. P. (1995) "The Development of Offending and Antisocial Behaviour from Childhood: Key Findings from the Cambridge Study in Delinquent Development," *Journal of Child Psychology and Psychiatry*, 360: 929–964.

Ferrell, J. (1993) *Crimes of Style: Urban Graffiti and the Politics of Criminality*, New York: Garland Publishing.

Ferri, E. ([1901] 1913) *The Positive School of Criminology: Three Lectures*, trans. E. Untermann, Chicago: Charles H. Kerr & Company.

Flavin, J. and Desautels, A. (2006) "Feminism and Crime," in C. M. Renzetti, L. Goodstein, and S. L. Miller (eds.) *Rethinking Gender, Crime, and Justice: Feminist Readings*, Los Angeles: Roxbury Publishing Company.

Foucault, M. (1979) *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan, New York: Vintage Books.

Gabbidon, S. L. (1996) "An Argument for Including W.E.B. Dubois in the Criminology and Criminal Justice Literature," *Journal of Criminal Justice Education*, 7: 99–112.

Gabbidon, S. L. (2001) "W.E.B. Du Bois: Pioneering American Criminologist," *Journal of Black Studies*, 31: 581–599.

Gall, F. G. ([1825] 1835) *On the Functions of the Brain and of Each of its Parts*, trans. W. Louis, Jr. Boston: Marsh, Capen & Lynn.

Garofalo, R. ([1905] 1914) *Criminology*, trans. R. W. Millar, Boston: Little, Brown, and Company.

Geuss, R. (1981) *The Idea of a Critical Theory: Habermas and the Frankfurt School*, Cambridge: Cambridge University Press.

Glaser, D. (1956) "Criminality Theories and Behavioral Images," *American Journal of Sociology*, 61: 433–444.

Goddard, H. H. (1921) *The Kallikak Family: A Study in the Heredity of Feeblemindedness*, New York: The Macmillan Company.

Godwin, W. ([1798] 1985) *Enquiry Concerning Political Justice and Its Influence on Modern Morals and Happiness*, 3rd edn, London: Penguin Books.

Goldman, E. ([1917] 1969) *Anarchism and Other Essays*, New York: Dover Publications.

Gordon, L. R. (1999) "A Short History of the 'Critical' in Critical Race Theory," *The APA Newsletter on Philosophy and the Black Experience*, 98: 23–26.

Goring, C. (1913) *The English Convict*, London: His Majesty's Stationery Office.

Gottfredson, M. and Hirschi, T. (1986) "The True Value of Lambda Would Appear to Be Zero: An Essay on Career Criminals, Criminal Careers, Selective Incapacitation, Cohort Studies, and Related Topics," *Criminology*, 24: 213–234.

Gottfredson, M. and Hirschi, T. (1990) *A General Theory of Crime*, Stanford, CA: Stanford University Press.

Greenberg, D. F. (ed.) (1981) *Crime and Capitalism: Readings in Marxist Criminology*. Palo Alto, CA: Mayfield Publishing Company.

Guerry, A-M. ([1833] 2002) *Essay on the Moral Statistics of France*, trans. H. P. Whitt and V. W. Reinking, Lewiston, NY: Edwin Mellen Press.

Hare, R. D. (1991) *The Revised Psychopathy Checklist*, Toronto: Multi-Health Systems.

Healy, W. (1915) *The Individual Delinquent: A Text-Book of Diagnosis and Prognosis for All Concerned in Understanding Offenders*, Boston: Little, Brown.

Henry, S. and Milovanovic, D. (1991) "Constitutive Criminology: The Maturation of Critical Theory," *Criminology*, 29: 293–316.

Hirschi, T. (1969) *Causes of Delinquency*, Berkeley, CA: University of California Press.

Hirschi, T. and Hindelang, M. J. (1977) "Intelligence and Delinquency: A Revisionist Review," *American Sociological Review*, 42: 571–587.

Hutcheson, F. ([1725] 2004) *An Inquiry into the Original of Our Ideas of Beauty and Virtue*, Indianapolis: Liberty Fund.

Hutcheson, F. ([1755] 2006) *A System of Moral Philosophy*, London: Continuum.

Jurik, N. C. (1999) "Socialist Feminism, Criminology, and Social Justice," in B. A. Arrigo (ed.) *Social Justice/Criminal Justice: The Maturation of Critical Theory in Law, Crime, and Deviance*, Belmont, CA: West/Wadsworth.

Kant, I. ([1797] 1965) *The Metaphysical Elements of Justice*, trans. J. Ladd, Indianapolis: Bobbs-Merrill.

Kropotkin, P. (1886) *Law and Authority: An Anarchist Essay*, London: International Publishing Company.

Kropotkin, P. ([1905] 1975) "Anarchism," in E. Capouya and K. Tompkins (eds.) *The Essential Kropotkin*, New York: Liveright.

Laub, J. H. and Sampson, R. J. (1991) "The Sutherland-Glueck Debate: On the Sociology of Criminological Knowledge," *American Journal of Sociology*, 96: 1402–1440.

Laub, J. H. and Sampson, R. J. (2003) *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70*, Cambridge, MA: Harvard University Press.

Lavater, J. G. ([1775–1778] 1840) *Essays on Physiognomy: Designed to Promote the Knowledge and the Love of Mankind*, 3rd edn, trans. T. Holcroft, London: B. Blake.

Lemert, E. M. (1951) *Social Pathology: A Systematic Approach to the Theory of Sociopathic Behavior*, New York: McGraw-Hill.

Lengermann, P. M. and Niebrugge-Brantley, J. (2000) "Early Women Sociologists and Classical Sociological Theory: 1830–1930," in G. Ritzer, *Classical Sociological Theory*, 3rd edn, Boston: McGraw-Hill.

Lindesmith, A. and Levin, Y. (1937) "The Lombrosian Myth in Criminology," *The American Journal of Sociology*, 42: 653–671.

Lombroso, C. (1895–1896) "Criminal Anthropology: Its Origin and Application," *Forum*, 20: 33–49.

Lombroso, C. (2006) *Criminal Man*, trans. M. Gibson and N. H. Rafter, Durham, NC: Duke University Press.

Lynam, D., Moffitt, T., and Stouthamer-Loeber, M. (1993) "Explaining the Relation Between IQ and Delinquency: Class, Race, Test Motivation, School Failure, Or Self-Control?," *Journal of Abnormal Psychology*, 102: 187–196.

Lynch, M. J. and Groves, W. B. (1989) *A Primer in Radical Criminology*, 2nd edn, New York: Harrow and Heston.

MacLean, B. D. and Milovanovic, D. (eds.) (1997) *Thinking Critically About Crime*, Vancouver: Collective Press.

Martineau, H. (1839) *Society in America*, vol. I, 2nd edn, London: Saunders and Otley.

Marx, K. ([1867] 1915) *Capital: A Critique of Political Economy*, vol. I, trans. S. Moore and E. Aveling, Chicago: Charles H. Kerr and Company.

Matza, D. (1964) *Delinquency and Drift*, New York: Wiley.

Merton, R. K. (1938) "Social Structure and Anomie," *American Sociological Review*, 3: 672–682.

Messner, S. F. and Rosenfeld, R. (2001) *Crime and the American Dream*, 3rd edn, Belmont, CA: Wadsworth.

Miller, J. (2003) "Feminist Criminology," in M. D. Schwartz and S. E. Hatty (eds.) *Controversies in Critical Criminology*, Cincinnati, OH: Anderson Publishing Company.

Moffitt, T. E. (1993) "Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy," *Psychological Review*, 100: 674–701.

Montesquieu ([1748] 1899) *The Spirit of Laws*, trans. T. Nugent, New York: The Colonial Press.

Nye, F. I. (1958) *Family Relationships and Delinquent Behavior*, New York: Wiley.

Park, R. E. (1936) "Human Ecology," *The American Journal of Sociology*, 42: 1–15.

Pashukanis, E. B. ([1924] 1978) *Law and Marxism: A General Theory*, trans. B. Einhom, London: Ink Links.

Pepinsky, H. (1978) "Communist Anarchism as an Alternative to the Rule of Criminal Law," *Contemporary Crisis*, 2: 315–327.

Pepinsky, H. and Quinney, R. (eds.) (1991) *Criminology as Peacemaking*, Bloomington, IN: Indiana University Press.

Pinel, P. ([1801] 1962) *A Treatise on Insanity*, trans. D. D. Davis, New York: Hafner Publishing Company.

Prichard, J. C. (1835) *A Treatise on Insanity and Other Disorders Affecting the Mind*, London: Sherwood, Gilbert, and Piper.

Quetelet, A. ([1831] 1984) *Research on the Propensity for Crime at Different Ages*, trans. S. F. Sylvester, Cincinnati, OH: Anderson Publishing.

Quinney, R. (1970) *The Social Reality of Crime*, Boston: Little, Brown and Company.

Quinney, R. (1980) *Class, State, and Crime*, 2nd edn, New York: Longman.

Quinney, R. (1991) "The Way Of Peace: On Crime, Suffering, and Service," in H. Pepinsky and R. Quinney (eds.) *Criminology as Peacemaking*, Bloomington, IN: Indiana University Press.

Rafter, N. (2004) "The Unrepentant Horse-Slasher: Moral Insanity and the Origins of Criminological Thought," *Criminology*, 42: 979–1008.

Rafter, N. (2005) "The Murderous Dutch Fiddler: Criminology, History and the Problem of Phrenology," *Theoretical Criminology*, 9, 65–96.

Raine, A. (2002) "Biosocial Studies of Antisocial and Violent Behavior in Children and Adults: A Review," *Journal of Abnormal Child Psychology*, 30: 311–326.

Raine, A. and Yang, Y. (2006) "Neural Foundations to Moral Reasoning and Antisocial Behavior," *Social, Cognitive, and Affective Neuroscience*, 1: 203–213.

Reckless, W. C. (1967) *The Crime Problem*, 4th edn, New York: Appleton-Century-Crofts.

Reiman, J. ([1979] 2007) *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice*, 8th edn, Boston: Allyn and Bacon.

Ross, J. I. (2009) *Cutting the Edge: Current Perspectives in Radical/Critical Criminology and Criminal Justice*, 2nd edn, New Brunswick, NJ: Transaction Publishers.

Rusche, G. and Kirchheimer, O. ([1939] 2003) *Punishment and Social Structure*, New Brunswick, NJ: Transaction Publishers.

Rush, B. (1812) *Medical Inquiries and Observations upon the Diseases of the Mind*, Philadelphia, PA: Kimber & Richardson.

Russell, K. K. (1999) "Critical Race Theory and Social Justice," in B. A. Arrigo (ed.) *Social Justice/Criminal Justice: The Maturation of Critical Theory in Law, Crime, and Deviance*, Belmont, CA: West/Wadsworth.

Sampson, R. J. and Groves, W. B. (1989) "Community Structures and Crime: Testing Social Disorganization Theory," *American Journal of Sociology*, 94: 774–802.

Sampson, R. J. and Laub, J. H. (1993) *Crime in the Making: Pathways and Turning Points Through Life*, Cambridge, MA: Harvard University Press.

Sampson, R. J., Raudenbush, S. W. and Earls, F. (1997) "Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy," *Science*, 277: 918–924.

Savitz, L., Turner, S. H., and Dickman, T. (1977) "The Origin of Scientific Criminology: Franz Joseph Gall as the First Criminologist," in R. B. Meier (ed.) *Theory in Criminology: Contemporary Views*, Beverly Hills, CA: Sage Publications.

Scarre, G. (1994) "Epicurus as a Forerunner of Utilitarianism," *Utilitas*, 6: 219–231.

Schur, E. M. (1971) *Labeling Deviant Behavior: Its Sociological Implications*, New York: Harper and Row.

Schwartz, M. D. and Hatty, S. E. (eds.) (2003) *Controversies in Critical Criminology*, Cincinnati, OH: Anderson Publishing Company.

Sellin, T. (1938) *Culture, Conflict and Crime*, New York: Social Science Research Council.

Shaw, C. R. and McKay, H. D. (1942) *Juvenile Delinquency and Urban Areas*, Chicago: University of Chicago Press.

Sheldon, W. H., Hartl, E. M., and McDermott, E. (1949) *Varieties of Delinquent Youth*, New York: Harper & Brothers Publishers.

Spurzheim, J. G. (1815) *The Physiognomical System of Drs. Gall and Spurzheim*, London: Printed for Baldwin, Cradock & Joy.

Stafford, M. C. and Warr, M. (1993) "A Reconceptualization of General and Specific Deterrence," *Journal of Research in Crime and Delinquency*, 30: 123–135.

Stark, R. (1987) "Deviant Places: A Theory of the Ecology of Crime," *Criminology*, 25: 893–909.

Sutherland, E. H. (1947) *Principles of Criminology*, 4th edn, Chicago: J.B. Lippincott Company.

Sutherland, E. H. and Cressey, D. R. (1955) *Principles of Criminology*, 5th edn, New York: J.B. Lippincott Company.

Sykes, G. M. and Matza, D. (1957) "Techniques of Neutralization: A Theory of Delinquency," *American Sociological Review*, 22: 664–670.

Tannenbaum, F. ([1938] 1951) *Crime and the Community*, New York: Columbia University Press.

Tarde, G. ([1903] 1912) *Penal Philosophy*, trans. R. Howell, Boston: Little, Brown, and Company.

Taylor, E. (1998) "A Primer on Critical Race Theory," *The Journal of Blacks in Higher Education*, 19: 122–124.

Taylor, I., Walton, P. and Young, J. (1973) *The New Criminology: For a Social Theory of Deviance*, New York: Harper and Row.

Thornberry, T. P., Huizinga, D., and Loeber, R. (2004) "The Causes and Correla Studies: Findings and Policy Implications," *Juvenile Justice*, 9: 3–19.

Tifft, L. (1979) "The Coming Redefinition of Crime: An Anarchist Alternative," *Social Problems*, 26: 392–402.

Tifft, L. and Sullivan, D. (1980) *The Struggle to Be Human: Crime, Criminology, and Anarchism*, Orkney: Cienfeugos.

Tittle, C. R. (1995) *Control Balance: Toward a General Theory of Deviance*, Boulder, CO: Westview Press.

Toch, H. (1998) "Psychopathy or Antisocial Personality Disorder in Forensic Settings," in T. Millon, E. Simonsen, M. Birket-Smith and R. D. Davis (eds.) *Psychopathy: Antisocial, Criminal, and Violent Behavior*, New York: Guilford Press.

Turk, A. T. (1969) *Criminality and Legal Order*, Chicago: Rand McNally and Company.

Vold, G. B. (1958) *Theoretical Criminology*, New York: Oxford University Press.

Wells-Barnett, I.B. ([1894] 1969) *On Lynchings*, New York: Arno.

Whitlock, F. A. (1982) "A Note on Moral Insanity and Psychopathic Disorders," *Psychiatric Bulletin*, 6: 57–59.

Wilkins, L. T. (1964) *Social Deviance: Social Policy, Action, and Research*, London: Tavistock.

Wolfgang, M. (1972) "Cesare Lombroso, 1835–1909," in H. Mannheim (ed.) *Pioneers in Criminology*, 2nd edn, Montclair, NJ: Patterson Smith.

Wonders, N. A. (1999) "Postmodern Feminist Criminology and Social Justice," in B. A. Arrigo (ed.) *Social Justice/Criminal Justice: The Maturation of Critical Theory in Law, Crime, and Deviance*, Belmont, CA: West/Wadsworth.

Young, J. (1997) "Left Realism: The Basics," in B. D. MacLean and D. Milovanovic (eds.) *Thinking Critically About Crime*, Vancouver: Collective Press.

2

Silence and the criminalization of victimization

On the need for an international feminist criminology

Syeda Tonima Hadi and Meda Chesney-Lind

Introduction

The situation of girls and women has long been ignored in discussions of law, justice and crime. That has meant that their experiences both of victimization, and crime and punishment (sometimes extremely harsh) have been rendered invisible by long-accepted patterns of sexism.

The nature of women's victimization is increasingly understood as a global phenomenon. Irrespective of their national, cultural, ethnic, and racial identities, women are violated, physically, sexually, and mentally across the globe. Under the umbrella of patriarchy, women are increasingly unlikely to exert control over their own bodies. More often than not, their victimization is legitimized through religious sanctions and criminal laws, and the silence is maintained about the true dimensions of the problem by the male religious and political leaders. As this chapter will document, such a pattern is common, not just in the developing world, but in the developed one as well. Normalizing female victimization, given its vast nature, is now increasingly understood – particularly outside of the United States – as a violation of international human rights.

The global dimensions of women's victimization have received attention only in recent decades, and theorizing about the meaning of such a cross-national pattern has lagged behind awareness. Although women's rights activists (particularly but not exclusively in the West) have been working on this issue since before women gained the right to vote, research on the actual scope of the problem appeared only in the mid-twentieth century. Through the efforts of international organizations such as the United Nations, Human Rights Watch, Amnesty International, and researchers worldwide, we have started to gain a more global understanding of the phenomenon. This chapter summarizes some of the early efforts of the second-wave feminists as well as some recent efforts to document the extent of the abuse in other countries. Through this discussion we examine some culturally unique and yet common aspects of women's victimization worldwide. We also note that women's attempts to escape situations of victimization have often been criminalized by the very systems of justice they should logically expect to protect them.

The systematic lack of concern about abuse of such a vast swath of the population produces in girls and women a despair and cynicism about the broader criminal justice enterprise. If the goal of criminal justice systems is public safety, it has failed girls and women spectacularly.

Bringing in women's voices, documenting their victimizations, and challenging misogynistic narratives, policies, and laws have been important contributions of feminist criminology. Such a perspective is much needed in the area of violence against women since the problem is so vast. A World Health Organization study revealed that at least one in every three women has been beaten, coerced into sex, or otherwise abused during her lifetime by her partner (Heise *et al.* 1999). International works have also consistently found that despite the serious nature of their victimization, the overwhelming number of women, irrespective of their nationality, cultural and religious practices, prefer to remain silent about their problems. As we shall show, the fear of stigmatization, re-victimization, lack of social support, denial of justice, and even criminalization of victims themselves pose serious threats to women's help-seeking behaviors. Again, while some might expect that these problems would be found only in certain international contexts, we shall document that the problems actually exist worldwide.

Early twentieth-century feminists also fought to establish a woman's right to control her own body through proposing laws that decriminalized and legalized family planning and later abortion. Conservative politicians and religious fundamentalists, both in the USA and elsewhere, have fought these advances by seeking to roll back and recriminalize birth control and abortion services around the globe. Once again, through the collaboration of international feminist activists and researchers, data now exist to document the alarming health consequences women from the developing world face, as a result of being denied access to legal and safe birth control or safe abortion. An estimated 68,000 women die every year from unsafe abortions, and millions more are injured, many permanently (Grimes *et al.* 2006). Ironically, these same politicians and religious leaders who remain silent about women's victimization are very vocal about seeking to explicitly control women's sexual and reproductive choices often in the name of protecting "life."

Finally, feminist scholars have been instrumental in exploring the degree to which the criminal justice system is complicit in the enforcement of male privilege. Stark examples of this can be found in certain international investigations, such as those conducted by Human Rights Watch. That said, even in countries where the feminist movement has had some notable successes – think of the Violence against Women Act in the United States – problems remain. Girls are still arrested and detained for running away from home in the United States. The increasing numbers of women arrested for minor crimes of violence is explained, not by women's crime more closely resembling male offending patterns (as the US corporate media would have it), but rather by the arrest of increasing numbers of domestic violence victims as "offenders." Hence, the combination of silence and lack of concern (about the real victimizations and issues of women) coupled with intense concern about controlling women's "wildness" and sexuality, are important cornerstones of modern patriarchal control of women globally. It falls to feminist criminology to illuminate these connections.

Breaking the silence surrounding violence against women

The inclusion of women in criminological research was catalyzed by the second wave of the feminist movement in the late 1960s and early 1970s (Chesney-Lind and Morash 2011). A first task of the earliest feminists was to direct attention to important areas neglected by prior scholarly literature. Many feminist criminologists of this period brought attention to women's oppression as a key cause of injustice and victimization. As the international feminist movement began to

gain momentum in the 1970s, the United Nations General Assembly declared 1975 as the International Women's Year and organized the first World Conference on Women, held in Mexico City (United Nations 2012). At the urging of the Conference, the years 1976–1985 were subsequently declared the UN Decade for Women. These were important landmarks, stimulating the attention of researchers, scholars, and activists not just in the West but worldwide to examine and prevent women's oppression and victimization.

Feminist thought can most clearly be seen in the earliest analysis of wife abuse. Some of the important works include: Martin's *Battered Wives* (1976), Dobash and Dobash's (1978) *Wives: The "Appropriate" Victims of Marital Violence*, Schechter's (1982) *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement*, and Walker's (1979) *Battered Women*. All these authors commonly expressed their concerns regarding the vulnerability of women in intimate relationships within a social, religious, political, and cultural system that does not provide women adequate support and justice and illustrated the failure of earlier scholars and researchers to bring out the actual nature of women's victimization.

Inspired by the work of British feminist Erin Pizzey, author of *Scream Quietly or the Neighbors Will Hear*, who was conducting a campaign on behalf of battered wives in England, Martin (1976) published her book *Battered Wives* in the USA (Bergen *et al.* 2005). In her book, Martin indicated that women might be more vulnerable in their homes to being physically victimized than on the streets. In her words, "Evidence of wife-beating exists wherever one cares to look for it" (Martin 1976: 161). However, statistics on the dimensions of the problem were still scarce in the USA and decades after its discovery, the US Federal Bureau of Investigation still has no specific category for this offense. Likewise, at the time Martin was writing, wife-abuse was not even necessarily regarded as a crime. Incidents of abuse against women in the home were often simply reported as "domestic disturbance," with police neglecting to file a report unless severe injuries or homicide were involved. Moreover, women were sometimes reluctant to reveal their victimization, because of the impact that might have on their marriage, particularly given the reluctance of the society to interfere in matters between a "husband and wife."

Dobash and Dobash (1978) put forward a historical analysis which exposed the legal, religious, and cultural legacies that supported a marital hierarchy designed to subordinate women, and legalize violence against them. They noted:

> All the legal systems of Europe, England and early America supported a husband's rights to beat his wife and so did the community norms. In 18th century France, for example, it was appropriate for a husband to chastise his wife for reasons such as assertion of her independence, wanting to retain control of her property after marriage, adultery, or even suspected infidelity . . . the chastisement of wives, like that of children was to be restricted to "blows, thumps, kicks or punches on the back . . . which did not leave any marks."
>
> (ibid.: 172)

Dobash and Dobash concluded, although domestic chastisement is no longer legal:

> Most of the ideologies and social arrangement which formed the underpinnings of this violence still exist and are inextricably intertwined in our present legal, religious, political and economic practices. Wives may no longer be the legitimate victims of marital violence, but in social terms they are still the "appropriate" victims.
>
> (ibid.: 179)

Schechter (1982) documented that battered women face not only brutality from their husbands, but also indifference from social institutions they turn to for help in addressing their

problems. She noted that police and courts often denied women justice, ignoring the brutality they experienced which both isolated and stigmatized the women and lent indirect support to their husbands. Women were even harassed if they tried to leave their husbands. Schechter noted, "In Chicago in the early 1970s, as in many cities, battered women who left were denied welfare. Still legally married, their husbands' income made them ineligible for assistance" (ibid.: 199). Walker echoed, "Cultural conditions, marriage laws, economic realities, physical inferiority – all these teach women that they have no direct control over the circumstances of their lives" (1979: 225). Lacking the sense of control over their lives, women often perceive themselves as weak, dependent, and ultimately somehow responsible for their own victimization. The extremely unsupportive social and legal system made help-seeking difficult for the victims, often resulting in their silence.

While earlier US feminists analyzed wife abuse against the backdrop of a patriarchal social, economic, political, and legal system that legitimized women's victimization within marriage, later feminists examined relationships outside marriage. In a study examining the factors behind women's victimization in dating or casual relationships in the US college and university fraternities, Martin and Hummer (1989) explained that these fraternities are often populated by men whose beliefs and attitudes are strongly patriarchal, upholding "masculinity" as superior, and treating "femininity" as inferior. These groups often treat women as commodities, use them as prey, and abuse them; often as a part of a "game" that men like to play. Fisher, Sloan, Cullen and Lu (1998) echoed in a later study that college students' somewhat "deviant lifestyle," such as exposure to crimes, alcohol and drug abuse, and lack of capable guardianships are factors that influence their victimization in intimate relationships. The "partying," alcohol and drug abuse are often justifications behind women's victimization because no one "knew her" and she was drunk (Cepeda and Valdez 2003). Thus, irrespective of their traditional role as a wife or as a deviant dating partner, women are victimized by men, often with society's approval to "control" or "correct" them.

On a related problem, feminist researchers like Mary Koss (1988), Peggy Sanday (1990), Martin Schwartz and Walter DeKeseredy (1997) did path-breaking work on the extensiveness and significance of campus sexual assault. When study after study found that roughly between 15 and 25 percent of young women had been the victims of sexual assault while in college (ibid.: 13), the question then became, why do so few campuses develop robust prevention and intervention strategies? Part of the explanation may lie in the fact that those who commit sexual assaults on campus are not the lurking hulks of the "stranger danger" myths, but instead members of exclusive, prestigious and powerful groups on campus, including fraternities and sports teams (ibid.: 136). Added to this is the fact that the most common campus responses, that of starting sexual assault awareness and prevention programs, are largely ineffective (Bordon *et al.* 1988).

In 1979, the UN General Assembly adopted the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) (United Nations 2012). This action is often described as an *International Bill of Rights for Women* since it inspired scholars around the world to explore the ways in which culture and tradition worked to shape inequitable gender roles and family relations. The work of early 1970s feminist scholars on women's victimization, along with international exposure of the social problem through UN efforts, have motivated researchers all over the world to examine the social problem through their own cultural lenses.

Since then, research on the subject of violence against women has grown tremendously. Solid research on the extent of women's victimization, not only in the US context, but worldwide, is increasingly available. According to Krug *et al.* (2002), in a World Health Organization Report on Violence, 10–69 percent of women in 48 population-based surveys from around the world reported being physically assaulted by an intimate male partner at some

point in their lives. As noted above, another statistic on intimate partner violence around the world revealed that at least one in every three women has been beaten, coerced into sex, or otherwise abused during her lifetime by her partner (Heise *et al.* 1999).

Recent surveys in the USA examining trends in domestic violence show an encouraging downward trend. According to national crime victimization data, between 1993 and 2005, the rate of non-fatal, intimate partner violence reported by women declined steeply, with the female rate of simple assault victimization declining by two-thirds and the female rate of aggravated assault declining by two-thirds (Catalano 2007). By contrast, male rates of non-fatal intimate partner violence remained relatively stable – 1.6 victimizations per 1,000 males 12 years old and older in 1993, compared to 1.3 per 1,000 in 2004. Recall, though, far more of women's victimizations than men's are explained by intimate partner violence; IPV accounted for over a fifth (21.5 percent) of all women's victimizations but only 3.6 percent of men's victimizations (ibid.).

Turning to lethal domestic violence rates, a different pattern emerges. While the number of intimate partner homicide victims has declined since 1993, the decline was far greater among male victims. During 1993, the number of females murdered by intimates was 1571, compared to 1159 during 2004 – a 26 percent decline. The number of males murdered by partners during 1993 was 698, compared to 385 – a 45 percent decline. There is considerable debate about the sources of these declines, but many credit the provision of legal and social services to victims (particularly services related to protective orders) as well as increasing women's educational attainment, for at least part of the trend (Dugan *et al.* 1999; Farmer and Tiefenthaler 2004).

The scope of US research has expanded from the early 1970s focus on wife abuse to all forms of partner abuse, including dating or casual partners and same sex partners. All forms of abuse including physical, emotional, and sexual, are research problems now. Medical, legal, and mental health services to the survivors of violence are much better. However, in many cultures around the world, violence against women is still very much an accepted practice.

Yoshioka, Gilbert, El-Bassel, and Baig-Amin (2003), in their study comparing South Asian, Hispanic, and African American women, noted that despite cultural differences between these communities, they share a sense of familism and collectivism. By familism, the researchers referred to identification with and attachment to the nuclear and extended family characterized by strong feelings of loyalty, reciprocity, and solidarity. There are norms within each of these communities to rely on informal support networks in times of family crises. Thus, it is no surprise that Yoshioka *et al.* found that the majority of the women in their study disclosed incidents of victimization to informal social networks, such as friends and family. However, for South Asian battered women, adherence to traditional gender roles appeared to be more of a barrier to help-seeking than in other communities. Yoshioka *et al.* indicated that oftentimes South Asian women fear that by speaking about the abuse they feared they would be seen as too "westernized." Also, there is stigma attached to the concept of divorce in the South Asian community. Thus, in the study, comparatively fewer South Asian women were instructed to leave their husbands. More of the South Asian women were advised to stay in their marriages and to put up with the abuse. Although Hispanic and African American women were advised more by informal sources to leave violent relationships, the researchers expressed concern regarding factors such as lack of financial resources and racial discriminations as barriers to their help-seeking behavior.

Rani and Bonu (2008) in their research using demographic and health surveys conducted between 1998 and 2001 in seven Asian countries (Armenia, Bangladesh, Cambodia, India, Kazakhstan, Nepal, and Turkey) noted that wife beating is frequently viewed as physical chastisement: the husband's right to "correct" an erring wife. The study found that acceptance of wife beating ranged from 29 percent in Nepal to 57 percent in India and from 26 percent in Kazakhstan to 56 percent in Turkey.

A study by the Centre for Health and Population Research, Bangladesh (ICDDR,B 2005) indicated that women suffer more from poverty and discrimination than men, especially in South Asia. Looking further at the case of Bangladesh, a South Asian nation, on average, 40 percent of women are abused by their husbands in both the rural and urban areas of Bangladesh (ibid.). Violence against women, especially in marriages, is usually accepted by Bangladeshi society. Revealing sensitive information regarding spouse violence may lead abused women to be socially stigmatized and later to be exposed to more violence; thus the study found 66 percent of women never report the violence (ibid.).

Cultural acceptance of wife beating in Bangladesh is often supported by norms and regulations, both religious and legal (Hadi 2011). The Constitution of Bangladesh (Article 28[2]) states: "Women shall have equal rights with men in all spheres of the *State* and of the *public life*" (Bangladesh Women Lawyers' Association 2003). However, the emphasis of equality only within "the State and public life" establishes that the government will not exert its authority in the "personal" sphere. In Bangladesh, these laws govern matters in the personal/private sphere and are dependent on a citizen's social and religious community. The majority of Bangladeshi citizens are Muslims, and thus, the Muslim personal laws determine the rights of many women in Bangladesh. The Muslim personal law (*Sharia*) perpetuates gender inequality by placing women under the control of men. Under the Muslim law of inheritance, men always end up inheriting more, putting women in an economically dependent and socially vulnerable position. Men are given the unilateral right to divorce, whereas women seeking divorce must go through extensive and complicated legal processes. In addition, women are often deprived of justice in cases of rape, molestation, and abduction, if they end up seeking legal help. In most cases, however, they do not seek justice because of the social stigma associated with their victimization.

The same is observed in another Muslim majority nation of South Asia: Pakistan. In Pakistan, the vast majority of cases of domestic violence are not reported to any official body (Andersson *et al.* 2010). Even the handful of cases reported where women were abused by husbands or in-laws are often termed as "accidents." The incidents of abuse against women that are reported officially are mostly the extreme cases where the victim is burnt, disfigured, raped, tortured, or murdered. Pakistan does not have any specific laws that protect victims of domestic violence except an ordinance based on Islamic criminal laws, where evidentiary requirements are very strict. This ordinance broadly penalizes all acts of causing intentional or unintentional physical harm to another including murder, attempted murder, or hurt. However, the ordinance treats an offense as a crime committed against an individual, rather than one against the state – a crime which can be revoked if the victim chooses to take money or decides to reconcile. Therefore, once a crime has been registered under this ordinance, an abused woman can face tremendous pressure to forgive her perpetrator. Due to this lack of formal recognition of violence against women as a criminal act, the judicial system tends to view domestic violence as a private affair and not open to legal scrutiny.

Haj-Yahia (2002), in a study conducted among 291 Arab women, examined their attitudes toward varying patterns of coping with wife abuse. The findings revealed that the more the participants were characterized by negative and traditional perceptions of women, stereotyped attitudes toward gender roles, high levels of religiosity and strong orientations toward familism, the greater their tendency to expect battered wives to resist seeking help from formal agencies or break up the family unit.

April Chiung-Tao Shen (2010), a Chinese researcher, exploring a different territory of partner violence in a qualitative study, examined dating females and their help-seeking behavior. She noted that, in the patriarchal Chinese culture, women are subordinate to men and violence by male partners is often accepted. Shen's findings indicated that Taiwanese dating-violence victims

tend to seek informal help rather than formal help. Culturally structured help-seeking experiences centered around six primary themes: (1) self-reliant culture – participants in the study decided to rely on themselves and did not reveal their dating-violence experiences to any member of their family because they did not want to burden their family; (2) personal and family shame – participants thought revealing their relationship problems would bring shame to the family; (3) secretive and sexual dating relationships – sexual relationships before marriage being taboo, participants decided to be secretive about this; (4) fear of negative reactions from others – participants were afraid that the abusive partner might hurt a family member as well as them if their parents were informed; (5) unfamiliarity with available resources – participants simply did not know where to seek help; and (6) re-victimization in seeking help – participants were victimized repeatedly for seeking help from others.

In sum, researchers, scholars and activists have been analyzing women's victimization now for decades and across a wide range of cultures and countries. The conclusion regarding the abuse of women is inescapable: regardless of the relationship type, social, cultural, economic, and political background, women report extensive victimization and find little recourse in the legal systems of their various countries. Despite the severity and the extent of violence faced by women worldwide, they often decide to remain silent and not seek help. Fear of re-victimization, social stigmatization followed by harassment, lack of economic resources, ignorance regarding existing source of support, neglect or worse from the law enforcement personnel, and an overall unsupportive community that essentially approves, either implicitly or explicitly, of male violence towards women, make it difficult for girls and women to escape their abusers. That said, if a country decides to take domestic violence seriously, as the United States arguably has, the evidence is that it can be reduced rather substantially.

The sexual and reproductive health of women worldwide

Efforts to criminalize (or re-criminalize) family planning and abortion place the criminal justice system firmly at the center of patriarchal control of girls' and women's behavior, particularly since women's sexual and reproductive health is a matter of grave concern worldwide. The World Health Organization estimates that 19 million unsafe abortions take place every year (Ahman and Shah 2002). About 78,000 women die from unsafe and illegal abortions (UNFPA figures) each year and countless women are injured or left infertile (Mishra 2001). Despite the adverse impact on women's health, roughly one-third of the world's women live in countries with strict abortion legislation that do not allow women to opt for abortion under any circumstances or only in extreme cases of rape, incest, or where the woman's health is in serious danger (ibid.). Moreover, whether legal or illegal, induced abortion is usually stigmatized and frequently opposed by political and/or religious leaders (Grimes *et al.* 2006). As a result, many women suffering complications from unsafe abortions are afraid to come in for medical treatment, often dying without ever being counted as an abortion-related fatality (Mishra 2001). Today, despite all sorts of medical advances, women worldwide still do not have the power to make their own sexual and reproductive choices without government interference.

The social control over women's sexuality, sexual expression, and reproduction is arguably as old as human civilization, and it is a central feature of the patriarchal sex/gender system (Renzetti *et al.* 2012). Insistence that women be virgins at marriage (and harsh punishments for those found not to be virgins), the express legal prohibition of women's prostitution, and harsh punishments for women's (and generally not men's) adultery are cornerstones of male dominance (Lerner 1986). The history of contraception and abortion is a bit more convoluted (largely because of centuries of confusion about when the fetus was viable) (Luker 1985), but in recent years,

as this chapter will document, the issue of reproductive rights, and specifically access to abortion services, has become a crucial battleground for women's health and women's rights.

The battle to establish woman's right to control her own sexuality and reproduction started at the beginning of the twentieth century (Sinding 2007). Two of the important feminist figures among the initial innovators are Margaret Sanger and Marie Stopes. These feminist health workers were concerned primarily with women's right to avoid unwanted pregnancies, focusing on the individual woman and her well-being. During that time, the term "birth control" did not even exist in the USA and "prevention of conception" was a taboo (Mlitt 1980). Two million illegal abortions took place annually, many fatal; 25,000 women were dying in childbirth; many pregnant women decided to end their constant suffering through committing suicide (ibid.). Margaret Sanger's own mother died very early in her forties out of the complications arising from 18 pregnancies she had. With the aim to change women's conditions, one of Sanger's revolutionary first steps during that time was the establishment of the first birth control clinic in New York in the year 1916 and her organization *Planned Parenthood* (Mlitt 1980; Sinding 2007).

Simultaneously, with her controversial book *Married Love*, published in 1918 in Britain, Marie Stopes advocated for women's sexual rights within marriage and their right to contraception (Copeland 2009).

> Many found it completely shocking that women should admit to sexual desires and recognize the need for their own sexual satisfaction. Yet a frank admission of this reality was at the heart of Stopes's mission. She mocked the view that "nice women were immune to sexual passion and that only the 'depraved' had physical yearning."
>
> (ibid.: 49)

Later in 1918 Stopes wrote a birth control manual, "Wise Parenthood" and in 1921, she and her husband founded the *Holloway Clinic*, the first birth control clinic in Britain. It was the forerunner of the National Birth Control Association, renamed the Family Planning Association in 1939 (ibid.).

While feminist activists like Sanger and Stopes were making significant progress in challenging the criminalization of contraception at the beginning of the twentieth century, the family planning movement gained further ground due to the second-wave feminist activists and their efforts to decriminalize abortion. Their use of the phrase "Reproductive Politics" emerged in the mid-twentieth century, and signaled that the movement no longer dealt with just women's right to avoid unwanted pregnancies. Instead, it expanded the struggle over contraception to include abortion, race and sterilization, class and adoption, women and sexuality, and other related subjects (Solinger 2005). One of the central questions these feminist advocates struggled with then was: Who has the power to make decisions about keeping or ending a pregnancy? The pregnant woman, a physician or a state legislator?

Among many of the second-wave feminist groups fighting for the decriminalization of abortion were the Redstockings (formerly the New York Radical Feminists). Founded in 1967 by Pam Allen, who had been active in the civil rights movement, the group argued that the sexual revolution was incomplete unless women could seek medically safe abortion services without fear of arrest or other forms of social shaming (Nelson 2003). Many prominent feminist advocates were involved in New York Radical Feminists, including Kathie Sarachild, a Harvard peace activist and veteran of the civil rights movement, Anne Koedt, previously of Students for a Democratic Society, Kate Millett, author of the famous *Sexual Politics*, and Robin Morgan, who gained her experience in the anti-war movement (Nelson 2003).

Two related goals shaped the Redstockings' movement: First, they wanted to make legal abortion available to all women, not just the "appropriate" ones deemed by the physician (ibid.). Second, they criticized the "sexual revolution" as incomplete as long as women lacked both reproductive control and social equality with men. Redstockings feminists explained that women needed *both* economic power and access to reproductive control in order to begin to enjoy their sexuality fully.

While this sexual and reproductive revolution was ongoing in the USA and England, in the international arena the first formal declaration of reproductive rights appeared in the United Nations International Conference on Human Rights in Teheran, Iran in 1968 (Pillai and Wang 1999). The declaration granted parents the right to decide on the number and spacing of their births and the right to have adequate education and information in this respect, reaffirmed in the World Population Plan of Action, adopted in Bucharest six years later (ibid.). The six-day debates at the 1994 Cairo Conference extended the definition of reproductive rights to include the rights of women to have freedom of choice and control over their bodies, and in the 1995 Fourth World Conference on Women held in Beijing, human rights advocates called for the removal of political, social, and economic inequalities imposed on women (ibid.).

Women's right to control their sexuality and reproduction has become an international struggle, with strong opposition emerging from organized religious groups like the Catholic Church and other sexually conservative religions. Maguire, analyzing the case of contraception and abortion in the international arena, stated:

> What is not notoriously difficult to say is that religions seriously affect national and international policy on contraception and abortion. The Vatican from its unduly privileged perch in the United Nations along with the "Catholic" nations, newly allied with conservative Muslim nations, blocked reference to contraception and family planning at the United Nations conference in Rio de Janeiro in 1992. This alliance also disrupted proceedings at the 1994 UN conference in Cairo and impeded any reasonable discussion of abortion. As the then Prime Minister Brundtland of Norway said of the Rio conference: "States that do not have any population problem—in one particular case, even no births at all [the Vatican]—are doing their best, their utmost, to prevent the world from making sensible decisions regarding family planning."
>
> (2003: 13)

Maguire argued that most of the world's religions originated at a time when the global population was 50–450 million people, in comparison to the six billion at the beginning of the second millennium and thus, "Are the laws and edicts articulated at that time to guide (control) human behavior applicable now?"

More recently, in the United States, leading candidates for the Republican presidential nomination seriously talked about not only re-criminalizing abortion, but also seeking to seriously restrict women's access to contraception. Mitt Romney, a prominent Mormon and the eventual nominee, argued that he would "get rid" of Planned Parenthood to balance the federal budget (Peoples 2012). Rick Santorum, another Republican candidate said,

> One of the things I will talk about, that no president has talked about before, is I think the dangers of contraception in this country . . . It's not okay. It's a license to do things in a sexual realm that is counter to how things are supposed to be.
>
> (Mataconis 2012)

Santorum, in these remarks, makes a crucial shift in discourse. By linking his reservations about contraception to sexuality, he is implicitly suggesting that the sexual freedom made possible by access to safe methods of contraception is morally objectionable. Since virtually all of these methods are female methods, the implications of these remarks about women's sexual freedom are ominous and mark a new willingness to use the criminal justice system to force women to carry unwanted pregnancies to term.

Rick Santorum, along with other Republican politicians including the current nominee from the Republican Party, Mitt Romney, stand ready to restrict a woman's right to make her own child-bearing decisions and deny essential health care to millions of women by ending government payments to Planned Parenthood for family planning services, cancer screening and other important health services provided to low-income women (*The New York Times* 2012). The candidates also want to reinstate the Global Gag Rule policy that denies US funding to any foreign non-government organization that provides abortion services, counseling or referrals (Mishra 2001; *The New York Times* 2012). This policy was first announced under the Reagan Administration, remaining in effect until the beginning of 1993 (Crane and Dusenberry 2004). The policy was rescinded under the Clinton administration, until the Republican-dominated Congress adopted a version of it in 1999 legislation. When President George W. Bush took office in January 2001, he reinstated it (ibid.). Mishra, in her article on the consequences of such policies on women's health and social status worldwide, stated:

> The Global Gag Rule is not only anti-women, but also restricts free speech, as it is a ban on lobbying. If it were applied in the US, it would violate the Constitution by denying individuals and organizations the right to lobby on the issues that are most vital to them without jeopardizing their public funding. Coming from the so-called "liberal democratic state" this rule adversely affects several NGOs working across the world on reproductive rights of women.
>
> (2001: 3817)

More women suffer and die from unsafe abortion and poor health services in the developing nations compared to the developed nations. In Latin America almost one unsafe abortion take place for every three live births; in Asia almost one unsafe abortion per every seven live births; in Africa, one unsafe abortion per seven live births. In contrast, there is one unsafe abortion per 25 live births in developed countries. In this scenario, a policy such as the Global Gag Rule can impact in further deteriorating the situation in the developing world.

In addition to policies on international platforms that restrict women's rights, laws and policies at national level also add to their misery. For example, in Nepal, abortion is a criminal act under any circumstance, even in cases of rape or incest or failure of contraception (Mishra 2001). It is also punishable by imprisonment for both the woman undergoing the abortion as well as the abortion service provider.

In India, the Medical Termination of Pregnancy Act (MTP Act) of 1972 allows women access to abortion in a few limited circumstances, but does not see abortion as a right (ibid.). The MTP Act permits termination of pregnancy on the grounds that the continuance of pregnancy involves risk to the life of the woman or of grave injury to her physical and mental health and where substantial risk exists of the child being born with serious physical or mental abnormality. The Act restricts abortions to be only performed at government hospitals and only by their registered medical practitioner. While providing women with the legal option for abortion, the MTP Act grants the decision-making power to the government medical personnel, not women.

In Bangladesh, although population control is a major national objective, abortion is still illegal except when the pregnancy results from rape or threatens the life of the mother (Islam 1982). In such cases, the decision to terminate the pregnancy must be made by three licensed medical practitioners; yet again, taking away all decision-making power from women. To provide women with a safer option, the World Health Organization (WHO) launched a program for menstrual regulation in Bangladesh (Singson 2008). Menstrual regulation, also known as "menstrual extraction" (ME), is a family planning method for women who missed their regular menstrual period and strongly suspect that they are pregnant but cannot or do not want to wait for the results of a pregnancy test (ibid.). However, given the conservative social, cultural, and religious norms in Bangladesh, the ME program is much criticized.

Apart from the policies and laws restricting women's access to reproductive health services, other social and cultural factors are important. A study (Casterline *et al.* 2001) on Pakistani married couples revealed two principal obstacles to using a contraceptive. First, woman's perception that such behavior would conflict with her husband's fertility preferences and his attitudes toward family planning; second, her perception of the social or cultural unacceptability of contraception.

While restrictive abortion laws or laws criminalizing abortion, poor maternal and reproductive health services, and, social, cultural and religious obstacles appear to be the factors keeping women from taking control over their own bodies, especially in the developing world, one might expect that the situation would be better in the developed world where abortion and contraception use have been legalized for decades with decent health care services available. For example, from a public health perspective, if one looks at the statistics comparing maternal mortality in the USA to countries where abortion remains illegal and unsafe, the situation in the USA looks positive (Fried 2000). Abortion has been legal since 1973 in the USA with between 1.2 and 1.4 million abortions taking place annually. There are virtually no mortality or health complications from abortion. However, Fried stated, "Activists worldwide have learned that the legalization of abortion is necessary but not sufficient to insure the availability of safe abortion to all women who seek it" (2000: 177). Women in prison, young women, women who have been raped, "undocumented" women, and women with few economic resources, are often denied abortion services. Federal funding does not cover abortions, except in extreme circumstances such as rape, incest, or if the woman's life is in danger (and not every state complies with exceptions). Because of the constant efforts of anti-choice groups, abortion providers are marginalized within the medical profession, often threatened and physically attacked, and women who have abortions are stigmatized, stereotyped as selfish, or portrayed as hapless victims incapable of making their own decisions (ibid.). Beyond this, in recent years the US Republican takeovers of state legislatures in many parts of the country have signaled a stunning roll-back in the availability of safe abortion procedures by placing hostile restrictions on those seeking abortion services. The Guttmacher Institute, which tracks these changes, recently reported:

> In 2000, the country was almost evenly divided, with nearly a third of American women of reproductive age living in states solidly hostile to abortion rights, slightly more than a third in states supportive of abortion rights and close to a third in middle-ground states. By 2011, however, more than half of women of reproductive age lived in hostile states. This growth came largely at the expense of the states in the middle, and the women who live in them; in 2011, only one in 10 American women of reproductive age lived in a middle-ground state.
>
> (Gold and Nash 2012: 1)

Social cultural barriers are also present in the more affluent of the developed nations. In a survey conducted on women in British Columbia, Canada, regarding the use of emergency contraceptives to avoid unwanted pregnancies, participants reported that they worried the health care providers would consider them irresponsible or promiscuous for requesting it. Presenting an Asian woman's experience with a female pharmacist, the researchers of the study (Shoveller *et al.* 2007) stated,

> This 20-year-old student, who had used the method twice, said she had felt "judged" and was "scolded" when requesting it. She reported having felt that the pharmacist was thinking: "Oh you're another one of those who don't use a condom, and now you might have a baby, and you have to come and get your emergency contraception pill, and you're not being safe."
>
> (ibid.: 16)

The struggle to establish women's rights to control their sexuality and reproduction, in both developing and developed world, is far from over. The efforts of anti-choice religious and political groups hinder decades of feminist advocates' efforts to prevent the re-criminalization of contraception and abortion. Despite the statistics revealing thousands of women dying worldwide from abortion complications because safe and legal services were not available to them, national policies, laws, and conservative social and community groups still do not permit women to make healthy life choices. Women's power over their own bodies, in short, is under attack worldwide.

Criminalizing women's victimization: a worldwide problem

Given the history that has just been reviewed, it should come as little surprise that girls and women cannot count on the criminal justice system to provide them with justice or safety, let alone stay out of the endorsement of male privilege in patriarchy. Indeed, criminalizing women and punishing them if they threaten male hegemony has been a common strategy to control girls and women. Women are often punished as criminals when in reality they are the victims. In Afghanistan, for example, approximately 400 women and girls are imprisoned for "moral crimes," according to a report by the Human Rights Watch (HRW 2012). The report indicated that almost all the girls in juvenile detention and about half of the women in Afghan prisons had been arrested for "moral crimes." These "crimes" usually involved flight from unlawful forced marriage, domestic violence, or an alleged relationship outside of marriage where in reality the women had been raped or forced into prostitution.

The HRW (2012) study reported that when the victims – the women – went to the police in need of immediate help or protection, they were arrested instead. Running away from an abusive relationship, physical violence, rape, or forced prostitution are not criminal acts, but police promptly arrest the women solely on the complaints of the husbands or relatives. Prosecutors ignore evidence that support women's innocence. Judges often convict solely on the basis of "confessions" given by the women in the absence of their lawyers and "signed" without having been read to the women who cannot read or write. After conviction, women routinely face long prison sentences, in some cases more than 10 years (ibid.).

While some might assume that these are extreme examples from atypical societies, it should be recalled that until very recently, the only two offenses in the United States where the arrests of females exceeded the arrest of males were "running away from home" and prostitution. Looking more closely at "running away," scholars have found that many girls who were running

away from home, which is technically a "status offense", were in fact running from sexual and physical abuse at home (see Chesney-Lind and Shelden 2004). Criminalized for attempting to escape domestic violence, these girls are forced to miss school, and are often arrested and held in detention centers as "offenders" for seeking to escape their abusers. Sadly, the Federal Bureau of Investigation in the United States has recently discontinued reporting runaway arrests, so such information will be more difficult to obtain in the future (Shelden 2012).

While in Afghanistan women are imprisoned for their desperate efforts to escape physical abuse, in Nepal, women are criminalized for attempting abortion, even when their pregnancies are the result of rape or incest. In 1997, a nationwide prison study conducted by CREHPA, an NGO in Nepal, revealed that approximately 20 percent of women prisoners were in custody on charges of abortion (Mishra 2001). In Nepal, abortion is a criminal act under any circumstances – be it rape or incest or failure of contraception – and is punishable by imprisonment for both the woman undergoing the abortion as well as the abortion service provider (ibid.). Moreover, the existing law in Nepal does not draw a clear distinction between abortion and infanticide. Thus, while abortion has a maximum punishment of one and a half years, infanticide would expose a woman to punishment for murder, which includes life imprisonment and confiscation of all her property (ibid.). Oftentimes this gap in law is misused by neighbors and/or family members with designs on the women's property, or those seeking revenge. The CREHPA study revealed that out of the 80 women incarcerated on these grounds, 62 women were imprisoned for infanticide (78 percent) and only 15 for abortion (19 percent); the remaining were still in police custody (ibid.). Furthermore, there is a gender dimension to the imprisonment. While 20 percent of women inmates are in prisons on charges of abortion, the corresponding figure for male inmates is only 0.3 percent, despite the fact that the male partners are equally, if not more, responsible for the unwanted pregnancies or the factors leading to abortion.

In Pakistan, the existing law can literally punish women for being raped. In Pakistan, rape is dealt with under the strict Islamic law known as the *Hudud* Ordinances (Plett 2006). These criminalize all sex outside marriage, known as *Zina* (Plett 2006; Amnesty International in Asia and Pacific n.d.) However, the Ordinance excludes marital rape from the definition of that offense.

The *Hudud* law puts all the burden of proof on the rape victims, the women who report that they have been raped. The victims could be charged for false accusation and incarcerated if unable to provide proof, which involves producing four male witnesses of the rape. The inability of the rape victims to produce four male witnesses will result in the presumption of them committing *Zina* while the rapists go free. In these cases, women and people of other faiths than Islam cannot be called as witnesses. According to the Human Rights Commission of Pakistan, every two hours a woman is raped in Pakistan and every eight hours a woman is subjected to gang rape (Amnesty International in Asia and Pacific n.d.; Plett, 2006). In such circumstances, a combination of social taboos, discriminatory laws such as the *Hudud*, and victimization at the hands of the police are key reasons in Pakistan for many rapes remaining unreported (Amnesty International in Asia and Pacific n.d.).

In addition to Pakistan, the *Hudud law* functions in some other parts of the world, such as in Iran and Saudi Arabia (Hardy 2005). In Iran, under the strict Islamic law, sex before marriage is punishable by one hundred lashes, but married offenders are sentenced to death by stoning (BBC News Middle East 2010a). In May 2006, a criminal court in East Azerbaijan province found a 43-year-old mother of two, Ms Sakineh Mohammadi Ashtiani, guilty of having had an "illicit relationship" with two men following the death of her husband, despite her denial of the accusation. She was given 99 lashes after being charged and has been in prison since

2006. She was later sentenced to death by stoning. Though Ms. Ashtiani still remains in prison as of January 2011, her stoning sentence has been "suspended" amidst the protests of various human rights groups and international community.

Sometimes, the matter of punishing women for a "crime" as perceived by the society does not even get reported to the legal authorities. The local community takes matters in their own hands. In Bangladesh, despite the banning of *Fatwa*, a form of religious sanction issued by informal village councils to resolve local disputes, local authorities can still enforce women to be publicly beaten when accused of adultery or having a child out of wedlock (BBC News South Asia 2011). Recent incidents include the public lashing of a 14-year-old girl and a 40-year-old woman, both accused of adultery in two different villages of Bangladesh (BBC News South Asia 2011). Both the victims died as a result of the severe injuries caused by their beatings.

In north-eastern Afghanistan a woman was strangled and killed by her mother-in-law for the "crime" of giving birth to a third daughter (Sarwary 2012). The birth of a boy is usually a cause for celebration in Afghanistan but girls are generally seen as a burden. Many times women in Afghanistan are abused if they fail to give birth to boys. Another high profile media story of Aisha in Afghanistan revealed that her nose and ears were cut off – with the approval of a Taliban commander – by her abusive husband as punishment for running away (BBC News, South Asia 2010). The 18-year-old was reportedly given away by her family in childhood and was subsequently married to a Taliban fighter. His family abused her, and she ran away but was recaptured and mutilated by her husband.

More recently, in the United States, the criminal justice system is involved in criminalizing women's victimization, though through a more circuitous route than the direct arrest and detention of runaway girls, which has long been controversial (see Chesney-Lind and Shelden 2004 for an overview). Over the last decade, arrests of girls and women for crimes of "violence," have been surging, while male arrests for these types of offenses have dropped (Chesney-Lind 2002). Consider the case of young girls whose arrests are about one juvenile arrest in five, but in 2010, they constituted a third of juvenile arrests (Federal Bureau of Investigation 2011). Much of this increase has been due, not to girls' arrests for running away from home, which used to dominate girls' arrests in the USA, but instead to arrests of girls for "violent" offenses like simple assault. These offenses are now among the most common reasons to arrest girls; and not because girls are getting "meaner" and "wilder" as the corporate media would have it (Chesney-Lind and Irwin 2008). Instead, research has shown that girls are increasingly likely to be arrested in the context of domestic violence, often arguing with their family members (see Buzawa and Hotaling 2006). Likewise, arrests of adult women for "crimes" of domestic violence have soared; a California study found that adult women constituted 5 percent of arrests for domestic violence in 1987 and 18 percent of domestic violence arrests in 2000 (DeLeon-Granados *et al.* 2006). An earlier study in Canada found that of the women arrested as perpetrators of domestic violence, over a third had called the police for protection (Comack *et al.* 2000).

Again, compared to beating, killing, public humiliation, imprisonment, or mutilating women as a form of punishment in the countries reviewed earlier in this section, the practices in the USA and Canada seem less extreme. Yet, from a human rights perspective, it is likely that all these women are victims not criminals. Yet, criminal justice systems appear to have long been enmeshed in the normalization of even extreme forms of male violence, and at a minimum, complicit in the legal enforcement of traditional gender norms (including sexual constraints). Interventions of human rights groups, NGOs, international communities and media are much needed to save the lives of thousands of women from being inappropriately criminalized for attempting to leave abusive families and households.

Research and policy implications

Violence against women and the criminalization of girls and women's survival strategies are related and are crucial global problems. The emergence of global feminist criminology makes clear the vital necessity for international pressure on the most extreme forms of governmental complicity with patriarchal practices that harm girls and women. We must resist efforts to encapsulate such extreme misogynistic practices as "cultural" or "religious" differences, and continue to re-frame them as human rights violations. We must also continue to gather data on the dimensions of male violence against women and we must understand that in virtually all countries the criminal justice system provides girls and women with virtually no justice or safety and instead is often complicit in the further victimization of girls and women.

As to what a global feminist criminology might look like. It will clearly be informed by various strands of feminist thought. Feminist theory calls attention to "what's missing" (Sprague 2005). In criminology, what has traditionally been "missing" from conversations about crime is the fact that the vast majority of serious violent crimes are committed by men. That advantaged (e.g., racially, economically, nationally) men have for centuries used systems of male privilege to access the criminal justice system to enforce male dominance has incredible relevance not only to feminist criminology but also to the entire field of criminology. Feminist work additionally calls attention to male violence and also documents the ways in which masculinity, itself, could be seen as criminogenic.

Beyond the idea of the centrality of gender, which Sprague contends is the other core assumption of feminist thought (Sprague 2005), there is a continuing need to better theorize feminist notions of patriarchy, particularly for critical feminist criminology. Borrowing from the work of feminist political scientists like Walby (1990), which early on identified that liberal notions of "public" and "private" greatly disadvantaged women, we must begin to systematically think about the links between the observed patterns of women's victimization, women's offending, and women's experience with the criminal justice system within the context of patriarchy.

We must also think about how feminist theorizing assists us in building a less violent and more just world, and include systems of crime control that take us out of the penal regimes of the past century. Notions of reconciliation, truth telling (that includes gender) and social responses to law violating that heal rather than punish and incapacitate will not only better reduce crime but also will humanize the current systems of punitive juvenile courts and institutions, jails and prisons that oppress and destroy not only those held within them, but also those who are employed to serve as guards and wardens.

Theory as a tool to fuel the disassembly and replacement of destructive processes in the name of crime control and prevention is long over-due both in the United States and in all the countries that are tempted to emulate the penal regimes that the United States has become so reliant upon. Does the new century offer any hopeful signs for such a conversion in theory? The very fact that progressive criminology, and particularly feminist criminology, have survived two decades of furious backlash politics gives us reason for hope. Beyond that, there is the vitality of our field. To do feminist criminology, this volume has posited, does not necessarily mean that one is restricted to what was once the standard trilogy: women as offender, victims, and workers in the criminal justice system. Instead, the whole of the field can fruitfully be re-thought from a feminist perspective. Moreover, as this chapter has clearly documented, there is a growing body of international research, particularly in the area of the victimization of women, that allows us to hope that feminist criminology will become globally relevant in the decades to come. As it does so, the field will do more than simply "document and count" women's victimizations;

instead it will begin to act across "national" boundaries to name the problem and to re-frame it in ways that make clear the centrality of the human rights of girls and women and also to find ways to take action on behalf of victimized and criminalized women.

Writing about the multiple schools of feminist thought embedded in numerous academic disciplines, Joey Sprague (2005) reinforces a crucial point that is directly relevant to a core aspect of feminist criminology. She argues that there is virtual consensus that across disciplines, feminist theory and research are characterized by a commitment to social justice. Echoing Jane Addams, she notes that "understanding how things work is not enough – we need to take action to make the social world more equitable" (ibid.: 3). Said slightly differently, we as feminist scholars shoulder many burdens, but perhaps the most daunting is the one articulated by British researcher on sexualized violence Liz Kelly: "Feminist research investigates aspects of women's oppression while seeking at the same time to be a part of the struggle against it" (Kelly 1988: 107). Feminist theorizing in criminology is ultimately about addressing the twin intellectual deficiencies – the failure to create and use knowledge to promote social justice and the exclusion of gender as a central focus of the discipline.

We must break the silence surrounding these problems while also understanding the power of the political forces of backlash in all parts of the world that seek to roll back the meager victories some women in a few countries have achieved.

Conclusion

Despite the mounting efforts of the agents of patriarchal societies around the world to silence the voices of the women who suffer violence, criminalize the victims' efforts to escape, and deny them even the basic right to control their own bodies, there are reasons to hope. Women are now speaking out more forcefully, often using new media as well as old to challenge repressive and patriarchal regimes. Adding to the notable protests, such as the Suffrage Movement (1913), the "Bra Burning" Miss America Protest (1968), the Equal Rights Amendment Marches (1976), the March for Women's Lives (2004), and many more where Western feminists demanded women's right to vote and for equality, protested against strict abortion laws and violence against women (*Time* 2012); women worldwide – particularly in the recent times – are also coming forward to protest. Recently, 3000 women staged the largest protest at a square in Istanbul's Kadikoy district against plans by Turkey's Islamic-rooted government to ban abortion (Hacaoglu 2012). The women belonged to ages ranging from 20 to 60 years and many were accompanied by their husbands and boyfriends. One of the women held a placard saying, "State, take your hands off my body," while a man waved a slogan reading "My darling's body, my darling's choice." While the large number of women protesters in Turkey brought a lot of attention to the cause, in June 2011 a few dozen women in Saudi Arabia defiantly demonstrating with their cars got worldwide attention. Saudi Arabia is the last remaining country in the world that forbids women from driving and the women protesting risked their lives by getting behind their wheels (Gibson 2011). The protest seemed to achieve some success as one woman pulled over by the authorities was issued a traffic ticket instead of being arrested. On July 2011, led by the head of Human Rights Commission, over one hundred Afghan women protested a recent public execution of a young woman for alleged adultery (Reuters 2011).

In the United States, when the presidential race seemed to be taking a distinctly anti-woman tone, women organized a one-day rally entitled "Unite against the War on Women" in cities across the country (Teegarden 2012). In those demonstrations, organized by key women's and labor groups, the centrality of the issues discussed in this chapter was clear. The failure of the

US Congress to renew the Violence against Women Act and other gender-related issues could well be a deciding factor in what is emerging as a close election.

The feminist movement of the 1960s, once very focused on US or UK issues, is now becoming an international and a more multi-faceted struggle. Feminist research, including critical feminist criminology, is also beginning to recognize the importance of listening to the narratives of diverse groups of girls and women and showcasing these in our research and our activism. Finally, feminist criminologists are understanding the importance of doing research that is global in scope, recognizing that data gathered from across national boundaries allows us to more clearly see the crucial ways in which patriarchal systems function to maintain male privilege. We would like to imagine a critical feminist criminology that will be inclusive of this struggle and the diversity of the problem of women's oppression worldwide in the decades to come.

Discussion questions

1   Given the high levels of documented violence against women globally, why do you think it took the field of criminology so long to become interested in women's victimization?
2   Why are women so reluctant to seek help from the criminal justice system as they attempt to escape abusive relationships?
3   Why is reproductive health so important to women's status globally? Why have these rights been eroded in recent decades?
4   Why are so many girls and women running away from home?

Websites

Amnesty International: http://www.amnestyusa.org/.
BBC: http://www.bbc.co.uk.
Human Rights Watch: http://www.hrw.org/.
United Nations: http://www.un.org/en/globalissues/women/.

References

Ahman, E. and Shah, I. (2002) "Unsafe Abortion: Worldwide Estimates for 2000," *Reproductive Health Matters*, 10:13–17.
Amnesty International in Asia and Pacific (n.d.) "*Hudood* Ordinances: The Crime and Punishment for *Zina*," available at: http://asiapacific.amnesty.org/apro/aproweb.nsf/pages/svaw_hudoo (accessed 5 July 2012).
Andersson, N., Cockcroft, A., Ansari, U., Omer, K., Ansari, N. M., Khan, A. and Chaudhry, U.U. (2010) "Attitudes Toward Wife Beating: A Cross-Country Study in Asia," *Journal of Interpersonal Violence*, 25: 1965–1985.
Bangladesh Women Lawyers' Association (2003) *Violence Against Women in Bangladesh: 2002*, Dhaka: Seba Printing Press.
BBC News Middle East (2010) "Halt Stoning of Iran 'Adulterer' – Human Rights Watch," available at: http://www.bbc.co.uk/news/10545062 (accessed 5 July 2012).
BBC News South Asia (2010) "Mutilated Afghan Girl Aisha Gets New Nose," available at: http://www.bbc.co.uk/news/world-south-asia-11530849 (accessed 5 July 2012).
BBC News South Asia (2011) "Bangladesh Lifts *Fatwa* Ban but Forbids Enforcement," available at: http://www.bbc.co.uk/news/world-south-asia-13379016 (accessed 5 July 2012).
Bergen, R. K., Edleson, J. L. and Renzetti, C. M. (2005) *Violence against Women*, New York: Pearson.
Bordon, L. A., Karr, S. K. and Caldwell-Colbert, A. T. (1988) "Effects of a University Rape Prevention Program on Attitudes and Empathy Toward Rape," *Journal of College Student Development*, 29: 132–138.
Buzawa, E. and Hotaling, G. (2006) "The Impact of Relationship Status, Gender, and Minor Status in the Police Response to Domestic Assaults," *Victims & Offenders*, 1: 323–360.

Casterline, J. B., Sathar, Z. A. and Haque, M. (2001) "Obstacles to Contraceptive Use in Pakistan: A Study in Punjab," *Studies in Family Planning*, 32: 95–110.

Catalano, S. (2007) "Intimate Partner Violence in the United States," U.S. Department of Justice, Bureau of Justice Statistics. Available at: http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=971 (accessed 2 August 2012).

Cepeda, A. and Valdez, A. (2003) "Risk Behaviors Among Young Mexican American Gang-Associated Females: Sexual Relations, Partying, Substance Use, and Crime," *Journal of Adolescent Research*, 18: 90–106.

Chesney-Lind, M. (2002) "Criminalizing Victimization: The Unintended Consequences of Pro-Arrest Policies for Girls and Women," *Criminology and Public Policy*, 2: 81–91.

Chesney-Lind, M. and Irwin, K. (2008) *Beyond Bad Girls: Gender, Violence and Hype*, New York: Routledge.

Chesney-Lind, M. and Morash, M. (2011) *Feminist Theories of Crime*, Burlington, VA: Ashgate.

Chesney-Lind, M. and Shelden, R. G. (2004) *Girls, Delinquency, and Juvenile Justice*, 3rd edn, Wadsworth, CA: Belmont.

Comack, E., Chopyk, V. and Wood, L. (2000) *Mean Streets? The Social Locations, Gender Dynamics, and Patterns of Violent Crime in Winnipeg*, Winnipeg: Canadian Centre for Policy Alternatives.

Copeland, J. (2009) "Marie Stopes," *History Review*, 63: 48–50.

Crane, B. B. and Dusenberry, J. (2004) "Power and Politics in International Funding for Reproductive Health: The US Global Gag Rule," *Reproductive Health Matters*, 12:128–137.

DeLeon-Granados, W., Wells, W. and Binsbacher, R. (2006) "Arresting Developments: Trends in Female Arrests for Domestic Violence and Proposed Explanations," *Violence Against Women*, 12: 355–371.

Dobash, R. E. and Dobash, R. P. (1978) "Violent Men and Violent Contexts," in R. E. Dobash and R. P. Dobas (eds.) *Rethinking Violence against Women*, Thousand Oaks, CA: Sage, pp. 141–168.

Dugan, L., Nagin, D. and Rosenfeld, R. (1999) "Explaining the Decline in Intimate Partner Homicide: The Effects of Changing Domesticity, Women's Status, and Domestic Violence Resources," *Homicide Studies*, 3(3): 187–214.

Farmer, A. and Tiefenthaler, J. (2004) "The Employment Effects of Domestic Violence Research," *Labour Economics*, 23: 301.

Federal Bureau of Investigation (2011) *Crime in the United States 2010*, Washington, DC: Federal Bureau of Investigation.

Fisher, B. S., Sloan, J. J., Cullen, F. T. and Lu, C. (1998) "Crime in the Ivory Tower: The Level and Sources of Student Victimization," *Criminology*, 36: 667–710.

Fried, M. G. (2000) "Abortion in the United States: Barriers to Access," *Health and Human Rights*, 4: 174–194.

Gibson, M. (2011) "Defiantly Driving in Saudi Arabia," available at: http://www.time.com/time/specials/packages/article/0,28804,2088114_2087975_2087970,00.html #ixzz23RB4xOMc (accessed 15 August 2012).

Gold, R. and Nash, E. (2012) "Troubling Trend: More States Hostile to Abortion Rights as Middle Ground Shrinks," *Guttmacher Policy Review*, 51. Available at: http://www.guttmacher.org/pubs/gpr/15/1/gpr150114.html (accessed 5 July 2012).

Grimes, D. A., Benson, J., Singh, S., Romero, M., Ganatra, B., Okonofua, F. E. and Shah, I. (2006) "Unsafe Abortion: The Preventable Pandemic," *The Lancet Sexual and Reproductive Health Series*, 368: 1908–1917.

Hacaoglu, S. (2012) "Turkish Women Protest Plans to Curb Abortion," available at: http://www.boston.com/news/world/europe/articles/2012/06/04/turkish_women_protest_plans_to_curb_abortion/ (accessed 5 July 2012).

Hadi, S. T. (2011) "Perceptions, Beliefs, and Attitudes Towards Intimate Partner Violence against Women: An Exploratory Study of Urban Dating Versus Married Participants in Bangladesh," doctoral dissertation. Available at: http://eres.library.manoa.hawaii.edu/login?url=http://search.proquest.com.eres.library.manoa.hawaii.edu/docview/907104797?accountid=27140 (accessed 5 July 2012).

Haj-Yahia, M. M. (2002) "Attitudes of Arab Women Toward Different Patterns of Coping with Wife Abuse," *Journal of Interpersonal Violence*, 17: 721–745.

Hardy, R. (2005) "Muslim Thinker Fights Death Penalty," available at: http://news.bbc.co.uk/2/hi/middle_east/4394863.stm (accessed 5 July 2012).

Heise, L., Ellsberg, M. and Gottemoeller, M. (1999) "Ending Violence against Women," *Population Reports*, 11.

Human Rights Watch (2012) "Afghanistan: Hundreds of Women, Girls Jailed for 'Moral Crimes'," available at: http://www.hrw.org/news/2012/03/28/afghanistan-hundreds-women-girls-jailed-moral-crimes (accessed 5 July 2012).

ICDDR,B (2005) *Major Study of Domestic Violence in Bangladesh*. Available at: http://centre.icddrb. org/pub/publication.jsp?classificationID=46&pubID=7575 (accessed 5 July 2012).

Islam, S. (1982) "Case Studies of Indigenous Abortion Practitioners in Rural Bangladesh," *Studies in Family Planning*, 13: 86–93.

Kelly, L. (1988) *Surviving Sexual Violence*, Cambridge: Polity Press.

Koss, M. (1988) "Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education," in A. W. Burgess (ed.), *Rape and Sexual Assault*, vol. 2, New York: Garland Publishing, pp. 3–25.

Krug, E. G., Dahlberg, L. L., Mercy, J. A., Zwi, A. B. and Lozano, R. (2002) *World Report on Violence and Health*, Geneva: World Health Organization.

Lerner, G. (1986) *Creation of Patriarchy*, Oxford: Oxford University Press.

Luker, K. (1985) *Abortion and the Politics of Motherhood*, Berkeley, CA: University of California Press.

Maguire, D. C. (ed.) (2003) *Sacred Rights: The Case for Contraception and Abortion in World Religions*, Cary, NC: Oxford University Press.

Martin, D. (1976) "Battered Wives," reprinted in R. K. Bergen, J. L. Edleson and C. M. Renzetti (eds.) (2005) *Violence against Women: Classic Papers*, New York: Pearson.

Martin, Y. and Hummer, R. A. (1989) "Fraternities and Rape on Campus," *Gender and Society*, 3: 457–473.

Mataconis, D. (2012) "Rick Santorum Favors Making Birth Control Illegal," available at: http://www.outsidethebeltway.com/rick-santorum-favors-making-birth-control-illegal/Outside the Beltway (accessed 5 July 2012).

Mishra, Y. (2001) "Unsafe Abortions and Women's Health," *Economic and Political Weekly*, 36: 3814–3817.

Mlitt, D. W. (1980) "Margaret Sanger: Birth Control's Successful Revolutionary," *American Journal of Public Health*, 70: 736–742.

Nelson, J. (2003) *Women of Color and the Reproductive Rights Movement*, New York: New York University Press.

Peoples, S. (2012) "Mitt Romney Attacked by Democrats over Planned Parenthood Remark," available at: http://www.huffingtonpost.com/2012/03/15/mitt-romney-planned-parenthood_n_1346967.html (accessed 5 July 2012).

Pillai, V. K. and Wang, G. (1999) "Women's Reproductive Rights and Social Equality in Developing Countries," *Social Science Journal*, 36: 231–242.

Plett, B. (2006) "How Pakistan's Rape Reform Ran Aground," available at: http://news.bbc.co.uk/ 2/hi/south_asia/5346968.stm (accessed 5 July 2012).

Rani, M. and Bonu, S. (2008) "Attitude Towards Wife Beating: A Cross-Country Study in Asia," *Journal of Interpersonal Violence*, 24: 1371–1397.

Renzetti, C. M., Curren, D. J. and Maier, S. L. (2012) *Women, Men, and Society*, 6th edn, Canberra: Pearson.

Reuters (2011) "Kabul: Afghan Women Protest for Equal Rights," available at: http://www. globalpost.com/dispatch/news/regions/asia-pacific/afghanistan/120711/kabul-afghan-women-protest-equal-rights (accessed 15 August 2012).

Sanday, P. R. (1990) *Fraternity Gang Rape: Sex, Brotherhood, and Privilege on Campus*. New York: New York University Press.

Sarwary, B. (2012) "Afghan Woman Is Killed 'For Giving Birth to a Girl'," available at: http://www.bbc.co.uk/news/world-asia-16787534 (accessed 5 July 2012).

Schechter, S. (1982) "Women and Male Violence: The Visions and Struggles of the Battered Women's Movement," reprinted in R. K. Bergen, J. L. Edleson and C. M. Renzetti (eds.) (2005) *Violence against Women: Classic Papers*, New York: Pearson.

Schwartz, M. D. and DeKeseredy, W. S. (1997) *Sexual Assault on the College Campus: The Role of Male Peer Support*, Thousand Oaks, CA: Sage.

Shelden, R. (2012) Personal communication with the author.

Shen, A. C. T. (2010) "Cultural Barriers to Help-Seeking Among Taiwanese Female Victims of Dating Violence," *Journal of Interpersonal Violence*, 26: 1343–1365.

Shoveller, J., Chabot, C., Soon, J. A. and Levine, M. (2007) "Identifying Barriers to Emergency Contraception Use Among Young Women from Various Sociocultural Groups in British Columbia," *Perspectives on Sexual and Reproductive Health*, 39: 3–20.

Sinding, S. S. (2007) "Overview and Perspective," in W. C. Robinson and J. Shivakumar (eds.), *Global Family Planning Revolution: Three Decades of Population Policies and Programs*, Herndon, VA: World Bank Publications.

Singson, S. (2008) "World Health Organization Circumvents Abortion Laws in Bangladesh," available at: http://Catholicexchange.Com/World-Health-Organization-Circumvents-Abortion-Laws-In-Bangladesh/ (accessed 5 July 2012).

Solinger, R. (2005) *Pregnancy and Power: A Short History of Reproductive Politics in America*, New York: New York University Press.

Sprague, J. (2005) *Feminist Methods for Critical Researchers: Bridging Differences*, Walnut Creek, CA: Altamira Press.

Teegarden, K. (2012) "The War on Women: Why We're Fighting," available at: http://www.huffingtonpost.com/karen-teegarden/war-on-women_b_1431796.html (accessed 17 August 2012).

The New York Times (2012) "Republicans Versus Reproductive Rights," available at: http://www.nytimes.com/2012/01/09/opinion/republicans-versus-reproductive-rights.html?_r=1&scp=20&sq=&st=nyt (accessed 5 July 2012).

Time (2012) "A Brief History of Women's Protests," available at: http://www.time.com/time/specials/packages/completelist/0,29569,2088114,00.html (accessed 13 August 2012).

United Nations (2012) *Global Issues: Women*, available at: http://www.un.org/en/globalissues/women/ (accessed 5 July 2012).

Walby, S. (1990) *Theorising Patriarchy*, Oxford: Blackwell.

Walker, L. E. (1979) "The Battered Women," reprinted in R. K. Bergen, J. L. Edleson and C. M. Renzetti (eds.) (2005) *Violence against Women: Classic Papers*, New York: Pearson.

Yoshioka, M. R., Gilbert, L., El-Bassel, N. and Baig-Amin, B. (2003) "Social Support and Disclosure of Abuse: Comparing South Asian, African American, and Hispanic Battered Women," *Journal of Family Violence*, 18: 171–179.

3

The radical philosophy of criminology culturalized

Intellectual history and ultramodern developments

Bruce A. Arrigo and Heather Y. Bersot

Introduction

The place of cultural analysis and critique within the criminological canon is a source of some sustained, although generally under-developed and even misunderstood, theoretical and applied research.[1] This absence of scholarship and this confusion about the same are related, in substantial part, to the interpretive processes that underscore and inform the cultural investigation that one undertakes. The analysis questions and probes the often concealed and therefore unexamined forces that help to form the self, the social, and their mutuality. Stated differently, the cultural lens "unearths" and "dissects": (1) the images of reality that are preferred; (2) the types of knowledge (i.e., the "texts") that these favored mental constructions privilege; (3) the lived versions of truth and moral accountability that these circumscribed texts produce; and (4) the replications of each artifact, especially when disseminated through society's informational (and increasingly carnivalesque) outlets (e.g., Carrabine 2008). Collectively, these forces or conditions establish an ordering of things (e.g., Foucault 1965; 1966; 1977). This ordering adversely impacts and, in some contexts, even harms far too many people in far too many instances throughout the world. Regrettably, for those held captive by this ordering, the harm that is both legitimized and reified is unreflectively taken to be emblematic of healthy, natural and inevitable human/social progress. Thus, critique must follow. To borrow a metaphor from archeology, the interpretive lens of cultural inquiry excavates and studies the artifacts of human expression (e.g. the images that inform how we engage in justice rendering, the texts that signify how we forgive offenders or restore victims, the ethics by which we make peace with crime and the techno-rational and seductive mechanisms/techniques that derivatively sustain each cultural expression given the artifact's rapacious consumption).[2]

One way to mine the artifacts of human expression and the forces that order or organize them, is to rely on Beck's (1992; 2009) socio-philosophical insights on cosmopolitanism and Delanty's (2009) critical theoretical commentary on the cosmopolitan imagination.[3] As a novel approach to cultural analysis, this proposed integration entails an assessment of human subjectivity

(and how the risk that subjectivity constitutes is managed), individual and collectivist consciousness (and how this consciousness is held captive), and freedom of choice and action (and how limits to or denials of both establishes harm that must be overcome). The attention drawn to these three phenomena, then, challenges the excavator as interpreter to retrieve and specify the forces (about the self, the social, and their mutuality) that organize and order the artifacts of human expression. Once again, these internal forces and emergent conditions are symbolic (images), linguistic (texts), and material ("bodies" of knowledge regarding ethical comportment) in essential composition.

When undertaking such a cultural inquiry within criminology proper, one must excavate (get underneath) the social sciences. The dissections that ensue identify and assess how dominantly constructed (although certainly contestable) realities concerning knowledge, truth, progress, power, and the like contribute to circumscribed and historically contingent manifestations about the human/social mutuality (Thomas 1993; Arrigo et al. 2005). From the perspective of cultural theory, this mutuality is not static; it evolves. Its evolution (e.g., shifting self/society typifications for and reifications about homosexuality, gambling, prostitution, and drug use throughout the world) is sensitive to the fluctuating interactive intensities of the prevailing symbolic, linguistic, and material conditions (of order and control) that help shape it. As cultural theorists and critical criminologists have cautioned, however, these conditions problematically tend toward closure (Bogard 1996), to finalizing being (Bakhtin 1982), and to reifying[4] an ethic of the shadow (Arrigo and Milovanovic 2009). This ethic celebrates less than who we could be; how we could live; and what we could do for ourselves, for others, for our communities, and for the global society. What is desperately reified is risk (excessive investments in normalizing, territorializing, and homogenizing difference), captivity (for the kept as well as their keepers, managers and watchers), and harm (denials of one's possible being; limits on one's potential becoming) (Arrigo and Williams 2009). Efforts that nurture, manufacture, or legitimize this reification, this *criminology of the shadow* (Arrigo 2008, 2012),[5] fuel a kind of systemic pathology (Fromm 1994) or cultural madness that feeds fear and governs (domesticates) through it (Simon 2009). This fear, often sourced in intensities that support hyper-vigilance, panopticism, and governmentality (i.e., Foucault's self/market technologies of bio-power) (see Rose 1996; 1999), erodes prospects for dynamic citizenship and transformative social justice for one and about all (Arrigo et al. 2011). Cultural analysis and critique, then, form the intellectual prism through which the complexities of this criminological "madness" can be more completely specified in historically contingent although manifest form.

Accordingly, in this chapter, three pivotal concerns will be addressed. The next section will examine the major and radical philosophical transitions since the modernist era (the Industrial Revolution) that have culturalized criminology. This examination will include key observations on how each current addresses the reification problem (i.e., risk, captivity, and harm) as outlined above. Then the chapter will discuss the present state of criminology culturalized. Emphasis will be given to how this epoch's dominant images, texts, and bodies of knowledge (i.e., as conditions/forces of control) portend a contemporary crisis[6] regarding the status of the human agency – social structure mutuality. Following this, we will suggestively outline several cultural-philosophical directions for overcoming the contemporary self/society crisis of reified madness. These directions function as departures in theory, method, and praxis. These departures review in brief how extant forms of consumerism, politics, technology, and their cosmopolitanisms sustain this crisis, but also can be more affirmatively and humanistically de/reconstructed for and by a global society held captive by its reified fear (Arrigo and Milovanovic 2009).

Criminology culturalized: major currents and reification

The origins of criminology culturalized can be traced to three intellectual developments that have emerged since the Industrial Revolution. These paradigmatic currents include: the radical Marxist critique, the techno-rationality of the Situationists, and the sign-system theory of the hyper-realists.[7] These major intellectual shifts manifestly draw attention to the reification process and the challenges it portends for the self/society mutuality.

Radical Marxism: on risk, captivity, and harm

The radical nature of the Marxist (1964; 1974) critique is derived from Marx's economic theory and his views concerning human nature. In contrast to Hegel's philosophy of history (1975), phenomenology of spirit (1979), and reaction-negation dialectic (1989), Marx resisted such idealism and supplanted it with historical materialism, a phenomenology of class consciousness, and labor power dynamics. For Marx (1984), one's consciousness (mental constructs) of the phenomenal world did not determine the conditions of reality; rather, the physical world determined people's consciousnesses, independent of their mental constructions for the same. As Marx (1974: 29) observed, Hegel's philosophical "ideal [was] nothing [more] than the material world reflected by the human mind, and translated into forms of thought." This Marxian conception of lived history and human consciousness reframed the human/social binary not as a search for an absolute spirit but as a collectivist struggle to overcome the real conflicts waged by powerful (i.e., alienating and exploitive) social (class) relationships (Lynch and Michalowski 2006).

Central to Marx's historical materialism was his assessment of "labor power and the abstraction of the worker" in a capitalist political economy (Arrigo 2006: 45). This abstraction reduced the intrinsic use-value of the laborer's productive capacities – as a tangible expression of one's generative potential – into an artificial exchange-value, defined by a fixed, false, and obfuscating monetary equivalent. In the capitalist mode of production, the triumph of objects, mass production, and the fetishism of the commodity displace their human producers, their very creators. This is the point at which "the worker sinks to the level of a commodity and becomes indeed the most wretched of commodities" (Marx 1978: 70). This wretchedness is the transformation of the laborer's humanness into an object of commerce, bought and sold in the marketplace and subjected to the regulatory conditions of marginalizing commodification.

However, what is managed by way of these pecuniary transactions is a deceptive risk. This fraud affirms the degradation of *having over being*, of acquiring rather than creating. Throughout the process of inverse risk management,

> [P]eople and their labor, as well as society and its progress, are [defined by] the elusive value assigned to commodities [converted] in the marketplace, reducing the qualitative concrete uniqueness of [individual] labor to the quantitative abstract logic of economic equivalence.
>
> (Arrigo 2006: 45)

For Marx (1974; 1984) and subsequent criminological commentators (e.g., Chambliss and Seidman 1971; Quinney 1974), what made these economic conditions so disturbing was the breadth of captivity spawned by such consumption. This domestication extended from the kept (workers) to their keepers (factory owners), from their managers (institutional decision-brokers) to their watchers (state government bureaucrats) (e.g., Rusche and Kirchheimer 1968; Pashukanis 2002).

Other commentators also noted that this quality of captivity "interpellated" them (Althusser 1971). In other words, one was said to be restricted by and capable of expressing valued human/social meaning only through artificial equivalencies and the commodity's fetishism (i.e., imaging, speaking, and living the human/social mutuality principally through monetary values/exchanges). For neo-Marxists (the Frankfurt School critics), this was existential – phenomenological (human/social) harm summoned and sustained through the capitalist mode of production (Marcuse 1991). This harmful consumerism and commerce – as systemic pathology, social dis-ease, and negative freedom (Fromm 1994) – vanquished dissent and difference. Indeed, this quality of freedom nurtured the industry of crime (e.g., the prison industrial complex; the trade in diversion courts; the business of surveillance policing). The normative footing of this industry was defined as healthy, natural and inevitable threat-avoidance progress. However, such economic growth also normalized violence through its feeding of collectivist (even nationalist) fear (Simon 2009). This is why some post-Marxists have suggested that legitimizing this reification is totalizing madness (Arrigo *et al*. 2011).

The Situationists: on risk, captivity, and harm

The image-conscious perspective of the Situationists (e.g., Lukács 1971; Debord 1983) reconstituted Marx's notion of commodity consumption by way of competitive capitalism, material production, and the logic of equivalence. As a paradigmatic shift, their critique explained how the effects of advanced state-regulated capitalism nurtured a new version of class consciousness and conspicuous consumerism (Best 1989; Pfohl 1993). In particular, this included the consumption of a mass-media manufactured reality whose commodities were (and are) disseminated through the information age of techno-rationality (e.g., digital and cyber-worlds) and omnipresent commercialism.

For the Situationists, late (monopoly) capitalism ushered in an alternative type of Marxian abstraction: one that yielded novel forms of exploitation, oppression, and alienation. This abstraction was sourced in the spectacle. "The spectacle refers to a society in which people consume phenomena created by others rather than generating their own commodities or products" (Arrigo 2006: 47; for penological applications, see Brown 2010). The proliferation of these consumable products – continuously marketed and exchanged amid a culture of multi-media outlets (e.g., television, radio, and film) – occurred, absent anyone's direct contact with or experience of them. In other words, for the Situationists, the commodity that Marx described was replaced with the *image* of the commodity or object itself. When smartly crafted and highly stylized representations of reality are produced, disseminated, and digested, the spectacle *culturalizes* use-value. This is "the moment when the commodity attains the total consumption of social life" (Debord 1983: 42). Thus, unlike the Marxist critique in which "the commodity's fetishism resulted in the exploitation of the worker," the Situationists proposed that the spectacle's consumerized fetishism "produced new and heightened avenues through which hegemony and alienation" could emerge and would endure (Arrigo 2006: 47).

What is abstracted by way of the spectacle is not the worker or the product of one's labor. Instead, the deceptive risk that is managed and reified is the media-generated and culturalized imitations for both. This (false and fictionalized) class consciousness transforms reality itself into an abstraction (Pfohl 1993). Indeed, what these consumable replications of human/social struggle affirm is the poverty of *appearing over having*, of imitating life (and its meanings) virtually rather than living it (including its desperations and fears) viscerally (Debord 1983). Perhaps what is most troubling about this inverse risk management is the quality of captivity that it supports. Rather than confront directly the "terror" that follows in the wake of one's anxious

(hyper-vigilant) and ravenous (panoptic) need to competitively accumulate (Fromm 1994), we are seduced sensationally and distracted incessantly by the ubiquitous image-object. As criminologists have noted, its allure not only enthralls those who gaze upon it (the kept) but imprisons those who profit from it (their keepers, managers, and watchers) (Carrabine 2008; Arrigo and Milovanovic 2009; Brown 2010). For example, this society of captives advances, among other things, offender re-entry (Halsey 2007), restorative justice (Polizzi 2008), and therapeutic jurisprudence (Roderick and Krumholz 2006) initiatives. But, as each of these cultural criminological critics has questioned, on whose terms and under what conditions are these correctives even promulgated (see also, Acorn 2005; Pavlich 2005)? Not surprisingly, these are terms and conditions restricted by excessive investments in the commercialized (i.e., marketed) image-crafting that these very programs and treatments stylize (e.g., Ferrell *et al.* 2009; Hayward and Presdee, 2010). This is the fetishism of the criminological commodity as cultural product to be circulated, consumed, and reproduced. However, under conditions of the spectacle, difference is vanquished, identity is normalized, knowledge is territorialized, and community is homogenized consistent with the spectacle's mass-marketing of its culturalized criminological artifacts.[8] This terrain is the vast landscape of illusion's harm.[9] When replicas and façades displace matter and materiality, then liquid identities and simulated realities are made normative (Bauman 2000). However, consuming such commercialized and stylized images – presumably indicative of virtuous human/social progress – normalizes violence. This is violence that domesticates through imitative and therefore incomplete realities that are taken to be more factual and true (i.e., reified) than the authenticity from which they are derived. As some criminologists have therefore suggested, this reification is madness; its ethic establishes a kind of captivity that is itself totalizing in its ritualized and stylized reproductions (Arrigo *et al.* 2011).

The hyper-realists: on risk, captivity, and harm

For the Situationists, the society of the spectacle (image-objects) replaced the society of the commodity (objects themselves). Risk, captivity, and harm (i.e., reification) were rooted in the "intangible world of unreal images over the tangible world of real forces and relations of production" (Best 1989: 32). However, for the hyper-realists (e.g., Baudrillard 1983a; 1983b), this condition begged a question: "Does an inversion of opposites (e.g., counterfactual over factual, counterfeit over authentic)" account for the contemporary human/social mutuality? In other words, is "illusion more real than [the] reality" from which it is derived (Arrigo 2006: 48)? In response to this question, the radical social theory espoused by prominent hyper-realists elevated the commodification of illusion to a novel and disturbing (alienating) level of abstraction.

For example, Baudrillard (1968; 1972) noted that when the commodification of one's labor in a product-oriented society (i.e., having) was replaced with (abstracted as) the commodification of the spectacle in a techno-rational consumer-driven society (i.e., appearing), then significance (i.e., value) could only be expressed through *sign-exchange-value*. This "replacement effect" is a reference to the semiotic meanings (spoke or written) assigned to culturalized commodities by all those who consume them as image-objects.[10] These meanings are largely symbolic in content. The exchange of symbolic meanings occurs because "the commodity form [image-object] is eclipsed by the sign-form [spoken/written word] and subsequently bears no relationship to any reality whatsoever" (Baudrillard 1983b: 11). In this culture of semiotic consumption, the binary relationship between use-value and exchange-value disappears. This is a culture in which commodity forms "circulate in the marketplace of signs, anchored, although temporarily, in the dominant sign meanings assigned to them in a particular political economy" (Arrigo 2006: 48).[11] This is a new and provocative level of abstraction beyond what Marx or even the

Situationists contemplated. In short, "the exchange of material products under the law of general equivalence [is replaced] with the operationalization of all exchanges under the law of the [sign system or] code" (Best 1989: 35).

Sign-exchange-value does not elevate the commodity or its image to some status of ontological primacy. For the hyper-realists, the reality/appearance dichotomy has no currency (Baudrillard 1983a; 1983b). This is because in a digitized information age of conspicuous and imitative consumerism, neither substance nor its manifold forms signify anything other than mutating words. Stated differently, in a hyper-real culture that digitally simulates and replicates its derivatives *ad infinitum*, "there is no longer a real to be recovered behind the illusion [and, thus,] there is no illusion either" (Best 1989: 37).

When sign-exchange-value continuously absorbs and outpaces the image-object, then the risk that is managed by way of semiotic consumerism establishes yet another inversion. Reality and its cyber-constructed appearances are no longer "polar opposites; rather, they are pseudo states of being, *hyper-real* states of existence that collapse and collide only to emerge and disappear amid a mass-mediated culture of evolving sign meaning" (Arrigo 2006: 51). Baudrillard (1983b: 21–23) described these meanings as "miniaturized models of reality, imitation units of authenticity."

Thus, what is abstracted through the consumable and mutating sign-exchange-values assigned to the human/social mutuality is the ruin of *simulacra over appearing*. Affirming this inverse risk management endlessly morphs significance (i.e., meaning) about the self, the social and their mutuality, absent any semiotic stabilization. The political economy of this risk transforms the self/society duality, as struggle, into illusory and derivative commodities for and about the same. Currently, this transformation sustains excessive investments in mechanisms of escape (Fromm 1994) that reduce/repress difference to sameness (Henry and Milovanovic 1996; Arrigo *et al*. 2005). This escape includes sadomasochistic dependence on authority, relentlessly acquisitive destructiveness, and unreflectively generated automaton conformity. These mechanisms – derivatively and continuously manufactured, repetitively and rapaciously digested – are the commutating messages (simulacra) of ultramodern captivity. This is captivity in the form of surveillance simulated in a hyper-controlled telematic society (Bogard 1996).[12] Harm, then, is a culturalized and consumerized sign-commodity. It is virtual and imitative in its character and normalized and addictive in its consumption. Ostensibly, these conditions are indicative of virtuous human/social progress. However, as criminologists and cultural critics have warned, this consumption, hyper-vigilantly reproduced and panoptically and synoptically[13] disseminated, signifies nothing real other than the fictionalized fear that it feeds for a simulated society of commodified captives (Dyer-Witheford 1999; Delanda 2005). Sustaining this culturalized semiotic reification is madness (Arrigo *et al*. 2011).

Criminology culturalized and the ultramodern condition

The madness of semiotic reification (regarding risk, captivity, and harm) as developed by the hyper-realists, is traceable to a larger ultramodern[14] international crisis concerning the human agency–social structure project and its presently disturbing conditions of control. These conditions include symbolic (aesthetic), linguistic (epistemological), material (ethical), and cultural (ontological) forces and intensities that co-produce and interdependently sustain a criminology of the shadow (Arrigo 2008; 2012; Arrigo and Williams 2009). This shadow or circumscription is harm that reductively sets limits to being and repressively imposes barriers to becoming for the kept (those confined) and their keepers (those who confine), for their managers (those who administrate confinement) and their watchers (those who observe confinement)

throughout the world. The constituents of these conditions of control and their relationship to the human/social mutuality as a cultural struggle of madness are briefly enumerated.

The symbolic: on the ultramodern shadow and the human/social mutuality

The symbolic is the realm of sign-exchange-value. This semiotic production constitutes manufactured meaning whose abundance originates in the unconscious. Thus, located within the psychic apparatus is a kind of structured language that communicates ubiquitous signification (Lacan 1977; 1981). Retrieving signification is about mobilizing and activating the union of image, speech, and subjectivity. These images, as symbolic constructions, represent prevailing expressions (i.e., "master" discourses) for and about the human/social mutuality. Subjectivity, or the divided self, consists of the production and circulation of speech that incompletely names or hails this subjectivity, this humanness (i.e., the "hysteric's" discourse). The excavation process reveals a hidden struggle whose aesthetic intensity (about human agency) and force (concerning structural meaning) dangerously (i.e., panoptically and synoptically) linger as desperation and fear respectively; in short, as the shadow for and about one and all. The unconscious struggle that is waged relates to the continued consumption of restricted images as sign-exchange-value, and how this limited consumerism inadequately symbolizes the existential (human agency, subjectivity) – phenomenological (structural meaning, society) experience and its potential transformations.[15]

What is left out (the "lack" or the "not-all") in this partial and fragmented semiotic retrieval process is replacement meaning that is dormant in the unconscious, plentiful, and awaiting symbolization. When mined and recovered, this desiring reservoir of symbolization suggests novel prospects for consumerism. These are prospects that more completely signify about otherwise concealed (unspoken, unimagined, and unlived) directions for overcoming the struggle, the reified madness, of the human/social mutuality. What is manufactured and disseminated by way of dominant sign-exchange-value, however, is semiotic captivity.[16] As an aesthetic, its intensities and forces extend from the kept to their keepers, from their managers to their watchers. Overcoming this aesthetical madness is a symbolic journey for a people yet to come (Deleuze and Guattari 1984; 1987).

The linguistic: on the ultramodern shadow and the human/social mutuality

The symbolic as consumerized sign-exchange-value represents a continuously consumable text. However, the excavation of circumscribed images put into speech (the unconscious narrative) communicates less than (produces less about) who we are or could become. This semiotic production is a mass-marketed fiction. The story that it advertises is political. As narrative, it enters the marketplace of sign-exchange-value and recounts the struggle of the human/social mutuality in its own governing voice. This voice tells of desperation and fear through the epistemology of logocentrism and the metaphysics of presence (Derrida 1973; 1977; 1978). Logocentrism posits that what is most foundational, true, good, and virtuous is that which is most instantly recognizable by and immediately accessible to consciousness. The value assigned to "recognition and accessibility is traceable to the conviction that stable, clear and absolute meaning resides in texts" (Arrigo 2010: 366). The problem with this logic is that while the written and circulated story offers narrative content that coheres and discloses, its tendencies are to foreclose and finalize (Bakhtin 1982), to reduce being and repress becoming (Arrigo *et al.* 2011), and to

reify the criminological shadow (Arrigo and Milovanovic 2009). The metaphysics of presence reasons that such risk management (the story's decision), captivity (limits on and denials of individual and collectivist consciousness), and harm (reproducing stories of desperation and fear that signify a totalizing madness) are an endlessly rewritten fiction. It is the marketplace narrative that governs and domesticates by defining the human/social struggle through hierarchical oppositions. This opposition-setting entails a metaphysical *presencing* (or privileging) of certain sign-exchange-values over their deferred (concealed or absent) binary others.[17]

Privileging one term in a hierarchical opposition over its binary opposite denies the existence of the contested terrain within which meaning dwells. Thus, the fiction and politics of the story concerning the human/social mutuality's interactive (i.e., dialectical) struggle are repeatedly written and told in ways that displace and undo the interconnectedness of its terms in binary opposition. However, the meaning of "risk management" is made more complete when its decided text of sameness (i.e., excessive investments in denying being and limiting becoming) is postponed by its undecided text of difference (i.e., generative investments in dynamically celebrating the recovering subject and the transforming subject). The meaning of "captivity" is made more complete when its decided text of confinement (for one and about all) defers to its undecided text of freedom (for one and about all). The meaning of "harm" is made more complete when its decided text of fear and desperation depends on its undecided text of well-being and hope. Each binary and the inter-reliance of their respective terms are a re-reading of signification that awaits greater inscription. This is the story to be told about the undisclosed meaning-making potential and promise of the human/social mutuality.[18]

The material: on the ultramodern shadow and the human/social mutuality

When the unconsciously written narrative is reproduced over and over again, it becomes a lived text or an embodied history. It becomes a body of knowledge, composed of disciplinary systems of thought (e.g., in psychiatry, law, penology, and education). These bodies of knowledge discipline the self, the social, and their interrelatedness. These systems of thought advance technologies (of self/market control) understood to be material expressions of power that normalize, de-pathologize, and correct (Foucault 1965; 1977). The domestication that ensues establishes an ordering of things (Foucault 1966) that renders subjects (one's own humanity and the systems of thought that discipline) ethical bodies, bodies of utility, and the product of state-based human engineering (Arrigo *et al.* 2005). This normative complacency in thought and action is captivity's shadow, its violence. Injury extends from the kept to their keepers, from their managers to their watchers. Indeed,

> the narrative of power as knowledge that is materially produced by . . . disciplinary systems promulgates regimes of truth and regimens of human-social existence. These truths [and regimens] inscribe and render docile . . . dissenting self and social bodies: they vanquish difference, territorialize knowledge, homogenize identity, and sanitize community.
>
> (Arrigo 2010: 366)[19]

The cultural: on the ultramodern shadow and the human/social mutuality

In the digitized age of image-objects manufactured and circulated as mutating simulacra, materiality (bodies of knowledge and disciplined bodies) is transformed into a hyper-reality. As hyper-reality, neither materiality's physical features nor their non-tangible appearances assume

ontological primacy. This is because there is no embodiment behind the illusion and, as such, there is no fixed imitation either. The pseudo-ontologies that emerge from hyper-reality dramatically and provocatively re-conceive the dialectical struggle of the human/social mutuality. The existential – phenomenological condition is culturalized as semiotic reproduction and re-presentation. This is the realm of consumerized sign–exchange–value in which the meaning of a commodity's worth pivots. For example, in Western society, we do not consume products (i.e., purchase a home, lease a car, buy shoes, etc.) for the physical comfort that tangible commodities yield. We do not consume image-products (advertisements about purchasing a home, leasing a car, buying shoes, etc.) for the techno-rational spectacles and derivative satisfactions that intangible commodities yield. We consume semiotic products (signs for and sign systems about purchasing a home, leasing a car, buying shoes, etc.) for the simulations and simulacra that these (and all other) commodities yield. These are meanings that "mutate and morph endlessly in order to support the conspicuous consumption of technologized culture for its own sake" (Arrigo 2010: 367). The liquid identities and virtual realities that follow as sign–exchange–value are inexhaustible in their ubiquity. This is ultra-modernity's cosmopolitanism.[20]

Culturalized hyper-reality feeds fear and nurtures desperation as the semiotically consumerized criminological shadow. This digitized condition of reified madness is reproduced through simulated mechanisms of escape (i.e., the captivity found at the nexus of image, language, and subjectivity). This nexus artificially and imitatively signifies within the ritualized pseudo-ontology of the hyper-real. Sadomasochistic dependence on authority (i.e., reductive/repressive images, texts; bodies of knowledge), relentlessly acquisitive destructiveness (i.e., semiotic captivity; mass-marketed fictions), and unreflectively generated automaton conformity (i.e., docility in thought and action) are replicated, *argumentum ad nauseam*. This is the realm in which the human/social mutuality is experienced incessantly by one and for all as virtual and derivative non-reality. As negative freedom, this reality is simultaneously the source and product of its own reified madness. Indeed, this is how the shadow, as liquidity, is nurtured, sustained, manufactured, and distributed symbolically, linguistically, and materially.[21]

Given the shadow's disturbing and collective flows, ultra-modernists have called for an "overcoming," a will-to-power (Nietzsche 1968) that dynamically transforms being and becoming (Arrigo and Milovanovic 2009). This overcoming entails a de/reconstruction of the dialectical struggle that is the human/social mutuality legitimized by way of its extant conditions of control. Undertaking this challenge, as a cultural criminological revolution, begins as a departure in theory, method, and praxis (Arrigo *et al.* 2011).

Affirmative ultramodern criminology and the awaiting cultural revolution

Figure 3.1 visually depicts the intensities and forces of an ultramodern criminology. Its conditions of control currently populate, interdependently co-shape, and recursively sustain the dialectical struggle waged by the human/social mutuality. Figure 3.1's existential–phenomenological flows (arrows) indicate movement to and from each sphere (the symbolic, linguistic, material, and cultural), as well as to and from the human/social mutuality. These collective flows demonstrate the porous composition of the ultramodern condition and the constituent interconnectivity of its general operation. The criminological shadow consists of semiotic captivity, mass-marketed fictions, docility in thought and action, and liquid/negative freedom. Overcoming the shadow's flows of reified madness is an invitation to transform risk, captivity, and harm. This is an invitation to follow a "strange," although affirmative, path (Arrigo and Milovanovic 2009); one that dis/reassembles the journey of theory, method, and praxis. It is a cultural revolution in the making.
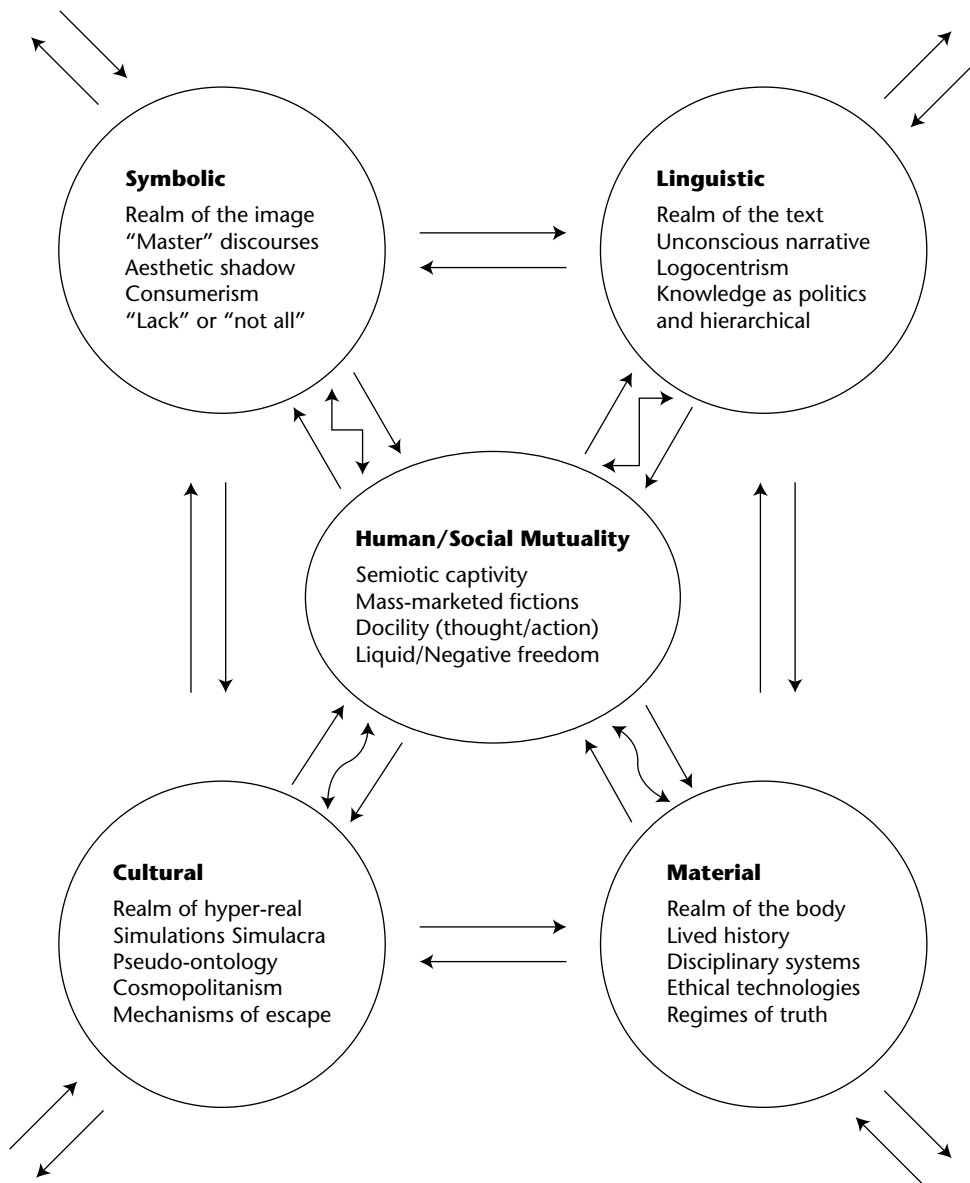
Figure 3.1 Ultramodern criminology, the conditions of control, and the shadow

Ultramodern criminology and the revolution in theory, method, and praxis

Presently, the consumerism, politics, technology, and cosmopolitanism of the ultramodern condition generate artifacts for and about the human/social mutuality that problematically reduce and repress prospects for transformative citizenship and dynamic social justice through the maintenance of co–productive and interdependent harm–generating intensities. However, when a space or habitus (i.e., horizon of perception thought, and action) (Bourdieu 1977) is more

fully and routinely inhabited that seeks dynamic transformation through the dialectical struggle and quest that revolutionary change signifies, then an emergent excellence and an unfulfilled promise that pulsate for a people yet to come can be made more attainable.[22] Activating this revolutionary pulse, then, commences as an exit (a way through and out of the madness).

As a departure in theory, the journey embraces a cosmopolitan imagination (Delanty 2009). This imaging entails the mining, retrieval, reproduction, and circulation of significations (i.e., meanings) that do not tend toward closure, to finalizing being, or to reifying the criminological shadow. The cosmopolitan imagination is the realm that re-conceives (re-symbolizes) the nexus of image, language, and subjectivity. Excavating this reservoir of desire necessitates a critical mindfulness, a critical reflexivity. The genealogical mining that ensues uproots the unconscious, its topography, and the Oedipal and capital logics that the psychic apparatus both privileges and sustains. At the level of the symbolic, this (criminological) terrain currently is populated with images, languages, and subjectivities that govern authoritatively through master discourses. The desire of these visions and voices consumes as the law of the father (Lacan 1977; 1981) virtualized and serialized recursively (Dyer-Witheford 1999). This jurisprudence awaits its de-centering and de-stabilization through provisional, positional, and relational intensities and forces (flows).[23] Harnessing this libidinal (desiring) energy requires that will be mobilized in the service of power (Nietzsche 1968). Excavating this desire both creatively and productively is how an overcoming (i.e., transpraxis) is seeded.[24]

As a venture in method, this overcoming affirms and seeks out "difference" both actively and mutatively. Difference is the vast uncharted promise of consciousness; it is "the lack" whose absence insists. Indeed, difference is the value deferred in an oppositional binary (i.e., sameness/difference). However, the binary's *mutual* interdependencies long for symbolization. This symbolization and its unexcavated possibilities (in being) and potentialities (in becoming) are a protean antidote to the diagnosis of reified madness and the criminological shadow. The consumption of these envisioned and spoken images, as sign-exchange-value, semiotically produces a subjectivity that is more fully affirming of one's evolving, unpracticed, and unfamiliar ("strange") humanness. This consumption is rendered more realizable because these newly harvested meanings are already lodged within the co-habited self/society mutuality awaiting release. Indeed, this union's more liberating interdependencies, while mostly concealed, are nonetheless bountiful. As an unconscious narrative, then, the story that this cohabitation tells (produces) is one that cultivates significations that affirm greater possibilities in being (overcoming reduction) and greater potentialities in becoming (overcoming repression).[25]

As an undertaking in praxis, this semiotic production becomes lived history. This history inscribes bodies (and bodies of knowledge) through habits of excellence. These lived habits when experienced dynamically are transformative in their embodiments and technologies. This metamorphosis extends from the kept to their keepers, managers and watchers. The materiality of this practiced excellence at the citizenship/social justice divide is a governing topography whose evolving jurisprudence awaits further and ever-changing assemblages.[26] For example, here the phenomena of risk, captivity, and harm all merit critical reincarnations but in ways that corporealize much more justly, courageously, generously, compassionately, wisely, etc., than presently found within the culturalizing of criminology. Among other things, the mutual interconnections that could more generatively and dynamically inform the composites for offenders and victims; violence and crime; healing and restoration; health and safety; and self, society, and community all await heterodox inscriptions.[27]

The hyper-real reproduction, circulation, and replication of such mutating theory (as the consumerism of critical mindfulness), method (as the politics of difference), and praxis (as the technologies of excellence) suggest a recovering human/social mutuality and a transforming

citizenship/social justice binary of unimagined, untold, and uninhabited proportions.[28] This is the archeological journey for a people yet to come. This is the strange and unexplored path for a criminology that is ultramodern in its assessment of risk, captivity, and harm; and affirmative in its treatment of the shadow, its conditions of control, the struggle to overcome them and the fear on which they are based. This is a cultural revolution global in its expanse, a critical cosmopolitanism, awaiting more thorough genealogical excavation. Retrieving its artifacts initiates release; a way out of the contemporary crisis that is madness reified semiotically, ubiquitously, and destructively.

Conclusion

This chapter has problematized the culturalizing of criminology both historically and socio-philosophically. Guided by the method of critical cosmopolitanism and commencing with the Industrial Revolution, three such historical currents or transformational worldviews were discernible. These currents consisted of the radical Marxist critique, the techno-rationality of the Situationists, and the sign-system theory of the hyper-realists. Of particular criminological import were the troubling manifestations of reification (i.e., the co-constitutive forces that manufacture risk, captivity, and harm internationally) identified by each historical transition. The inversion of being (use-value) culturally abstracted as having (exchange-value), then appearing (imitation-value), and presently as coding (simulacra-value), yields a number of unexamined artifacts about the human/social mutuality and its historically-contingent conditions of control. These artifacts (social realities) include human subjectivity and the management–modalities of difference, individual and collectivist consciousness and the sadomasochistic forms of imprisonment that captivate one and all throughout the world, and freedom of choice and in action and the limit-setting and denial-imposing intensities that restrict/repress being and becoming.[29]

In the ultramodern age, the conditions of control that culturalize criminology reify semiotic captivity, mass-marketed fictions, docility in thought and action, liquid identities, and negative freedom. Sustaining these interdependent and co-productive flows nurtures the criminological shadow (i.e., the reification of madness). This madness consumes subjectivity as the sign-exchange-value of lack; writes the texts of difference as the politics of sameness and the metaphysics of presence; disciplines subjectivities through disciplinary bodies of knowledge that domesticate as self/market technologies of bio-power; and culturalizes reality through mechanisms of escape that virtualize existence, simulate choice and serialize action as unremitting hyper-real façades. Several suggestions for overcoming ultra-modernity's risk-captivity-harm cultural crisis of reified madness were tentatively enumerated. These provisional recommendations delineated protean departures in theory, method, and praxis. Exploring these exits further and unleashing the latent promise that these departures signify, represent a (cultural) criminological revolution in the cosmopolitan making.

Discussion questions

1   The authors identify four forces that help to form the self, the social, and their mutuality. Are there other unexamined forces that you believe shape the self, the social, and their mutuality?
2   What images, texts, and bodies of knowledge for and about "offenders" and "victims" are replicated through informational outlets (e.g., television and the Internet) in your country? How do these images, texts, and bodies of knowledge diminish prospects for healing, restoration, and justice?

3   Beyond the tentative strategies enumerated in the chapter, are there other approaches that may be employed to overcome the contemporary self/society crisis of reified madness?

Websites

Critical criminology information and resources: http://www.critcrim.org.
Cultural studies and critical theory: http://theory.eserver.org.
Cultural criminology: http://blogs.kent.ac.uk/culturalcriminology

Notes

1 At the outset, it is important to note that the intellectual history on which this article is based extends before and beyond the critically animated cultural criminological insights developed by such notables as Ferrell (2005), Young (2000), Presdee, (2001), Hayward and Presdee (2010), Hamm (2007), and Brown (2010). As astute provocateurs, their philosophical insights underscore and inform several important aspects of the contemporary image-manufactured crisis regarding the management of human risk (i.e., difference). However, this chapter focuses on the radical philosophical *transitions* that society has witnessed since the Industrial Revolution as exhibited in the dominant forms of each transition's cultural artifacts. These artifacts include, among others, the favored images of crime; the preferred texts of delinquency; the prevailing embodiments of justice identified by each current. The interdependent and co-productive flows, intensities, and frequencies that are recursively sustained by these images, texts, and embodiments *culturalize* criminology historically. This is not the same as cultural criminology whose aim is to draw attention to the "creeping criminalization of everyday life" (Presdee 2001: 159). This is governmentality that authenticates and domesticates crimes of style (Ferrell 1996); structurally locates and contextualizes the sociology of vindictiveness and the criminology of transgression that fuels this criminalization (Young 2007); posits and problematizes a criminological imagination that awaits its own transformative unleashing (Young 2011), and invites and incites reform in which the meanings of these awaiting transformations when practiced and lived become embodied excellence (Ferrell *et al.* 2009).

2 Cultural and linguistic anthropologists have been particularly persuasive on this matter, noting that underlying social structures or patterned formations are discernible through such artifacts (e.g., Lévi-Strauss 1983, see also, Durkheim 1933, for some criminological applications). The ensuing chapter, however, "does" cultural inquiry as an instance of critical ethnography (Thomas 1993) informed by canonical insights developed within the critical theory and continental traditions.

3 Indeed, as a grounded sociological method, Delanty (2006: 25) describes critical cosmopolitanism as serving one principal function: "to discern or make sense of social transformation by identifying new or emergent social realities." These realities are evident

> when and wherever new relations between self, other and world develop in moments of open-ness . . . [The critical cosmopolitan imagination] shifts the emphasis to internal developmental processes within the social world rather than seeing globalization as the primary mechanism [of change].
>
> (ibid.: 27)

In this way, then, the critical cosmopolitan imagination as cultural medium "refers to the multiplicity of ways in which the social world is constructed in different modernities" (ibid.; Delanty 2009). In order to specify the transformational worlds (the radical philosophies) and social realities (the emergent reifications) that have culturalized criminology since the industrial revolution, this chapter appropriates the critical socio-ethnographic method of the cosmopolitan imagination.

4 Reification occurs when humans assign objective-like qualities to their own constructions or belief-systems (i.e., ideologies) and then treat these constructions as if they were "facts of nature, [the] result of cosmic laws, or manifestations of divine will" (Berger and Luckmann 1966: 33). The concept of reification extends from Marx's (1974) critique of capital logic and the fetishizing of the commodity form, to Althusser's (1971) commentary on the ideological state apparatus and the interpellated subject, to Lukács' (1971) assessment of bourgeoisie false consciousness (i.e., the conversion of the commodity's significance as image object) projected onto the proletariat as class consciousness, to Honneth's (2012) rejection of structural arguments replaced by psychodynamic explanations that source reification in intersubjective relations of (pathological) struggle over recognition and power.

5 The intellectual history of the "shadow" construct is a critique of the social person (i.e., the self that is both in and of society) (Arrigo 2011; 2012). The shadow is rooted in Plato's (2008) appearance/reality binary; is historicized in Hegel's (1979) master/slave dialectic; is internalized in Freud's (1965) and interpersonalized in Jung's (1976) psychoanalytic theory, is culturalized in the Frankfurt School's criticisms of capital logic (Marcuse 1955), freedom (Fromm 1994), and the mass-produced culture industry (Adorno and Horkheimer 2002); is corporealized in existential phenomenology (Merleau-Ponty 1983) and hermeneutic ontology (Ricoeur 1970); and is de/re-textualized in various postmodernist critiques of educational (Freire 1970), political (Laclau and Mouffe 2001), legal (Unger 1987), and related institutional struggles. As an instance of the *criminological* shadow, however, the chapter's third section assesses the reification problem in the ultramodern age, the interdependent and constitutive forces that nurture this reification, and the systemic and totalizing transgressions that follow from this reification's (unreflective) maintenance.

6 The "crisis" to which this article refers includes the *field* of criminology (i.e., a theoretical, methodological, disciplinary crisis) and the *terrain* of criminology (e.g. the more 'material' crisis of prison expansion, the rise of actuarial justice, "risk" society politics).

7 As the radical philosophy that informs this chapter will demonstrate, each of these three currents as "moments of 'openness'" (Delanty 2006: 27) distinctively problematizes critical social transformations in the constitution of risk, captivity, and harm (reification). By logical extension, then, each current uniquely re-culturalizes the field and terrain of criminology. This includes critical transitions in consumerism (e.g., the favored forms of commodification regarding crime phenomena), politics (e.g., the hierarchical narratives that fictionalize offenders and victims), and technology (e.g., the dominant mechanisms/techniques of crime control that domesticate one and all) from one period to the next. For an analysis exploring some of the historical and current linkages among culture, criminology, and critique, see Carrabine (2008) and Young (2011). For a theoretical commentary describing the relevance of each historical transition and the culturalizing of society, see Baudrillard (1983b), Bauman (2000), and Debord (1983), and for justice-centered implications (Milovanovic 2010).

8 Examples of this phenomenon are ubiquitous. Consider the trade in therapeutic, restorative justice and related diversionary courts; the commerce in surveillance and cyber-policing; and the industry of neuroscience and radio frequency identification technology administered in the criminal law. The mass image-marketing of these criminological commodities furthers a form of reification that governs through panoptic and proliferating mechanisms of control that discipline corporeally, that is, through a "microphysics of power" (Foucault 1977: 26). This hermeneutics of suspicion (Ricoeur 1970, see also, Scott-Baumann 2009) is a form of domestication that renders subjects "docile bodies, bodies of abject utility and mere functionaries of the state" (Foucault 1977: 210).

9 One case in point is the "No-Lie" fMRI technology that now is being offered as "truth verification" evidence in criminal courts as a basis to determine competency to stand trial, competency to execute, sexual assault culpability, and related legal matters (e.g., Tancredi 2005).

10 According to semiotic theory, all phenomena stand for more or other than the thing itself (e.g., Kevelson 1988). Objects or events in the world communicate meaning beyond the object or event. This logic obtains not only at the phenomenal level but at the organizational, institutional, and macro-logical as well, that is, within all *systems* of communication. For example, law is but one of many coordinated linguistic systems by which a type of meaning (i.e., highly specialized, often status quo-directed, and exclusive in its very construction) is conveyed. To illustrate, consider the meanings for "death by lethal injection." For some, it is a reasoned method of administering capital punish-ment; for others, it is an indication of just how sterile, clinical, and antiseptic penological practices have become; for still others, it is an industry from which to materially profit at the expense of another's apparent lack of intellectual and social capital. Semiotic meaning abounds; however, these signifi-cances are often reduced to circumscribed interpretations of what is just, true, fair, or equitable (Milovanovic 1986). These are interpretations in which the logic of capital, dominant political economic interests about the same, and prevailing psycho-cultural dynamics co-produce finite social relations and restricted class consciousness (Milovanovic 2010). For the hyper-realists, however, the question is begged: What meanings does the law advance and privilege, as a system of signs, regarding death by lethal injection, given the simulated and consumable industry that helps to sustain it through the language (sign-exchange-values) used to talk about it? This industry includes DVD movies, CDs and video games, YouTube sites, etc., that digitally commodify the phenomenon, thereby producing virtual meanings *ad infinitum*. A more detailed response to this query is beyond the scope of the present chapter.

11 The process of generating sign-exchange-value occurs repeatedly. Consider advertising campaigns for McDonald's, Coca-Cola, or Nike. In each instance, the image-object (for fast food, soft drinks and sneakers) is dynamically stylized to attract (to captivate) diverse market audiences (parents on the run; youthful senior citizens, adolescent would-be athletes). Moreover, these individual campaigns evolve, consistent with the manufactured and derivative human/social (political-economic) reality that these target groups presumably experience. In this way, the culturalized semiotic meanings that directed audiences assign to the commodity's image-object help to "sell" the commodity's worth to that group (e.g., Arrigo *et al.* 2005).

12 O'Malley's (2010) example of the traffic fine represents a compelling example of simulated justice and telemetric (i.e., digitized surveillance) policing. As he argued,

> [The offense] is electronically monitored, calibrated, monetized into a fine, the fine issued and expiated in simulated space—that point at which the real and the virtual converge. While all of this is very "real" (real money is primarily electronic and digitized), binary codes rather than liberal individuals are focal. Key forms of simulated justice operate beyond the reach of "individual rights" as liberal individuals are fragmented into simulated "dividuals" and commodified privileges rather than rights become critical to everyday life.
>
> (ibid.: 795)

13 Foucault's (1977) work on the panopticon argued that the predominant mechanisms of social control exercised by modern institutions (e.g., prisons, schools, courts) were not "the spectacles of criminal justice in which the 'many' saw the 'few' [but rather were the proliferating techniques of] surveillance in which the 'few' saw the 'many'" (Doyle 2011: 284). Indeed, as Foucault (1977: 217) himself posited, "our society is not one of spectacle, but of surveillance." However, in the digital age of mass media–sourced information, a parallel and reciprocal mechanism of social control is the synopticon in which, as a "viewer society," "the many" see "the few" (Mathiesen 1997: 215–216, see also, Bauman 1998). Among other things, the synopticon has been used to theorize the role of the media in relation to the 9/11 attacks (Lyon 2006), policing and society (Mawby 1999), white-collar crimes (Levi 2006), and therapeutic courts (Moore 2011). For the purpose of this chapter, the panopticon and synopticon are recognized as two complementary techniques of surveillance whose connections to the cultural critique of the hyper-realists are situated in their semiotic relevancies.

14 In addition to the linguistic realm (i.e., the postmodern condition of privileged texts that discursively reproduce systems of communication) are the symbolic, material, and cultural conditions to which the linguistic sphere is interconnected and from which it co-productively fashions "liquid" representations (i.e., partial/fragmented definitions) of social relations (Bauman 2000). These definitions as

> phenomenal forms (e.g., the self as "lack", the body as "disciplined", and the state as "sign-exchange" value), imbue language with its ontological footing, ethical signification, and aesthetical resonance. [When] these phenomenal forms [are] expressed through a system of communicative thought, [these forms] help bridge the divide from the postmodern to the ultramodern.
>
> (Arrigo 2011: 434; see also Henry and Milovanovic 1996)

15 For example, the sign-exchange-values that are produced and disseminated in regard to offenders and victims; violence and crime; recovery and restoration; health and safety; and self, society, and community are all less than what they could be or could become. As circumscribed pictures in our minds, the restricted meanings we conjure about them typically convey only dominant (criminological, penological, psychiatric, educational, etc.) renditions of knowledge and truth regarding these culturalized commodities. Moreover, these governing sign-exchange-values mostly support and sustain images (as simulacra) that are consistent with the system-maintaining status quo dynamics of a given political economy, its ordering of things (Foucault 1966), and its regimes of signs (Deleuze and Guattari 1987).

16 The notion of semiotic captivity is akin to Polizzi, Draper, and Andersen's description of the social construction of "fabricated selves" (Chapter 11 in this volume). In their hermeneutic phenomenology of incarceration, they argue that the rehabilitative machine as "apparatus" (Agamben 2009: 12) endures for one and all because:

> the apparatus of the correctional machine seeks to not only manage and control those held by its disciplinary regime, but also seeks to manifest that control within the thoughts and behaviors of these incarcerated individuals, which in turn attempts to re-fabricate the very identity of the self.
>
> (Polizzi *et al.*: 237)

17 Consider the following criminal law examples:

> [T]he expression "*competency* to stand trial" defers or postpones its binary opposite "*incompetency* to stand trial." The legal construct of "*sanity*" conceals and displaces its binary opposite "*insanity*." The phrase "right to psychiatric *treatment*" devalues or renders as absent its binary opposite, "right to psychiatric *non-treatment*." In each instance, rather than cultivating an epistemology that grows meaning through the *mutual interdependence* of both terms/values that constitute a hierarchical opposition, meaning (and knowledge about the self, the social, and their interconnectedness) is reduced to the activity of esteeming one term/value in a binary over and against its other term/value. As such, the metaphysics of presence prefers logocentric assumptions, ideas, and truths at the expense of potentially worthwhile, though often unexamined, alternatives.
>
> (Arrigo 2010: 366, emphasis added)

18 This logic applies to the narratives of criminology as well. If, for example, the stories of crime deferred more interdependently to their texts of justice, what criminologies regarding the social person (e.g., from those who offend to those victimized; from those who police, treat and keep the kept to those who legislate, manage and educate about them) might emerge from these yet-to-be-written mutualities?

19 An illustration from criminology that explains the shadow as a type of exclusion (i.e., as promulgator of regimes of truth about the human/social mutuality) is worth noting. This includes the interaction of evidence-based research, actuarial penology, and the policing of risk. As Arrigo and Williams explained:

> [P]reoccupation with avoiding threat or reducing risk [seemingly at all costs] makes obsolete the free-thinking role of the individual in society. Indeed, excessive investments in technology displace the creative contributions of the individual. Within the science of criminology, the mechanistic regulation of citizens occurs through offender-monitoring techniques (intensive probation supervision, boot camps, mandatory-minimum sentences, three strikes legislation, transfer of juveniles to the adult system) that seek to [maximize] compliance and/or minimize transgression.
>
> (2009: 235)

Interestingly, neither the empirical nor the probability studies support the policy maintenance of these techniques. Thus, the presence of sustained docility can only be explained through risk politics that domesticates (captivates and polices) subjects by feeding collectivist fears, desperations, and insecurities.

20 Consider, for example, how surveillance technology innovations (e.g., radio frequency identification ["tagging"] of paroled sex offenders; global positioning system monitoring ["tracking"] of diverted juveniles) have reconceived and intensified the management of human risk or hazard throughout the world (e.g., Milovanovic 2010; O'Malley 2010; see also Lippens and Van Calster in Chapter 16 in this volume). This is a hyper-real state in which our ultramodern experiences of crime and justice, law and order, violence and victimization, etc., are serialized. Sustaining this serialization converts (i.e., abstracts) objects, events, and people to (for their) mere informational (i.e., coded) utility. The cultural "informationalizing" of these phenomena is harm normalized that implicates one and all. This is harm digitized in the form of social sorting (Lyon 2003), bio-political tattooing (Agamben 2004), and prepression (Schinkel 2011). Indeed, these hyper-control society and situational surveillance conditions have even led some critics of institutional corrections to warn that:

> Current attitudes in corrections and offender treatment and the policy initiatives these evoke, reveal an underlying set of negatively defined socially constructed meanings about offenders that effectively contradict and undercut any superficial [let alone detailed] discussion about the benefits of rehabilitation, reentry, or restorative justice practices. It is very difficult to envision what successful work in corrections, offender psychotherapy, or rehabilitation would actually look like in such an environment. Successful work with offender populations will be difficult to achieve without first thoroughly addressing the way in which these [actuarially-conceived and] socially-generated definitions, concerning who and what the offender is, both restrict and actually prevent the type of success the criminal justice [mental health and substance abuse] system[s] appear willing to pursue.
>
> (Polizzi and Braswell 2009: 4)

21 Baudrillard (1996: 3–4) describes this virtual and derivative condition as the "perfection of crime." It is a condition where subject and object are "equivalent," without any tangible, stable referent, where "assailant and victim" are one. This ultramodern crisis of reified madness is the *murder of reality*. This crisis sustains the criminological shadow.

> The only suspense which remains is that of knowing how far the world can de-realize itself before succumbing to its reality deficit, or, conversely, how far it can hyper-realize itself before succumbing to an excess of reality (the point when having become perfectly real, truer than true, it will fall into the clutches of total simulation).
>
> (ibid.: 4)

22 The quality of this excellence and the nature of this promise are traceable to Aristotle's (1976) notion of *eudaimonia* (i.e., happiness or human flourishing) purposefully embodied as a habit of character. This flourishing passes through Levinas' (2004) phenomenology of "becoming other" (i.e., beyond essence or outside of ontology) subjectively embodied as care ethics. This care ethic re-emerges in Deleuze and Guattari's (1984) schizoanalysis as a "body without organs" (i.e., the smooth space through which movement/change can occur unfettered by underlying or unifying principles of constraint, rigidity, or permanence as in a system of organization) nomadically inhabited as becoming minoritarian, becoming imperceptible, or becoming (ethically) revolutionary.

23 One critical cosmopolitan and re-constitutive possibility is found in the transformational philosophy of the gift. As Olsteen aptly summarizes:

> We live in a culture consumed and deafened by the rhetoric of self-interest, by a superficial "globalization" that mostly consists of spreading this rhetoric without considering the lessons we might draw from the ways that people in other cultures interact through objects. In our own society, the questions of the gift impinge upon essential issues in social life: What kinds of obligations do gifts engender, and what role do gift practices play in creating communities? What are the relationships between persons and objects: can objects function other than as commodities? How are gift practices related to family dynamics? Does economism make gifts less prevalent or more calculated? How does thinking of each other as gift-givers and -receivers invite new ways of conceiving ourselves and our choices? If we revise the stories we tell about social interaction, might we also revise the interactions? How, in a secularized society, do gift rituals express the desire for spiritual transcendence? Finally, is a truly free gift possible or even desirable?
>
> (2002: 1–2)

A theory of the gift as fitted to the terrain of criminology re-conceives the human/social mutuality in countless untapped and unexamined ways. For some preliminary commentary in penology that is consistent with this philosophy of the gift see, Arrigo and Milovanovic (2009: 76–78) on the deconstructive dynamics of "punishment and reward."

24 Additional insights in regard to "willing" the cosmopolitanism of critical consciousness include: Lacan (1991) on the integration of the discourse of the "hysteric" and "analyst"; Freire (1970) on conscientization and dialogical pedagogy; and Deleuze and Guattari (1984; 1987) on schizoanalytics, de-territorialization and re-territorialization, and the "rhizomatics" (i.e., active lines of flight) regarding libidinal and economic production.

25 For a more detailed description of this revolution in method and several of its criminal law applications, see Arrigo and colleagues (2011). In this work, the authors addressed three controversial instances of overcoming reified madness and the criminological shadow. These instances included: (1) juveniles waived to the adult system, despite developmental maturity concerns, subsequently found competent to stand trial; (2) psychiatrically disordered offenders placed in long-term disciplinary segregation where said isolation was not deemed to be cruel and unusual punishment; and (3) sexually violent predators subjected to criminal/civil confinement, followed by offender registration and community notification.

26 Consider the victim/offender binary as one case in point. Its terms (values) constitute a hierarchical opposition wherein the binary's conditions of control make victims into "offenders" (by way of fearful hyper-vigilance and dangerous panopticism) and offenders into "victims" (by way of limits to being and denials of becoming). This privileging of meaning yields regimes of truths and regimens of human/social existence (i.e., governmentality) that discipline bodies incompletely through inadequate bodies of knowledge. Indeed, the images, narratives, inscriptions, and replications of this victim/offender binary are less than what they could be or could become for one and all. Overcoming and transforming these "partialities" are the task of an ultramodern praxis when its jurisprudence more fully inhabits lived excellence.

27 Several additional praxis strategies have been identified that are consistent with the proposed ultramodern critique and the lived journey of human/social flourishing. Among them are the following: Foucault (1980) on the ontology of actuality, heterotopia, sites/bodies of resistance, and in-process inscriptions; Levinas (1987; 2004) on care ethics as inhabiting the space of the other; Sen (2011) on

capabilities theory, freedom, and democracy; Williams and Arrigo (2002) on chaos theory, dissipative structures, strange attractors, and far-from-equilibrium conditions; Spivak (1988) on post-colonialism, the subaltern, epistemic violence, and strategic essentialism; and Badiou (2005) on the ontology of language, set theory, and deciding on and naming the undiscernible, the "event." Collectively, these praxis strategies seek to overcome – contingently, positionally, and relationally – the intensities and forces of reified madness that nurture and sustain the criminological shadow.

28 Several emergent directions regarding recovery in being and transformation in becoming appear promising and are worth noting. Consider, for example, the cosmopolitanism of delinquency (e.g., tearing down the streets) (Ferrell 1996) when imagined, spoken, and lived as graffiti artist/art; the cosmopolitanism of psychiatric illness (e.g., order within and out of chaos) (Saks 2008) when imagined, spoken, and lived as mental health consumer advocate/advocacy; and the cosmopolitanism of criminality (the edgework of voluntary risk-taking) (Lyng 2004) when imagined, spoken, and lived as boundary transcendor/transcendence (e.g., BASE jumper, dumpster diver, identity extremist). The culturalized reproductions of these departures – from the symbolic, to the linguistic, to the material – are incipient directions (a "strange" humanness) that make more realizable the journey of a people yet to come. For several critical and cultural, existential and phenomenological, dramaturgical and hermeneutic elaborations in criminology, see Hardie-Bick and Lippens (2011).

29 Given this chapter's approach to cultural inquiry and critical ethnography, the culturalizing of criminology by way of modernity's (the age of radical Marxism) and late modernity's (the age of the Situationists) conditions of control warrants separate and more detailed analyses.

References

Acorn, A. (2005) *Compulsory Compassion: A Critique of Restorative Justice*, Vancouver: University of British Columbia.

Adorno, T. and Horkheimer, M. (2002) *Dialectic of Enlightenment*, Stanford, CA: Stanford University Press.

Agamben, G. (2004) "No to Bio-Political Tattooing," *Le Monde*, 10 January.

Agamben, G. (2009) *What Is an Apparatus? And Other Essays*, Stanford, CA: Stanford University Press.

Althusser, L. (1971) *Lenin and Philosophy and Other Essays*, New York: Monthly Review Press.

Aristotle (1976) *Ethics*, trans. J.A.K. Thomson, New York: Penguin.

Arrigo, B. A. (2006) "The Ontology of Crime: On the Construction of the Real, the Image, and the Hyper-Real," in B. A. Arrigo and C. R. Williams (eds.) *Philosophy, Crime, and Criminology*, Urbana, IL: University of Illinois Press.

Arrigo, B. A. (2008) "Crime, Justice, and the Under-Laborer: On the Criminology of the Shadow and the Search for Disciplinary Legitimacy and Identity," *Justice Quarterly*, 25(3): 439–468.

Arrigo, B. A. (2010) "De/Reconstructing Critical Psychological Jurisprudence: Strategies of Resistance and Struggles for Justice," *International Journal of Law in Context*, 6(4): 363–396.

Arrigo, B. A. (2011) "Madness, Citizenship, and Social Justice: On the Ethics of the Shadow and the Ultramodern," *Law and Literature*, 23(3): 404–441.

Arrigo, B. A. (2012) "The Ultramodern Condition: On the Phenomenology of the Shadow as Transgression," *Human Studies: A Journal for Philosophy and the Social Sciences*, 35(3): 429–445.

Arrigo, B. A. and Milovanovic, D. (2009) *Revolution in Penology: Rethinking the Society of Captives*, Lanham, MD: Rowman and Littlefield.

Arrigo, B. A. and Milovanovic, D. (2010) "Introduction: Postmodern and Post-structural Criminology," in B. A. Arrigo and D. Milovanovic (eds.) *Postmodernist and Post-structuralist Theories of Crime*, Farnham: Ashgate Publishing.

Arrigo, B. A. and Williams, C. R. (2009) "Existentialism and the Criminology of the Shadow," in R. Lippens and D. Crewe (eds.) *Existentialist Criminology*, London: Routledge-Cavendish.

Arrigo, B. A., Milovanovic, D. and Schehr, R. C. (2005) *The French Connection in Criminology: Rediscovering Crime, Law, and Social Change*, Albany, NY: State University of New York Press.

Arrigo, B. A., Bersot, H. Y. and Sellers, B. G. (2011) *The Ethics of Total Confinement: A Critique of Madness, Citizenship, and Social Justice*, New York: Oxford University Press.

Badiou, A. (2005) *Being and Event*, trans. O. Feltham, New York: Continuum.

Bakhtin, M. (1982) *The Dialogic Imagination: Four Essays*, Austin, TX: University of Texas Press.

Baudrillard, J. (1968) *Le Système des objets*, Paris: Denoël-Gonthier.

Baudrillard, J. (1972) *For a Critique of the Political Economy of the Sign*, St. Louis, MO: Telos Press.

Baudrillard, J. (1983a) *In the Shadow of the Silent Majorities*, New York: Semiotext(e).

Baudrillard, J. (1983b) *Simulations*, New York: Semiotext(e).

Baudrillard, J. (2008) *The Perfect Crime*, New York: Verso.

Bauman, Z. (1998) *Globalization: The Human Consequences*, Oxford: Blackwell.

Bauman, Z. (2000) *Liquid Modernity*, Cambridge: Polity Press.

Beck, U. (1992) *Risk Society: Towards a New Modernity*, London: Sage.

Beck, U. (2009) *World at Risk*, Cambridge: Polity Press.

Berger, P. and Luckmann, T. (1966) *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, New York: Anchor/Doubleday.

Best, S. (1989) "The Commodification of Reality and the Reality of Commodification: Jean Baudrillard and Post-Modernism," *Current Perspectives in Social Theory*, 9: 23–50.

Bogard, W. (1996) *The Simulation of Surveillance: Hypercontrol in a Telematic Society*, Cambridge: Cambridge University Press.

Bourdieu, P. (1977) *Outline of a Theory of Practice*, Cambridge: Cambridge University Press.

Brown, M. (2010) *The Culture of Punishment: Prison, Society, and Spectacle*, New York: New York University Press.

Carrabine, E. (2008) *Crime, Culture, and the Media*, Cambridge: Polity Press.

Chambliss, W. and Seidman, R. (1971) *Law, Order and Power*, Boston: Addison–Wesley.

Debord, G. (1983) *Society of the Spectacle*, Detroit: Black and Red.

Delanda, M. (2005) *Intensive Science and Virtual Philosophy*, New York: Continuum.

Delanty, G. (2006) "The Cosmopolitan Imagination: Critical Cosmopolitanism and Social Theory," *European Journal of Social Theory*, 57(1): 25–47.

Delanty, G. (2009) *The Cosmopolitan Imagination: The Renewal of Critical Social Theory*, New York: Cambridge University Press.

Deleuze, G. and Guattari, F. (1984) *Anti-Oedipus: Capitalism and Schizophrenia*, Minneapolis, MN: University of Minnesota Press.

Deleuze, G. and Guattari, F. (1987) *A Thousand Plateaus: Capitalism and Schizophrenia*, Minneapolis, MN: University of Minnesota Press.

Derrida, J. (1973) *Speech and Other Phenomena*, Evanston, IL: Northwestern University Press.

Derrida, J. (1977) *Of Grammatology*, Baltimore, MD: Johns Hopkins University Press.

Derrida, J. (1978) *Writing and Difference*, Chicago: University of Chicago Press.

Doyle, A. (2011) "Revising the Synopticon: Reconsidering Mathiesen's 'The Viewer Society' in the Age of Web 2.0," *Theoretical Criminology*, 15(3): 283–299.

Durkheim, E. (1933) *The Division of Labor in Society*, trans. G. Simpson, New York: Free Press.

Dyer-Witheford, N. (1999) *Cyber-Marx: Cycles and Circuits of Struggle in High Technology Capitalism*, Urbana, IL: University of Illinois Press.

Ferrell, J. (1996) *Crimes of Style: Urban Graffiti and the Politics of Criminality*, Boston: Northeastern University Press.

Ferrell, J. (2005) *Empire of Scrounge: Inside the Urban Underground of Dumpster Diving, Trash Picking, and Street Scavenging*, New York: New York University Press.

Ferrell, J., Hayward, K. and Young, J. (2009) *Cultural Criminology: An Invitation*, London: Sage.

Freire, P. (1970) *Pedagogy of the Oppressed*, New York: Continuum.

Freud, S. (1965) *The Interpretation of Dreams*, New York: Avon Books.

Foucault, M. (1965) *Madness and Civilization: A History of Insanity in the Age of Reason*, New York: Vintage.

Foucault, M. (1966) *The Order of Things: An Archeology of the Human Sciences*, New York: Vintage.

Foucault, M. (1977) *Discipline and Punish: The Birth of the Prison*, New York: Pantheon.

Foucault, M. (1980) *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, London: Harvester.

Fromm, E. (1994) *Escape from Freedom*, New York: Henry Holt and Company.

Halsey, M. (2007) "Assembling Recidivism: The Promise and Contingencies of Post-Release Life," *Journal of Criminal Law and Criminology*, 97(4): 1209–1260.

Hamm, M. (2007) *Terrorism as Crime: From Oklahoma City to Al-Qaeda and Beyond*, New York: New York University Press.

Hardie-Bick, J. and Lippens, R. (eds.) (2011) *Crime, Governance, and Existential Predicaments*, Basingstoke: Palgrave Macmillan.

Hayward, K. and Presdee, M. (eds.) (2010) *Framing Crime: Cultural Criminology and the Image*, London: Routledge-Cavendish.

Hegel, G. W. F. (1975) *Lectures on the Philosophy of World History*, New York: Cambridge University Press.

Hegel, G. W. F. (1979) *Phenomenology of Spirit*, New York: Oxford University Press.

Hegel, G. W. F. (1989) *Hegel's Science of Logic*, trans. A.V. Miller, New York: Prometheus.

Henry, S. and Milovanovic, D. (1996) *Constitutive Criminology: Beyond Postmodernism*, London: Sage.

Honneth, A. (2012) *Reification: A New Look at an Old Idea*, New York: Oxford University Press.

Jung, C. (1976) "Aion: The Phenomenology of the Self," in J. Campbell (ed.) *The Portable Jung*, New York: Viking Penguin.

Kevelson, R. (1988) *The Law as a System of Signs*, New York: Springer.

Lacan, J. (1977) *Ecrits: A Selection*, New York: W. W. Norton.

Lacan, J. (1981) *The Four Fundamental Concepts of Psycho-Analysis*, New York: W. W. Norton.

Lacan, J. (1991) *L'Envers de la psychoanalyse*, Paris: Editions du Seuil.

Laclau, E. and Mouffe, C. (2001) *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, 2nd edn, New York: Verso.

Levi, M. (2006) "The Media Construction of Financial White Collar Crimes," *British Journal of Criminology*, 46(6): 1037–1057.

Levinas, E. (1987) *Time and the Other*, Pittsburgh, PA: Duquesne University Press.

Levinas, E. (2004) *Otherwise Than Being: Or Beyond Essence*, Pittsburgh, PA: Duquesne University Press.

Lévi-Strauss, C. (1983) *Structural Anthropology*, Chicago: University of Chicago Press.

Lukács, G. (1971) *History of Class Consciousness*, Cambridge, MA: MIT Press.

Lynch, M. J. and Michalowski, R. J. (2006) *Primer in Radical Criminology: Critical Perspectives on Crime, Power, and Identity*, 4th edn, New York: Criminal Justice Press.

Lyng, S. (2004) *Edgework: The Sociology of Risk-Taking*, New York: Routledge.

Lyon, D. (2003) "Surveillance as Social Sorting: Computer Codes and Mobile Bodies," in D. Lyon (ed.) *Surveillance as Social Sorting*, London: Routledge.

Lyon, D. (2006) "9/11, Synopticon, Scopophilia," in K. Haggerty and R. Ericson (eds.) *The New Politics of Surveillance and Visibility*, Toronto: University of Toronto Press.

Marcuse, H. (1955) *Eros and Civilization*, Boston: Beacon Press.

Marcuse, H. (1991) *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society*, Boston: Beacon Press.

Marx, K. (1964) *The Economic and Philosophical Manuscripts of 1844*, New York: International Publishers.

Marx, K. (1974) *Capital*, vol. I, New York: International Publishers.

Marx, K. (1978) *The Marx-Engels Reader*, 2nd edn, New York: W. W. Norton.

Marx, K. (1984) *Contributions to a Critique of Political Economy*, New York: International Publishers.

Mathiesen, T. (1997) "The Viewer Society: Michel Foucault's 'Panopticon Revisited,'" *Theoretical Criminology*, 1(2): 215–234.

Mawby, R. C. (1999) "Visibility, Transparency, and Police Media Relations," *Policing and Society*, 9(3): 263–286.

Merleau-Ponty, M. (1983) *The Structure of Behavior*, Bloomington, IN: Indiana University Press.

Milovanovic, D. (1986) "Juridico-Linguistic Communicative Markets: Towards a Semiotic Analysis," *Contemporary Crisis*, 10(3): 281–304.

Milovanovic, D. (2010) "Justice-Rendering Schemas: A Typology for Forms of Justice and a Prolegomenon for Transformative Justice," *Journal of Theoretical and Philosophical Criminology*, 3(1): 1–56.

Moore, D. (2011) "The Benevolent Watch: Therapeutic Surveillance in Drug Treatment Court," *Theoretical Criminology*, 15(3): 255–268.

Nietzsche, F. (1968) *The Will to Power*, ed. W. Kaufmann, New York: Vintage.

Olsteen, M. (ed.) (2002) *The Question of the Gift: Essays Across Disciplines*, New York: Routledge.

O'Malley, P. (2010) "Simulated Justice: Risk, Money and Telemetric Policing," *British Journal of Criminology*, 50(5): 795–807.

Pashukanis, E. (2002) *The General Theory of Law and Marxism*, New Brunswick, NJ: Transaction Books.

Pavlich, G. (2005) *The Paradoxes of Restorative Justice*, London: Glasshouse Press.

Pfohl, S. (1993) "Twilight of the Parasites: Ultra Modern Capital and the New World Order," *Social Problems*, 40(2): 129–151.

Plato (2008) *The Republic*, trans. R. Waterfield, New York: Oxford University Press.

Polizzi, D. (2008) "Restore to What?: Restorative Justice and the Social Construction of the Offender," *International Journal of Restorative Justice*, 4: 80–98.

Polizzi, D. and Braswell, M. (2009) "Introduction," in D. Polizzi and M. Braswell (eds.) *Transforming Corrections: Humanistic Approaches to Corrections and Offender Treatment*, Durham, NC: Carolina Academic Press.

Presdee, M. (2001) *Cultural Criminology and the Carnival of Crime*, London: Routledge.

Quinney, R. (1974) *Critique of the Legal Order*, Boston: Little Brown and Co.

Ricoeur, P. (1970) *Freud and Philosophy: An Essay on Interpretation*, New Haven, CT: Yale University Press.

Roderick, D. and Krumholz, S.T. (2006) "Much Ado About Nothing: A Critical Examination of Therapeutic Jurisprudence," *Trends and Issues in Scientific Evidence*, 1: 201–223.

Rose, N. (1996) *Inventing Our Selves*, Cambridge: Cambridge University Press.

Rose, N. (1999) *Powers of Freedom: Reframing Political Thought*, Cambridge: Cambridge University Press.

Rusche, G. and Kirchheimer, O. (1968) *Punishment and Social Structure*, Totowa, NJ: Transaction Publishers.

Saks, E. R. (2008) *The Center Cannot Hold: My Journey Through Madness*, New York: Hyperion.

Schinkel, W. (2011) "Prepression: The Actuarial and New Technologies of Security," *Theoretical Criminology*, 15(4): 365–380.

Scott-Baumann, A. (2009) *Ricoeur and the Hermeneutics of Suspicion*, New York: Continuum.

Sen, A. (2011) *The Idea of Justice*, Cambridge, MA: Belknap Press of Harvard University Press.

Simon, J. (2009) *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*, New York: Oxford University Press.

Spivak, G. (1988) "Can the Subaltern Speak?" in C. Nelson and L. Grossberg (eds.) *Marxism and the Interpretation of Culture*, Basingstoke: Macmillan.

Tancredi, L. (2005) *Hardwired Behavior: What Neuroscience Reveals About Morality*, New York: Cambridge University Press.

Thomas, J. (1993) *Doing Critical Ethnography*, Newbury Park, CA: Sage.

Unger, R. (1987) *False Necessity*, New York: Cambridge University Press.

Williams, C. R. and Arrigo, B. A. (2002) *Law, Psychology, and Justice: Chaos Theory and the New (Dis)order*, Albany, NY: SUNY Press.

Young, J. (2000) *The Exclusive Society: Social Exclusion, Crime, and Difference in Late Modernity*, London: Sage.

Young, J. (2007) *The Vertigo of Late Modernity*, London: Sage.

Young, J. (2011) *The Criminological Imagination*, Cambridge: Polity Press.

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The industries of crime and justice

Systems of policing

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4

Global non-state auspices of security governance

Julie Berg, Sophie Nakueira and Clifford Shearing

Introduction

A major question that has occupied scholars who have considered the development of non-state governing entities has been their sources of authority and how these have been constituted. The principal argument that has been put forward is that their authority, to the extent that they have legitimate authority and are not acting illegitimately, is a delegated authority that is granted to them by nation-states. For example, within the sphere of security governance, private sector providers of policing services derive whatever authority they have from state law – primarily property law and contract law.

In this chapter we begin by examining the understandings of governance, that include both state and non-state entities, which have emerged over the past several decades. We then turn to an examination of the 2010 Soccer World Cup to explore how the delegations of state power that FIFA (*Fédération Internationale de Football Association*) operated under were established. We then show that established assumptions – largely drawn from neo-liberal analyses of the state delegating the rowing of governance while retaining the steering – about these processes of delegation fail to recognise the complex set of contests and negotiations through which the delegation of authority take place. Nor do they adequately recognise the complex sets of assemblages of auspices and providers of governance that these contests and negotiations establish.

Changes in global (security) governance

A defining moment in the conceptualisation and creation of the modern nation-state as an ultimate governing sovereignty or auspice was undoubtedly the Peace of Westphalia treaties signed in 1648, bringing an end to conflict stemming from plural governing orders (Bayley and Shearing 2001; Shearing 2007). Among other things, the Peace of Westphalia created an international system of autonomous, sovereign states – states with the authority, as sovereign entities, to govern subjects and 'all areas of social life' within territorial borders through a monopoly over the use of coercive, legitimate violence (Garland 1996; Scholte 2004: 6). The nineteenth and twentieth centuries are considered to be the heyday of the state or the 'monopoly era' characterised by a focus on nation-building (particularly in the European context) where the creation of a monocentric system (with a single locus of authority) was established to counteract multi-centric

governance systems with multiple sites of authority (Shearing 2006; Lea and Stenson 2007; White 2011: 92).

Post-Westphalia and global security governance

It is by now a truism that the state has never fully realised its governance monopoly, either within global or local spaces (Garland 1996; Falk 2002; Kempa and Shearing 2002). Changing economic, political and social trends (particularly post-1945) linked to the rapid progression of globalisation have undermined the sovereignty of the state and impacted on the way in which governance is being understood and practised (Valaskakis 2001; Hettne 2002; Scholte 2004). State sovereignty has been increasingly challenged by, for instance, multinational corporations (inter-governmental organisations, non-governmental organisations, private corporations and hybrid organisations), which operate within global spheres, outside of bounded, nation–state jurisdictions (Valaskakis 2001). In other words, governance – meaning the 'organised efforts to manage the course of events in a social system' – is undertaken by a plurality and/or hybridity of international and transnational global governing auspices (Bayley and Shearing 2001; Burris *et al.* 2008: 2). The state has had a role to play in this in many respects (Sassen 2006) and has not disappeared or become completely irrelevant but rather it has become one player amid many in global governance systems in which governance is either undertaken by public or private forms or by hybrid forms (a mix of public and private).

Changes in policing are particularly telling in that they are a useful lens through which to gain insights into the nature of global governance more broadly: 'Policing is one of many questions that pervades debates about the character of global governance' (Sheptycki 2002a: 22). However, we prefer to adopt the term security governance by which is meant the shaping of the flow of events in a social system 'so as to create "spaces" in which people can live, work and play' (Wood and Shearing 2007: 7) and refers to

> the constellation of institutions, whether formal or informal, governmental or private, commercial or voluntary, that provide for social control and conflict resolution, and that attempt to promote peace in the face of threats (either realized or anticipated) that arise from collective life.
>
> (Dupont *et al.* 2003: 332)

Global security governance thus implies the constellation of auspices of governance operating within global spaces, in particular. In this formulation, state-constituted or state-authorised international police systems are but one node amid an array of auspices doing the business of policing.

Yet, the state has long attempted to assert itself as the primary institution and claim a monopoly over security governance (and coercive use of force) through its ability to raise armies and incite war; and its creation of public police forces such as, for instance, in France in the seventeenth century and in Britain in the nineteenth century (Schreier and Caparini 2005; Brodeur 2010). However, empirical evidence has suggested that in the realm of policing also, the exclusive role of the state is no more than a 'hiccup in history' and the model of state policing is a 'historical blip' (Zedner 2006: 81; Wood and Shearing 2007: 7). Global trends and ideologies have impacted on the way security governance is undertaken by both the state and non-state, for instance, neo-liberal policy, globalisation and the advent and rise of global technologies of information sharing, surveillance and communication (Garland and Sparks 2000: 189; Sheptycki 2002b; Scholte 2004). One of the main impacts on global security governance is the nature of global crime

and the activities of both old and new forms of global risks, such as transnational organised crime, terrorism and cybercrime, as well as the implications of mass migration, environmental risks and trans-border health challenges (Bowling 2009; Hein *et al.* 2009; Sullivan and Wirtz 2009). These threats 'create a problem for everyone, but they belong to no one' due to their ability to transcend nation-state jurisdictions and thus have to be tackled, it is argued, through collaborative governance – hence the efforts at creating co-operative arrangements between intergovernmental organisations and police systems (Sheptycki 2007; Hills 2009; Sullivan and Wirtz 2009: 2). The changing nature of conflicts has also impacted on security governance arrangements in that the proliferation of 'new wars' – wars which are not necessarily territorially bound and can inhabit both local and global spaces – not only have opened up new markets for transnational private military governance but also necessitate a 'cosmopolitan governance' approach (Johnston 2000; Kaldor 2001: 147). The notion of 'security' itself has been broadened to accommodate these new risks and so has moved from a narrower understanding of security as being *state* or *physical* security to being about the rights of a person to all manner of securities – food security, health security, and so forth (Wood and Shearing 2007).

Again, this does not mean that the state has disappeared from the global security governance landscape – it has profoundly affected it, either through default; through, for instance, actively pursuing a traditional, Westphalian role; or through reinventing itself by means of neo-liberal policy (Garland 1996: 452; Loader and Sparks 2002; Burris *et al.* 2008). The state has re-positioned itself in ways in which it retains some hold over security governance while adapting to postmodern developments through strategies which have been described by scholars as 'rule at a distance' and meta-regulation (Rose and Miller 1992; Grabosky 1995; Garland 1996; Loader and Sparks 2002). The non-state too has adapted to changes in governance in many respects through, for instance, expansion and the diversification of functions (Braithwaite and Drahos 2000).

Re-conceptualising global governance

Notwithstanding the theoretical conflicts and diversifications in International Relations studies, the prevailing theoretical stance has been a realist approach to global governance (COT Institute for Safety, Security and Crisis Management 2007). The realist view is state-centric in so far as it conceptualises global governance developments from the perspective of states and the power struggles between them. Global governance is viewed as anarchical or chaotic due to the absence of a central hierarchy or sovereignty (normatively ascribed to the nation-state) (ibid.). This normative ideal of the state as ultimate sovereignty or locus of authority and the conceptual framing of the state as primary and/or only auspice of governance, still dominates understandings of governance today – especially within policy circles (Walt 1998). This can perhaps be traced back to beliefs that governance by a multitude of auspices is a decidedly undesirable state of affairs, and the realists' tendency to see the anarchical system of world politics as a site for the ever-present threat of war between nation-states, as articulated by Thomas Hobbes in *Leviathan*: 'men have no pleasure, (but on the contrary a great deale of griefe) in keeping company, where there is no power able to over-awe them all . . . they are in that condition which is called Warre' [*sic*] (Hobbes [1651] 1968: 185).

Yet, scholars have adapted their conceptual tools in order to engage with new developments recognising the fundamental limitations of state-centric analytical frameworks – especially in light of new security threats not necessarily involving state-on-state conflict and also the need to address broader, human security issues (Beeson and Bellamy 2003). Many scholars have recognised that traditional notions of sovereignty are no longer appropriate as new governance

configurations work above the state (Scholte 2004; Backer 2011b). Thus, from the latter part of the twentieth century systems of global governance have been understood as being 'post–Westphalian' or post-statist (Falk 2002; Burris *et al.* 2008). This means that sovereignty is not normatively linked to the state but where the state 'remains a crucial site of public regulation' and the 'construction and administration of societal rules [are] now also undertaken at multiple other sites besides the state' (Scholte 2008: 331). Global governance scholars are increasingly describing this type of governance as *polycentric.*

Polycentrism or polycentricity is not a new term – one of its first uses was by Michael Polanyi in his (1951) book *The Logic of Liberty* – what it stands for is very relevant to the nature of global developments, particularly the nature of collaborative governance that may take place. The following section will thus elaborate on the origins and meanings of the term and then discuss other terminology, associated with polycentrism, which have also been applied to developments in global governance (although not all of which focus primarily on security governance).

Referring specifically to the production of scientific knowledge, Polanyi (ibid.: 35) describes a polycentric system as one without 'central direction' or authority but not necessarily chaotic. In fact, according to Polanyi, central direction would ultimately undermine the system, since it would destroy co-ordination between nodes in the system. However, there are certain provisos to this 'spontaneously attained order' functioning well – that there is a 'common underlying purpose' to which all subscribe and that each individual (or institution) is able to judge his/her contribution to that purpose (ibid.: 39, 156). He argues further (in a critique of the notion that socialism could replace the market) that 'a centrally directed industrial system is administratively impossible' and that one would need a 'Universal Mind', as suggested by Leo Trotsky (ibid.: 126). This notion of polycentric systems has largely been taken forward by the work of Elinor and Vincent Ostrom through their empirical work on urban governance, environmental resource management and federalism, which has spanned five decades. For them, polycentric governance is a possible solution to polycentric problems. Their work has thus been somewhat of a countervailing trend, since polycentricity was and is still considered to be an undesirable state of affairs. The Ostroms were thus one of the first governance scholars to theoretically and empirically de-pathologise polycentric governance systems.

In reference to political systems, the concept of polycentricity is defined as having 'many centers of decision-making which are formally independent of each other' but which take account of each other 'through processes of cooperation, competition, conflict, and conflict resolution' (Ostrom *et al.* 1961: 831; Ostrom 1991: 225). Polycentric systems may thus be characterised by processes of negotiation and bargaining as these independent institutions within the system may agree on common ideals but may have differing capacities, forms of power and resources (Ostrom and Parks 1999). Polycentric systems are essentially 'self-organizing and self-governing . . . in contrast to a command-and-control system directed from the top' (Ostrom 1991: 23). They are 'adaptive' and 'complex' systems where there is a multiplicity of independent and autonomous rule-enforcing auspices/authorities operating at different scales or levels, of different sizes, and of different degrees of specialisation with overlapping jurisdictions (Ostrom 1999: 528; 2001; 2005; Andersson and Ostrom 2008). Yet, although they may function independently of each other, they may also be part of an 'interdependent system of relations', but, it is argued, this is an empirical question not a normative given (Ostrom *et al.* 1961: 831). Although Vincent Ostrom focused much attention on state systems, it is clear from their work that the auspices or governing authorities they refer to may be either state or non-state, private or public (Ostrom 1999; 2001). In sum, polycentric systems operate within an overarching set of rules but where no one auspice monopolises authority – power is dispersed throughout the system (Aligica and

Tarko 2011). As mentioned, much of the empirical work of the Ostroms has focused on, as mentioned, de-pathologising polycentric systems not necessarily as a normative ideal, but as another possibility in the available set of governance tools for solving complex or 'collective-action' problems – problems which require 'the inputs and efforts of multiple individuals in order to achieve joint outcomes' (McGinnis 2000; Ostrom 2009: 18). Much of the work of the Ostroms and colleagues has been to conduct empirical work in order to debunk myths about monocentric systems being conceptually and empirically superior to polycentric ones.

The work of the Ostroms has close affinity with the work of many other scholars in a variety of disciplines who have identified the increasingly pluralised nature of governance practices as well as those who continue to conduct empirical studies within the Ostroms' theoretical framework. For instance, McGinnis and others have focused on an analysis of institutions with the normative goal of finding ways to promote self-governance particularly within communities. The overriding hypothesis is that self-governance happens best in situations of polycentricism and that multiple sites of governance need to be considered concurrently (McGinnis 2000). Others have focused on particular, complex problems (such as climate change governance) (Cole 2011; Sovacool 2011), or on particular spaces, such as cities (Baer and Marando 2001; Davoudi 2002; Hague and Kirk 2003) or, as mentioned, on global developments (Scholte 2004; 2008; Backer 2011a). In the latter case, polycentrism in global settings is described simply as being 'where rules to manage collective problems come from many places at once' (Scholte 2008: 331).

Apart from those adopting the theoretical framing of the Ostroms, many schools of thought have expanded on key ideas stemming from, or related to, their work. For instance, the idea of multiple scales or levels of governance has been implicit in much of their work, but the term *multi-level* was only coined in Elinor Ostrom's work quite recently in reference to the fact that polycentric systems may require state (or non-state) involvement at different levels of governance (Andersson and Ostrom 2008). The affinity between *polycentric* and *multi-level* has been recognised by others and the terms are either used interchangeably or are recognised as denoting very similar ideas (Hooghe and Marks 2003; Roe 2009; Sovacool 2011). Scholars such as Hooghe and Marks (2001; 2003), in particular, take this concept forward through exploring possible typologies of multi-level governance, where jurisdictions operate at different scales, where authority is thus dispersed and where notions of a central authority are abandoned. However, much of the work on multi-level governance is either nested in International Relations studies and/or focused on the European Union as a multi-level governance structure (Scharp, 1994; Slaughter 2001; Hooghe and Marks 2003; Piattoni 2009). The concept is thus used to refer to the spatial dynamics of governance entities and processes, especially the relations and co-ordination between supra-national, national and sub-national nodes, all with differing jurisdictions, authorities and power (Kohler-Koch and Rittberger 2006; Camilleri 2008; Duit and Galaz 2008; Roe 2009; Callaghan 2010; Cafaggi 2011). It is a 'system of continuous negotiation among nested governments at several territorial tiers' but may also involve informal networks and non-state actors (Hooghe and Marks 2003: 234; Haas 2004; Van Kersbergen and Van Waarden 2004). There are also vertical and horizontal components with interactions taking place both vertically to actors situated at other levels of governance or horizontally to actors within the same territory (Roe 2009). The emphasis of a multi-level approach seems to be on vertical relations and predominantly on the nation-state's role in increasingly transnational governance developments.

The concepts of polycentric and multi-level approaches also have close affinities to notions of decentred and networked understandings of governance. In fact, the concepts of a decentred approach or decentralisation is sometimes also used interchangeably with polycentricity (Gunningham and Grabosky 1998; Black 2007; Meidinger 2009). Julia Black treats the concepts

of decentred and polycentric approaches as synonymous, the only difference being in the focus of their analysis: that a decentred approach focuses on the state and 'draws attention *away'* from it whereas a polycentric approach takes on a more positive analysis through drawing 'attention *to* the multiple sites' of governance (Black 2007: 5). Akin to the polycentric approach, a decentred approach acknowledges that there is no one centre or controller of governance and that governance or regulation (which is what the decentred approach is mostly aimed at) is distributed among a plurality of state and non-state actors, in which governance cannot be monopolised by any one institution – these networks can operate at sub-national, national or global levels (Black 2002a; 2003; Casey 2009; Meidinger 2009). A decentred approach thus challenges the notion that the state holds the privileged position of primary locus of authority, given the complex and fluid nature of governance arrangements where the state is only one actor among many – in fact, the state may be completely absent (Black 2003; 2007; Gunningham 2009). It is also characterised by networks of 'interdependence, negotiation and trust' between actors as opposed to traditional hierarchical command and control modes of governance (Sørensen and Torfing 2005: 196; Crawford 2006). A decentred approach is both analytical as well as normative – analytically no conceptual priority is given to the state, normatively it is asserted that the state should not monopolise regulation (Black 2001; Casey 2009). A decentred approach acknowledges the complexity of interactions between actors; the futility of private/public distinctions; the fragmentation of knowledge, power and authority in systems of multiple centres; and the autonomy of governance actors within systems characterised by self-regulation (which corresponds to the Ostroms' idea of these systems being self-governing) (Black 2002b; 2007; Casey 2009; Senn 2011). However, as mentioned, the concept is aimed mostly at the state, in that it is the state that is being decentred. It also differs to a polycentric approach in that whether the state should or should not be central to governance/regulation is not an empirical question which is context-specific but a normative goal that the state should never monopolise regulation. The aim of the decentred approach was initially to shed light on alternative approaches to regulation, however, the approach seems to normatively exclude the state (Senn 2011).

Although the term 'network' is a complex concept used in a variety of different ways, generally it refers to the relational aspect of autonomous actors – or as Manuel Castells refers to them, as 'nodes' – involved in complex systems, who interact (voluntarily, contractually or in a regulatory manner) through negotiation, trust and the exchange of resources, information and so forth, to resolve complex problems – they are thus interdependent (Castells 2000a; Bevir and Rhodes 2003; Sørensen and Torfing 2005; Brodeur and Dupont 2006; Dupont 2006a; Fleming and Wood 2006). The networked approach also acknowledges the fact that power and authority are dispersed among an array of non-state actors and thus also rejects the idea of the state monopolising governance/regulation – the state may be completely absent (Castells 2000a; Pierre and Peters 2000). As with the polycentric definition, networks are by definition, centreless and there are multiple sites of governance in networked formations which 'resist central direction' and which can be self-organising, self-regulating and where decision-making is thus shared among nodes involved (Rhodes 1997: 3; Castells 2000a; Sørensen and Torfing 2005; Fleming and Wood 2006). Many of the outcomes of governance are the result of negotiations between actors at various levels, from sub-national to global and from within state and non-state formations, with a blurring of the public and private and with no single actor having the knowledge and capacity to govern on its own (Rhodes 1997). This definitional account is fairly simplified though, as the concept has been used to refer to information networks (Castells 2000a), policy networks (Rhodes 1997), security networks (Dupont 2006a; 2006b) and even dark networks (Raab and Milward 2003), within local, national and global spheres of governance (Slaughter 2001). Thus, necessarily, there are variations as to what a network exactly entails. However, generally

speaking, whereas the multi-level approach highlights vertical relations, the networked approach highlights the horizontal nature of interactions. There is also a normative component to the networked approach in that it is seen as being preferable to hierarchical approaches and a means to improve service provision (Raab and Milward 2003; Wood 2006). Thus scholars have identified the state as having shifted from a hierarchical (monocentric/unicentric) to a contract (neo-liberal) to a networked state (polycentric) in an attempt to improve governance capacity in complex systems (Sørensen and Torfing 2005; Rhodes 2006). Scholars have also recognised the challenges generated by networks and have engaged in the normative task of trying to design networks to reduce or remove negative side effects (Burris *et al.* 2008).

Perhaps the closest affinity to the Ostroms' understanding of polycentricity is most likely the nodal governance school of thought within the field of criminology, which focuses predominantly on the study of security governance. Espoused by Clifford Shearing, Scott Burris, Les Johnston, Benoît Dupont, Jennifer Wood and others, the nodal scholars themselves admit the close affinity with polycentric thinking: 'polycentric governance refers to multi-nodal, or more simply, nodal governance . . . The argument that security governance has become nodal, and to propose the use of a nodal framework is simply an invitation to treat governance as polycentric' (Shearing 2007: 252). The nodal governance school thus draws its inspiration from the Ostroms; but also from Friedrich von Hayek; Michel Foucault's governmentality literature (where government is recognised as not being the exclusive realm of the state and where power comes from everywhere), as well as the networked approach of Manuel Castells (O'Malley *et al.* 1997; Wood and Shearing 2007). However, in terms of the latter influence, the aim of the nodal school is to further develop network theory through focusing not only on the 'space of flows' between nodes but on the features of nodes themselves: 'their internal constitutions, their cultures, their resources, and the strategies they use to amass and project power' (Castells 2000b: 442; Burris 2004; Burris *et al.* 2008: 9). Nodal governance theory is in fact a conceptual tool used as a framing device to understand new power formations of polycentric governance arrangements through an exploration of the 'mentalities, institutions, technologies and practices' of 'nodes' (Wood and Shearing 2007: 27). In other words, a node is a 'site of governance' which has four features: (1) a way of thinking or mentality; (2) methods or technologies for governing; (3) resources to support its activities; and (4) an institutional structure (Wood and Dupont 2005). A nodal arrangement may thus consist of a proliferation of nodes or nodal assemblages, including the state (which is itself a nodal assemblage, for instance), businesses, or NGOs, as well as the informal sector (Shearing and Wood 2003; Burris *et al.* 2008). Akin to the Ostroms, the nodal theorists argue that conceptual priority should not be given to any one node (such as the state) or any one system (monocentric versus polycentric, for instance), but that this is an empirical question dependent on the context and in consideration of the empirical reality of governance developments (Johnston and Shearing 2003; Kempa 2011). Thus, although particular systems of governance may become 'entrenched', their existence should be considered 'an empirical state of affairs rather than an analytical constant' (Shearing and Wood 2003: 404). It is therefore not assumed that nodes are necessarily networked (although they might network in permanent or more fluid formations) (Dupont and Wood 2007). It also does not normatively exclude the state altogether (as some critics of the school have claimed) but may actively focus on the state through investigating the state's role as one node among many in new nodal formations (see, for instance, Ayling *et al.* 2009; Marks *et al.* 2009). However, criminologists in general have been criticised for being too focused on the local aspects of crime rather than engaging with broader global developments (with the growth in so-called global criminology a fairly recent development) (Friedrichs 2007). Similarly, nodal governance theorists have been criticised for the tendency to focus more on local security governance issues (Abrahamsen and Williams 2011).

Drawing on the nodal school approach, a more recent endeavour to engage with global shifts in security governance is the work of Rita Abrahamsen and Michael Williams, associated with the school of Critical Security Studies. Drawing on a range of disciplines, their empirical work on transnational private security has led them to the development of the notion of '*global security assemblages*: new security structures and practices that are simultaneously public and private, global and local' (Abrahamsen and Williams 2011: 3). Their aim has been both to debunk dichotomies of public/private and global/local and to show that private auspices are not simply undermining the power of nation-states in a zero-sum game but that the two are interlocked in shifting power formations linked to national and global developments (such as neo-liberalism and the rise of risk-based technologies). The notion of global security assemblages is used as a conceptual tool to engage with these power formations. Through these 'transboundary' assemblages, they argue, one can see that despite the empirical reality of the state not being able or willing to fulfil its governance monopoly, the Hobbesian normative ideal remains strong and a significant source of capital or symbolic power for the state (ibid.: 4). They also acknowledge the positive role that non-state security auspices can play in preserving 'the existing social and political order' in fragile developing contexts (ibid.: 235).

This elaboration of nodal thinking, as we will see, provides a useful set of tools to examine the nodal assemblages that are being created, in the new global/local and public/private spaces that have emerged, to govern security. The emergence of global mega-events that take place within the boundaries of particular states but that draw together participants from across the globe constitutes an excellent example of these new spaces and will be discussed in the following section.

FIFA as a global non-state auspice of security governance

Maurice Roche (2000: 1) describes mega-events as 'large scale cultural (including commercial and sporting) events which have a dramatic character, mass popular appeal and international significance'. Countries bid to host mega-events such as the Soccer World Cup and the Olympic Games for various reasons – for example, potential economic benefits, nation-building, and as an accelerator of infrastructural development. However, due to their mass appeal and the potential involvement of a number of countries, hosting a mega-event becomes a complex security matter. For example, such events have in the past been targeted by terrorists and protesters who seek to take advantage of the profile these events offer so as to make political statements – hence making mega-events high-risk security events. 'Mega-events attract large numbers of visitors and high profile dignitaries, as well as hoodlums, hooligans and potential tourists. Managing risk is an issue of governance as much as the specific policies that might be applied' (Body-Gendrot 2003: 2).

As a consequence, these events require special security and justice arrangements and the expertise of both public and private security cooperation in order to provide safety for all those attending the event (Sarre 2010). Mega-events thus act as sites where state/non-state partnerships take place, the security for these events involves 'a complex assemblage of social control mechanisms that is undergoing profound change, notably in terms of costs, personnel [and] the rising influence of private security' (Giulianotti and Klauser 2010).

Given this, analysing mega-events can serve to highlight a range of broader issues. A study of mega-events can uncover, empirically, the actual functioning of collaborative (security) governance arrangements but they also provide an opportunity to explore the theoretical implications of what we call *floating sovereignties* – (non-state) auspices which transcend and move between national spaces – and their relations with nation-states.

What follows is an analysis of the FIFA Soccer World Cup in South Africa in 2010 to highlight the activities and authority of a global non-state auspice of security governance.[1]

A central mechanism through which global non-state auspices, such as FIFA, acquire and exercise authority that enables them to influence order inside the territorial boundaries of the state, is through the identification and mobilisation of a range of players that are crucial to the achievement of their objectives. A key enabler of this process of identifying and mobilising others is done through the negotiation of a complex set of legal agreements that allow them certain jurisdictional authority and grant them some legitimacy. States agree to certain terms and conditions in agreements with FIFA, which grants FIFA a pseudo-authority inside national boundaries. While conventional wisdom has it that it is a state which delegates authority; enrols private actors; and regulates how this authority is exercised, FIFA's bid requirements operated to turn this relationship on its head (Osborne and Gaebler 1993). What happened instead was that it was FIFA that enrolled the state both as an auspice, to provide authority within state territory, and as a provider of governance services, such as security. In Osborne and Gaebler's (1993) terms, it was FIFA that was steering and it was the state and its service providers who were rowing. FIFA operated as a super-auspice or super-node, enrolling other auspices, such as the state.

What this meant in practice was that the staging of the World Cups, as with Olympic Games events, was underpinned by numerous laws, both new and old laws that worked together to provide FIFA with the ability to steer the governance of the event both during, before and after the event itself. The legal frameworks put in place for the staging of the 2010 FIFA World Cup were similar in nature and complexity to that of other World Cups and of other mega sports events. The 2010 World Cup has been described as having had 'the most complex and comprehensive legislative, regulatory and contractual framework that has ever been put in place for a major sports event in South Africa'.[2] There were three levels of agreement that enabled this framework: (1) a government guarantee signed by the President; (2) agreements between FIFA and the Host Cities; and (3) agreements with the entities responsible for the stadiums (Sport and Recreation and Provincial and Local Government Portfolio Committees 2006). First, and foremost, South Africa had to formally agree to the guarantees stipulated in the 'bid book' of the Organizing Association Agreement. The Organizing Association Agreement listed the requirements of FIFA on all aspects of organising and managing of the event. Thus, to host the FIFA World Cup, the South African national government was required (if it was to win the bid to host the games) to provide 17 'guarantees', meaning that the government had to pass new laws to meet FIFA's governance requirements.[3] For instance, the Ministry of Police was required to pledge that it would provide safety and security, the Ministry of Health was required to pledge that it would provide medical care, the Ministry of Trade was required to pledge that it would protect FIFA from ambush marketing, the Ministry of Transport was required to pledge that it would provide transport, and so forth. Thus, the Organizing Association Agreement was the overall agreement for staging the 2010 World Cup. With regards to security governance, it outlined the safety and security duties and goals that were expected of the host country. The Organizing Association Agreement stipulated that the relevant governmental agencies would develop a detailed security plan 'jointly with FIFA's advice and assistance'[4] and this security plan was to be based on former security practices and traditions of previous FIFA competitions and other mega international sporting events. The security concept was supposed to be provided to FIFA by 30 June 2008 and the security plan was to be provided to FIFA by 30 June 2009, almost a year prior to the World Cup. This allowed ample time to come up with innovative ways of securing the World Cup within the general guidelines that were mandated by the Agreement.

In addition to the Organizing Association Agreement, with respect specifically to the policing of the 2010 World Cup, the South African government was compelled to pass two

Acts, namely, the 2010 FIFA World Cup Special Measures Act, No. 11 of 2006 and the 2010 Special Measures Acts No. 12 of 2006. These Acts, which were designed to be used in conjunction with existing laws as well as other World Cup specific legislation such as the Host Cities By-Laws, as well as amendment to the Merchandise Marks Acts (No. 17 of 2006 and No. 61 of 2006), provided the principal legislative framework for policing the 2010 World Cup. Collectively, these laws provided the legal resources that FIFA deployed through its bid agreements, within South Africa, to steer the provision of security at the World Cup. In addition, the Host Cities were required to sign the Host City Agreement that stipulated the Host City's obligation towards ensuring the success of the event.

For instance, the City of Cape Town 2010 FIFA World Cup By-Law[5] was mainly concerned with matters of advertising, Controlled Access Sites, Street Trading, City Beautification and Traffic management. FIFA's trademarks, copyrights and other Intellectual Property rights and that of its sponsors were to be protected from event piracies like ambush marketing, intellectual property infringements and these were to be enforced in 'conjunction with FIFA's regulations and the Cape Town City By-Law'.[6] In the latter case, the legislation was enacted to protect multinational corporations like Adidas, Coca-Cola, McDonald's and others, who pay substantial sums to have their products associated with mega-events such as the World Cup and the Olympic Games. In exchange they require guarantees of exclusive rights to advertise, and often to sell, their products in the commercial exclusion zones that have become a regular feature of mega sports events. Therefore, what the tranche of new legislation meant in practice, was that decisions pertaining to securing the 2010 Soccer World Cup were legitimately exercised by FIFA who decided what spaces should be policed, what should be policed and how this policing should take place within their exclusion zones.

For the 2010 World Cup in order to ensure that FIFA's commercial affiliates did not face competition from other businesses that had not paid for these rights, various South African police institutions, both state and non-state, along with a host of volunteers collaborated together to enforce these rights. This meant that the public police worked, alongside other agencies that were part of the FIFA security architecture, to secure the commercial rights of a variety of, principally multinational, corporations in ways that protected them from competition from many local businesses who were excluded from trading in the mega-event zones.

But how was policing orchestrated? A range of actors were involved in policing the mega-event spaces. These actors included the state police (the South African Police Services or SAPS), fire and rescue services, traffic police and law enforcement (City-level policing) and the Metropolitan Police (provincial-level policing), among other state and non-state agencies. Symbolically, SAPS was in charge, because of its visibility in the mega-event spaces and the fact that it had signed the mandate with FIFA to ensure safety and security for the tournament. However, in order to carry out its obligation in the host cities a security architecture was put in place in the form of operation centres. These included Venue Operation Centers, Joint Operation Centers, Provincial Operation Centers and National Operational Centers. These operation centres were located in all the Host Cities and each centre had a representative from each of the agencies that were designated to police the particular match or venue. The ability of all the players from the different agencies involved in policing the World Cup to work together was a crucial factor in securing the mega-event spaces. As one official put it: 'I mean, us sitting together and just hearing and sharing some thoughts and ideas – that's what actually made it, what made it from our side' (Interview, events security representative, Cape Town, August 2010).

Additionally, FIFA had 24-hour special courts, which ensured the speedy prosecution of offenders, thus enhancing justice in a country infamous for lost dockets and long pre-trial periods.

As is apparent, FIFA's authorising role emerged out of a regulatory framework and institutional arrangements based on guarantees signed between FIFA and the state. FIFA depends upon and manipulates the Westphalian system to enrol states and legitimise its authority by requiring states to pass legislation through contractual arrangements. The effect of this is that this enables FIFA to function outside of a Westphalian state system. As evidenced from the authority accorded to FIFA due to various agreements signed between the state, the state had various incentives to cooperate with FIFA. However, FIFA's ability to enrol the state and ensure compliance with FIFA's objectives is enabled by the stiff competition arising from countries wishing to host the tournament precisely because they are perceived to be lucrative events.

There is a wide acceptance that the processes of enrolment and governance that characterise mega-events are at times undemocratic and may involve widespread violations of rights and the like (Boyle and Haggerty 2009). Similar arguments have been made about other international institutions such as the World Trade Organization (WTO) or the United Nations in as far as key decision-makers are unidentifiable and thus not traceable for accountability purposes (Zürn 2004). This is true in terms of the legal web that is spun by international legal experts who help sports governing bodies like FIFA or other such transnational actors evade any legal accountability in a meaningful sense of the term. For instance, FIFA evades accountability through the requirement that the host country indemnifies it from any claim arising out of the hosting of the mega-event.

Additionally, because contractual arrangements are signed by hosting states, there is an implicit assumption that states, in signing these agreements, are acting in the best interests of their citizens. What authors such as Boyle and Haggerty (2009) have argued is that the pressure states face to bring lucrative mega-events to their territories often persuades them to act in ways that make this assumption questionable. Thus, for example, the agreements granting exclusive intellectual property rights to FIFA and its commercial affiliates were opposed to South Africa's existing competition policies as they barred entry into the market to all but a few businesses within their exclusion zones.

Nonetheless, from the perspective of security governance, the security arrangements, that the FIFA agreements gave rise to, enabled FIFA and South Africa to host a remarkably safe and secure World Cup. This was so in spite of the many doomsayers who had predicted that this would not be possible given South Africa's reputation as a very insecure territory. These doomsayers included even actors recruited to police the tournament:

> I was very negative, I came up with all the worst case scenarios before the event, I mean, I did, I was one of those who came up with this could happen and that could happen; I came up with all these worst case scenarios. I didn't believe it was going to go off as good as it did, I really didn't, and I'm actually surprised that it did go so well.
>
> (Interview, events security representative, Cape Town, August 2010)

Despite this, not only the World Cup venues themselves but the experience of the vast majority of visitors to South Africa proved to have benefitted enormously from the security arrangements that were put in place. Perhaps most significantly FIFA's steering of the security governance of the 2010 World Cup worked to change the practices of security provision from their established reactive patterns to patterns that were strikingly proactive and preventative. And in fact, since 2010 there have been a number of reports that have argued that the shifts in policing that FIFA engineered through its provisions have had a longer legacy than many had expected. This legacy, if indeed it exists, might be due to a residue of partnerships and modes of cooperation that were developed as a consequence of the World Cup (Eick 2011).

In summary, FIFA was able to enter into a series of agreements with the South African state and its agencies that had a profound effect on security within South Africa during the event and that appears to have left a legacy with respect to the way security governance is thought about and practised. Most importantly, because the security plan and security concept were to be based on previous FIFA tournaments, this meant that FIFA was in a position to create a polycentric system of security governance in a manner that favoured the successful policing of the 2010 World Cup.

The legal implication of this is that, in the face of private authority, constitutional powers are meaningless if the state participates in the curtailing of its own power. In the case of FIFA, the agreements with FIFA had a clause stating that FIFA has final say over any decision. When this is viewed in the context of state sovereignty, where only the state has *de jure* authority to make laws governing its territory, we witness the paradox of the state delegating this power to a private actor. The assumption is that this necessarily leads to a loss of power by the state. However, as has been stated above, this only enhanced the state's functional sovereignty as by collaborating with other actors to secure spaces, the citizens and entire public felt safe, thus re-positioning the state as a capable actor in ensuring its citizens' and its territory's security. Prior to the World Cup, it is implicit in one fan's statement, that South Africa's citizens had little faith in the state's ability to secure them: 'Now we know they can do it. You must tell them to come to keep us safe. Not only here where the tourists are' (Interview, female fan at the Grand Parade Fan Park, Cape Town, June 2010). The above statement, which was made by a fan from an impoverished township, is loaded. It highlights the fan's renewed faith in the state's ability to provide security but it also points to the disparate spaces where this security is provided. Since the laws and agreements required South Africa and the Host City to secure commercial spaces, this came at the cost of excluding some areas in the equitable provision of these services. Thus, one could argue that where private actors have the ability to act in their self-interest, how does one curtail such power?

Polycentric systems of governance: implications and future directions

What the FIFA case study does is force one to engage in radical new ways with the reality of global security governance auspices. FIFA created but was also a part of a complex system of polycentric governance, where a variety of independent state and non-state auspices from a number of scales (international to local) took part in governing security – but without a central authority (FIFA enrolled others but did not centrally govern the entire World Cup). However, despite the success of the World Cup, polycentric governance brings with it a number of challenges. This is not to say that polycentric governance is less appropriate than monocentric governance or vice versa, it is to acknowledge that 'no perfect governance arrangement exists' (Andersson and Ostrom 2008: 73; see also Jessop 1998). As argued by many theorists, shifts from a monocentric to a polycentric approach (and vice versa) will depend on the context and issue to be addressed. However, the very nature of polycentric governance systems may exacerbate the challenges found in monocentric systems. Three challenges identified by Black (2008) include systemic, democratic and normative challenges.

Systemic

In terms of the systemic challenge of polycentric governance systems, an issue raised is the fact that these systems incite questions about the nature of law and what constitutes *law* in light of

increasingly multi-level governance practices and the exclusion of law from some governance systems (Black 2008). In terms of the FIFA case study, law was used as a tool by FIFA to accomplish its objectives – it operated above nation-state law and above state constitutional law, yet it was considered legitimate. Thus, how is law to be conceived in this instance?

The increasing complexity of polycentric governance (particularly in global spaces) has prompted *legal* scholars to adapt their theoretical and conceptual tools so as to better engage with the conceptual and practical challenges that may arise from these governance developments. Debates abound in legal circles, for instance, as to the nature of law and its interaction with polycentric governance. De Búrca and Scott (2006) explicate three ways in which this interaction is conceived. The gap thesis posits an incompatibility between formal law and polycentric governance practices and views law as a potential obstacle to these developments. The hybridity thesis recognises the inter-connectivity of law and new governance arrangements and how they may be 'mutually interdependent and mutually sustaining' (De Búrca and Scott 2006: 6). Legal pluralists, for instance, in studies on customary or living law have long recognised the existence of more than one legal order and that law may originate from both the state as well as the non-state and focus on exploring the relationships, contestations and complementarities that state law may have with alternative norm-based or rule-making systems of order (Griffiths 1986; Black 2002c). The transformation thesis conceives of polycentric governance arrangements as requiring formal law to evolve; to reconceptualise its meaning and role in order to engage with these new developments. 'New [or polycentric] governance is transformative of law in that it challenges what we think of as law' (Trubek 2006: 13).

In these ways legal scholars are recognising, and engaging with, the pervasive role of (non-state) supranational normative orders in the governing of international systems and relations that transcend, and may challenge, nation-state sovereignty (Braithwaite and Drahos 2000). The (territorially) bounded nature of state law within a globalised world is recognised as problematic, since law within a global arena is becoming increasingly privatised and state law is increasingly confronted with dilemmas in responding to polycentric governance challenges on a global scale (see Lindahl 2010).

Democratic

The democratic challenge of polycentric governance systems is that they may be undemocratic, unaccountable, under-regulated or more prone to regulatory failure (Newburn 2001; Sørensen and Torfing 2005; Fleming and Wood 2006; Black 2008; Scholte 2008). For instance, referring to civil society organisations, Scholte (2008) has argued that the rise of polycentric governance systems has meant that the non-state is increasingly taking on regulatory roles. In some instances, civil society organisations operating in global spheres have actively promoted regulation by the non-state – the non-state has devised its own strategies of regulation (such as self-regulation). Yet, the non-state has also been involved in illegal and 'undemocratic practices' (ibid.: 345). Consider the lack of obligations to remain publicly transparent and the possible exclusion and/or rights infringement of the weak, certain racial or ethnic groupings, and so forth, if certain non-state organisations with particular goals or representation dominate governance systems – it has been argued, for instance, that the World Cup in South Africa spatially excluded vulnerable groups (Sassen 1998; Sørensen and Torfing 2005; Burris *et al.* 2008; Scholte 2008). Certain nodes may be less regulated or accountable than other nodes and thus duties assigned to these nodes by other, more regulated, nodes within polycentric systems, may result in these tasks evading scrutiny (Dupont 2006b; Lewis and Wood 2006; Dupont *et al.* 2003). For instance, consider FIFA's lack of accountability for its actions in terms of the state taking on legal

responsibility for any of FIFA's failings. There is also the problem of polycentric systems being taken over by a power elite (again, FIFA dominated and determined much of the governance of the World Cup):

> Not all self-organized resource governance systems will be organized democratically or rely on the input of most appropriators. Some will be dominated by a local leader or a power elite who only change rules that they think will advantage them still further.
>
> (Ostrom 2005: 282)

In sum, as stated succinctly by Scholte (2008: 345): 'many parts of contemporary polycentric governance lack a democratic underpinning – and in many cases have little intention of developing one'.

The ideals of a liberal-democratic society have always been conceptually linked to the state, thus the 'democratic credentials' of non-state organisations have been called into question (Pierre and Peters 2000; Scholte 2008: 332). In other words, the traditional notion of the state as ultimate regulator is no longer a given, but the capacity of non-state actors to now fulfil this role is also questioned. In terms of the state's role, it is clear from research that the state's influence and involvement in polycentric security governance arrangements and its ability to ensure that security networks are held democratically accountable have at least altered and in some respects completely diminished. In light of the complexities of polycentric systems, it can thus be argued that creating an adequate regulatory framework requires a normative departure from a conventional state-centric approach where this duty is simply allocated to the state, since the state may merely be one node within a range of other nodes or is itself the object of regulation. The rise of polycentric security governance has meant that many scholars have called for a re-conceptualisation of regulation and have begun to engage normatively with how to achieve this.

Normative

As mentioned, polycentric regimes may not normatively aspire to common 'conceptions of "the good" that should be pursued' or to 'publicly endorsed values' (Shearing and Wood 2003: 406; Black 2008: 141). Since the state has always been viewed as the means to ensure democratic processes and alignment with a common good, the challenge then becomes how to do this in polycentric systems where there is not necessarily state anchoring to democratic values (Sørensen and Torfing 2005; Loader and Walker 2006; Wood and Shearing 2007). 'Democratic anchorage' therefore needs to be sought in a different way so as to ensure that polycentric regimes aspire to good governance principles of 'fairness, accountability, responsibility and transparency' and where weak nodes are empowered when strong nodes predominate (Sørensen and Torfing 2005: 201; Braithwaite 2006; King 2006: 15; Meidinger 2009; Burris et al. 2008). This is not to say that polycentric governance systems are necessarily undemocratic or do not align with the public good; it is to recognise that the new issue at hand is how to implement new democratic frameworks of governance in light of the end of Westphalia, where, even though it had considerable weaknesses 'at least the formula . . . was clear' (Scholte 2008: 348). Now a new formula has to be developed to deal with polycentric governance.

There are a number of conflicts in the literature with respect to how polycentric systems should be aligned with democratic values. Some scholars have focused specifically on how to ensure that polycentric systems are compliant and adhere to set standards; which mechanisms are appropriate to ensure this (shaming, coercion or sanctions, for instance); and how regulatory systems should be designed (Braithwaite 1995; Gunningham 2009; Wright and Head 2009).

Suggestions have been made, for instance, to enhance informal regulatory capacity as opposed to simply trying to improve command and control regulation (Black 2002a). With specific reference to accountability, various suggestions have been made to improve accountability within polycentric environments, such as extended accountability (Scott 2000, 2006), hybrid accountability (Considine 2002; Dowdle 2006; Black 2008), network accountability (Harlow and Rawlings 2007), and so forth. Conflicts in the literature arise from competing normative claims about which analytical tool is most appropriate to engage with regulation within polycentric systems. Some scholars have focused on identifying broader features of good governance within theories of deliberative democracy (Baiocchi 2001; Gunningham 2009). Model-building has been the means to achieve this, such as Fung's (2003) approach of Empowered Participatory Governance, and Cohen and Sabel's (1997) directly-deliberative polyarchy. Speaking in global terms, others have suggested that transnational organisations be 'functionally equivalent' to the state (Dupont *et al.* 2003; Börzel and Risse 2010; Backer 2011b). Dupont, Grabosky and Shearing (2003) and Börzel and Risse (2010) discuss this issue largely in terms of contexts where state governance is weak or absent and suggest also that international NGOs and states of other countries may become the functional equivalents in contexts of limited governance capacity. Börzel and Risse (ibid.: 125) further suggest that 'socially embedded markets' may serve as functional equivalents, while Dupont, Grabosky and Shearing (2003) further suggest that civil society may serve this purpose. However, they argue that this is an empirical issue, dependent on the context. Similarly, Kempa (2011) suggests that rather than this be a normative given, it should be an empirical consideration depending on context and performed on a case-by-case basis. In light of the empirical findings, we agree with this. However, developing normative policy guidelines applicable to all polycentric systems then becomes very difficult as solutions are embedded in the contexts and specificities of the polycentric arrangements themselves. Yet, what is apparent from the FIFA case is that the policy implications cannot be legal. For, as exemplified in FIFA's ability to exploit existing legal loopholes, this would lead to no accountability. What is needed is perhaps collaborative state and civil society action. States can collectively negotiate to reform those requirements they deem detrimental to their countries' interests while pressure from civil societies could ensure that FIFA does not go beyond certain powers. Civil organisations can mobilise other like-minded organisations at the local and global level to highlight the potential or actual effects of FIFA's governance, thus regulating FIFA in a way that allows it to govern World Cups in line with the values in its mission statement.[7] This goes back to the Ostroms' claim that polycentric governance is a solution to polycentric problems – that is, polycentric forms of regulation are what is needed to address the complexities of polycentric governance systems.

Conclusion

Our approach in this chapter has not been to engage with conventional transnational problems of crime and its control, but rather to highlight an empirical case of a polycentric security governance system largely dominated by a non-state global governance auspice. We have sought to demonstrate the challenges – analytically and theoretically – in understanding the direct impacts that global (non-state) players can and do have on grassroots security issues. We have shown that the seemingly innocuous world of global sports can present profound challenges to the notion of statehood and sovereignty – let alone phenomenon such as dark networks of crime and terrorism. We have also reflected on the analytical tools used by others to come to grips with the changing global world, noting the complexity of development as well as the overlap of ideas between different disciplines.

However, there is much to be done in terms of accumulating empirical knowledge on how these systems and individual global auspices function – particularly security governance systems. For instance, Stenning and Shearing (2012) point out the limited systematic and in-depth research that has been done on the transnational aspect of private security – itself an influential global auspice of security governance. Knowing more about global security governance auspices and their impacts can assist in developing a deeper sense of the complexities of relations between global and local actors and the power dynamics between nodes and so too allow for a deeper engagement with normative issues.

Discussion questions

1   What is the nature of non-state global governance nodes, not just as providers but as auspices of governance?
2   What is the nature of nodal networks and the interaction of nodes as auspices and providers of governance?
3   What is the nature of accountability in nodal networks involving both state and non-state auspices of governance?

Websites

FIFA: http://www.fifa.com.
South African government: http://www.sa2010.gov.za/guarantees.
Western Cape government: http://www.westerncape.gov.za/other/2011/9/legacy_report.pdf.

Notes

1   Two of the authors undertook field research from June to November 2010 in Cape Town, South Africa, which consisted of direct and participant observation, informal interviews, guided interviews and documentary analysis. Participants involved in the research included representatives from the City of Cape Town, state policing agencies and a range of other players involved in the World Cup. A nodal governance perspective was adopted, whereby, during the research endeavour, no analytical priority was given to any one node.
2   Letter to Hon. B. Komphela (Chairperson, Parliamentary Portfolio Committee, Sports and Recreation) discussing the Safety at Sports and Recreational Events Bill (B7-2009). Available at: http://www.pmg.org.za/docs/2009/090818orgcomm.pdf (accessed 15 October 2012).
3   These guarantees are contained in the original bid book in support of the South African Football Association (SAFA) in its bid to host the 2010 FIFA World Cup. See 'Governments 2010 Guarantees' Available at: http://www.sa2010.gov.za/guarantees (accessed 12 October 2010).
4   Organizing Association Agreement, section 23.5.1. Available at: http://ccs.ukzn.ac.za/files/Fifa%20 agreement%20with%20SA%202.pdf (accessed 15 October 2012).
5   City of Cape Town 2010 FIFA World Cup By-Law. Promulgated 16 January 2009 PG 6594; LA 33468 (hereinafter 'Cape Town By-Law').
6   2010 Observer Programme (2010) 'Cape Town: Ready to Host the World Cup', unpublished City of Cape Town report.
7   See FIFA website, available at: http://www.fifa.com (accessed 15 October 2012).

References

Abrahamsen, R. and Williams, M. C. (2011) *Security Beyond the State: Private Security in International Politics*, New York: Cambridge University Press.
Aligica, P. and Tarko, V. (2011) 'Polycentricity: From Polanyi to Ostrom, and Beyond', *Governance: An International Journal of Policy, Administration, and Institutions*, 25: 237–262.

Andersson, K. and Ostrom, E. (2008) 'Analyzing Decentralized Resource Regimes from a Polycentric Perspective', *Policy Sciences*, 41: 71–93.

Ayling, J., Grabosky, P. and Shearing, C. (2009) *Lengthening the Arm of the Law: Enhancing Police Resources in the 21st Century*, New York: Cambridge University Press.

Backer, L. (2011a) 'Governance Without Government: An Overview and Application of Interactions between Law-State and Governance-Corporate Systems', in G. Handl and J. Zekoll (eds) *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization*, Boston: Brill.

Backer, L. (2011b) 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order', *Indiana Journal of Global Legal Studies*, 18: 751–802.

Baer, S. and Marando, V. (2001) 'The Subdistricting of Cities: Applying the Polycentric Model', *Urban Affairs Review*, 36: 721–733.

Baiocchi, G. (2001) 'Participation, Activism, and Politics: The Port Alegre Experiment and Deliberative Democratic Theory', *Politics & Society*, 29: 43–72.

Bayley, D. and Shearing, C. (2001) *The New Structure of Policing: Description, Conceptualization, and Research Agenda*, Washington, DC: National Institute of Justice.

Beeson, M. and Bellamy, A. (2003) 'Globalisation, Security and International Order after 11 September', *Australian Journal of Politics and History*, 49: 339–354.

Bevir, M. and Rhodes, R. (2003) 'Searching for Civil Society: Changing Patterns Of Governance in Britain', *Public Administration*, 81: 41–62.

Black, J. (2001) 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World', *Current Legal Problems*, 54: 103-146.

Black, J. (2002a) 'Regulatory Conversations', *Journal of Law and Society*, 29: 163–196.

Black, J. (2002b) 'Mapping the Contours of Contemporary Financial Services Regulation', *Journal of Corporate Law Studies*, 2: 253-287.

Black, J. (2002c) *Critical Reflections on Regulation*, London: Centre for Analysis of Risk and Regulation.

Black, J. (2003) 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation', *Public Law*, Spring: 63–91.

Black, J. (2007) 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', IILJ Working Paper 2007/12, Global Administrative Law Series.

Black, J. (2008) 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', *Regulation & Governance*, 2: 137–164.

Body-Gendrot, S. (2003) 'Cities, Security, and Visitors: Managing Mega-Events in France', in M. Lily, S. Hoffman, D. Fainstein, and R. Judd (eds) *Cities and Visitors: Regulating People, Markets, and City Space*, Oxford: Wiley-Blackwell.

Börzel, T. and Risse, T. (2010) 'Governance Without a State: Can It Work?', *Regulation & Governance*, 4: 113–134.

Bowling, B. (2009) 'Transnational Policing: The Globalization Thesis, a Typology and a Research Agenda', *Policing*, 3: 149–160.

Boyle, P. and Haggerty, D. K. (2009) 'Spectacular Security: Mega-Events and the Security Complex', *International Political Sociology*, 3: 257–274.

Braithwaite, J. (2006) 'Responsive Regulation and Developing Economies', *World Development*, 34: 884–898.

Braithwaite, J. and Drahos, P. (2000) *Global Business Regulation*, Cambridge: Cambridge University Press.

Braithwaite, V. (1995) 'Games of Engagement: Postures within the Regulatory Community', *Law and Policy*, 17: 225–255.

Brodeur, J-P. (2010) *The Policing Web*, New York: Oxford University Press.

Brodeur, J-P. and Dupont, B. (2006) 'Knowledge Workers or "Knowledge" Workers?', *Policing & Society*, 16: 7–26.

Burris, S. (2004) 'Governance, Microgovernance and Health', *Temple Law Review*, 77: 335–362.

Burris, S., Kempa, M. and Shearing, C. (2008) 'Changes in Governance: A Cross-Disciplinary Review of Current Scholarship', *Akron Law Review*, 41: 1–66.

Cafaggi, F. (2011) 'New Foundations of Transnational Private Regulation', *Journal of Law and Society*, 38: 20–49.

Callaghan, H. (2010) 'Beyond Methodological Nationalism: How Multilevel Governance Affects the Clash of Capitalisms', *Journal of European Public Policy*, 17: 564–580.

Camilleri, J. (2008) 'Sovereignty Discourse and Practice – Past and Future', in T. Jacobsen, C. Sampford, and R. Thakur (eds) *Re-envisioning Sovereignty: The End of Westphalia?* Aldershot: Ashgate.

Casey, D. (2009) 'Three Puzzles of Private Governance: Global Gap and the Regulation of Food Safety and Quality', UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 22/2009.

Castells, M. (2000a) 'Materials for an Exploratory Theory of the Network Society', *British Journal of Sociology*, 51: 5–24.

Castells, M. (2000b) *The Rise of the Network Society, The Information Age: Economy, Society and Culture*, vol. 1, 2nd edn, Malden, MA: Blackwell.

Cohen, J. and Sabel, C. (1997) 'Directly-Deliberative Polyarchy', *European Law Journal*, 3: 313–342.

Cole, D. (2011) 'From Global to Polycentric Climate Governance', EUI Working Papers RSCAS 2011/30, European University Institute, Florence: Robert Schuman Centre for Advanced Studies Global Governance Programme. Available at: http://cadmus.eui.eu/bitstream/handle/1814/17757/RSCAS_2011_30.pdf (accessed 15 October 2012).

Considine, M. (2002) 'The End of the Line? Accountable Governance in the Age of Networks', *Governance: An International Journal of Policy, Administration and Institutions*, 15: 21–40.

COT Institute for Safety, Security and Crisis Management (2007) *Notions of Security: Shifting Concepts and Perspectives*. The Hague: COT Institute for Safety, Security and Crisis Management, Transnational Terrorism, Security and the Rule of Law, Deliverable 1, Work Package 2. Available at: http://www.transnationalterrorism.eu/tekst/publications/Notions%20of%20Security.pdf (accessed 15 October 2012).

Crawford, A. (2006) 'Networked Governance and the Post-Regulatory State? Steering, Rowing And Anchoring The Provision Of Policing And Security', *Theoretical Criminology*, 10: 449–479.

Davoudi, S. (2002) 'Polycentricity – Modelling or Determining Reality?', *Town and Country Planning*, April: 114–117.

De Búrca, G. and Scott, J. (eds) (2006) *Law and New Governance in the EU and the US*, Oxford: Hart Publishing.

Dowdle, M. (2006) 'Public Accountability: Conceptual, Historical and Epistemic Mappings', in M. Dowdle (ed.) *Public Accountability: Designs, Dilemmas and Experiences*, Cambridge: Cambridge University Press.

Duit, A. and Galaz, V. (2008) 'Governance and Complexity: Emerging Issues for Governance Theory', *Governance: An International Journal of Policy, Administration, and Institutions*, 21: 311–335.

Dupont, B. (2006a) 'Delivering Security Through Networks: Surveying the Relational Landscape of Security Managers in an Urban Setting', *Crime, Law & Social Change*, 45: 165–184.

Dupont, B. (2006b) 'Mapping Security Networks: From Metaphorical Concept to Empirical Model', in J. Fleming, and J. Wood (eds) *Fighting Crime Together: The Challenges of Policing and Security Networks*, Sydney: University of New South Wales Press.

Dupont, B. and Wood, J. (2007) 'Urban Security, from Nodes to Networks: On the Value of Connecting Disciplines', *Canadian Journal of Law and Society/Revue Canadienne Droit et Société*, 22: 95–112.

Dupont, B., Grabosky, P. and Shearing, C. (2003) 'The Governance of Security in Weak and Failing States', *Criminal Justice*, 3: 331–349.

Eick, V. (2011) '"Secure Our Profits!" The FIFA(tm) in Germany 2006', in C. Bennett and K. Haggerty (eds) *Security Games: Surveillance and Control at Mega-Events*, New York: Routledge.

Falk, R. (2002) 'The Post-Westphalia Enigma', in B. Hettne and B. Odén (eds) *Global Governance in the 21st Century: Alternative Perspectives on World Order*, Stockholm: Almquist and Wiksell International.

Fleming, J. and Wood, J. (2006) 'Introduction: New Ways of Doing Business: Networks of Policing and Security', in J. Fleming and J. Wood (eds) *Fighting Crime Together: The Challenges of Policing and Security Networks*, Sydney: University of New South Wales Press.

Friedrichs, D. (2007) 'Transnational Crime and Global Criminology: Definitional, Typological, and Contextual Conundrums', *Social Justice*, 34: 4–18.

Fung, A. (2003) 'Associations and Democracy: Between Theories, Hopes and Realities', *Annual Review of Sociology*, 29: 515–539.

Garland, D. (1996) 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society', *British Journal of Criminology*, 36: 445–471.

Garland, D. and Sparks, R. (2000) 'Criminology, Social Theory and the Challenge of Our Times', *British Journal of Criminology*, 40: 189–204.

Giulianotti, R. and Klauser, F. (2010) 'Security Governance and Sport Mega-Events: Toward an Interdisciplinary Research Agenda', *Journal of Sport and Social Issues*, 34: 49–61.

Grabosky, P. (1995) 'Using Non-Governmental Resources to Foster Regulatory Compliance', *Governance*, 8: 527–550.

Griffiths, J. (1986) 'What Is Legal Pluralism?', *Journal of Legal Pluralism*, 24: 1–55.

Gunningham, N. (2009) 'The New Collaborative Environmental Governance: The Localization of Regulation', *Journal of Law and Society*, 36: 145–166.

Gunningham, N. and Grabosky, P. (1998) *Smart Regulation*, Oxford: Clarendon Press.

Haas, P. (2004) 'Addressing the Global Governance Deficit', *Global Environmental Politics*, 4: 1–15.

Hague, C. and Kirk, K. (2003) 'Polycentricity Scoping Study', Draft report, Edinburgh: School of the Built Environment, Heriot-Watt University.

Harlow, C. and Rawlings, R. (2007) 'Promoting Accountability in Multi-Level Governance: A Network Approach', *European Law Journal*, 13: 542–562.

Hein, W., Burris, S. and Shearing, C. (2009) 'Conceptual Models for Global Health Governance', in K. Buse, W. Hein, and N. Drager (eds) *Making Sense of Global Health Governance: A Policy Perspective*, Basingstoke: Palgrave Macmillan.

Hettne, B. (2002) 'In Search of World Order', in B. Hettne and B. Odén (eds) *Global Governance in the 21st Century: Alternative Perspectives on World Order*, Stockholm: Almquvist and Wiksell International.

Hills, A. (2009) 'The Possibility of Transnational Policing', *Policing & Society*, 19: 300–317.

Hobbes, T. ([1651] 1968). *Leviathan*, ed. C. B. Macpherson, London: Penguin Books.

Hooghe, L. and Marks, G. (2001) 'Types of Multi-Level Government', *European Integration Online Papers*, 5. Online. Available at: http://eiop.or.at/eiop/texte/2001-011.htm (accessed 15 October 2012).

Hooghe, L. and Marks, G. (2003) 'Unraveling the Central State, But How? Types of Multi-Level Governance', *American Political Science Review*, 97: 233–243.

Jessop, B. (1998) 'The Rise of Governance and the Risks of Failure: The Case of Economic Development', *International Social Science Journal*, 50: 29–45.

Johnston, L. (2000) 'Transnational Private Policing: The Impact of Global Commercial Security', in J. Sheptycki (ed.) *Issues in Transnational Policing*, London: Routledge.

Johnston, L. and Shearing, C. (2003) *Governing Security: Explorations in Policing and Justice*, New York: Routledge.

Kaldor, M. (2001) *New and Old Wars: Organized Violence in a Global Era*, Stanford, CA: Stanford University Press.

Kempa, M. (2011) 'Public Policing, Private Security, Pacifying Populations', in M. Neocleous and G. Rigakos (eds) *Anti-Security*, Ottawa: Red Quill Books.

Kempa, M. and Shearing, C. (2002) 'Microscopic and Macroscopic Responses to Inequalities in the Governance of Security: Respective Experiments in South Africa and Northern Ireland', *Transformation*, 49: 25–54.

King, M. (2006) *The Corporate Citizen: Governance for All Entities*, Johannesburg: Penguin.

Kohler-Koch, B. and Rittberger, B. (2006) 'The "Governance Turn" in EU Studies', *Journal of Common Market Studies*, 44: 27–49.

Lea, J. and Stenson, K. (2007) 'Security, Sovereignty, and Non-State Governance "From Below"', *Canadian Journal of Law and Society/Revue Canadienne Droit et Société*, 22: 9–27.

Lewis, C. and Wood, J. (2006) 'The Governance of Policing and Security Provision', in J. Fleming and J. Wood (eds) *Fighting Crime Together: The Challenges of Policing and Security Networks*, Sydney: University of New South Wales Press.

Lindahl, H. (2010) 'A-legality: Postnationalism and the Question of Legal Boundaries', *Modern Law Review*, 73: 30–56.

Loader, I. and Sparks, R. (2002) 'Contemporary Landscapes of Crime, Order, and Control: Governance, Risk, and Globalization', in M. Maguire, R. Morgan and R. Reiner (eds) *The Oxford Handbook of Criminology*, 3rd edn, Oxford: Oxford University Press.

Loader, I. and Walker, N. (2006) 'Necessary Virtues: The Legitimate Place of the State in the Production of Security', in J. Wood and B. Dupont (eds) *Democracy, Society and the Governance of Security*, Cambridge: Cambridge University Press.

Marks, M., Shearing, C. and Wood, J. (2009) 'Who Should the Police Be? Finding a New Narrative for Community Policing in South Africa', *Police Practice and Research: An International Journal*, 10: 145–155.

McGinnis, M. (ed.) (2000) *Polycentric Games and Institutions: Readings from the Workshop in Political Theory and Policy Analysis*, Ann Arbor, MI: University of Michigan Press.

Meidinger, E. (2009) 'Private Import Safety Regulation and Transnational Governance', *Buffalo Legal Studies Research Paper Series*, Paper No. 2009-13.

Newburn, T. (2001) 'The Commodification of Policing: Security Networks in the Late Modern City', *Urban Studies*, 38: 829–848.

O'Malley, P., Weir, L. and Shearing, C. (1997) 'Governmentality, Criticism, Politics', *Economy and Society*, 26: 501–517.

Osborne, D. and Gaebler, T. (1993) *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*, New York: Penguin Books.

Ostrom, E. (1999) 'Coping with the Tragedies of the Commons', *Annual Review of Political Science*, 2: 493–535.

Ostrom, E. (2001) 'Vulnerability and Polycentric Governance Systems', *Newsletter of the International Human Dimensions Programme on Global Environmental Change*, 3: 3–4.

Ostrom, E. (2005) *Understanding Institutional Diversity*, Princeton, NJ: Princeton University Press.

Ostrom, E. (2009) 'Polycentric Systems as One Approach to Solving Collective-Action Problems', in M. Salih (ed.) *Climate Change and Sustainable Development: New Challenges for Poverty Reduction*, Cheltenham and Northampton: Edward Elgar.

Ostrom, E. and Parks, R. (1999) 'Neither Gargantua nor the Land of Lilliputs: Conjectures on Mixed Systems of Metropolitan Organization', in M. McGinnis (ed.) *Polycentricity and Local Public Economies*: *Readings from the Workshop in Political Theory and Policy Analysis*, Ann Arbor, MI: University of Michigan Press.

Ostrom, V. (1991) *The Meaning of American Federalism: Constituting a Self-governing Society*, San Francisco: Institute for Contemporary Studies.

Ostrom, V., Tiebout, C. and Warren, R. (1961) 'The Organization of Government in Metropolitan Areas: A Theoretical Inquiry', *The American Political Science Review*, 55: 831–842.

Piattoni, S. (2009) 'Multi-Level Governance: A Historical and Conceptual Analysis', *European Integration*, 31: 163–180.

Pierre, J. and Peters, B. (2000) *Governance, Politics and the State*, New York: St. Martin's Press.

Polanyi, M. (1951) *The Logic of Liberty: Reflections and Rejoinders*, Chicago: The University of Chicago Press.

Raab, J. and Milward, H. (2003) 'Dark Networks as Problems', *Journal of Public Administration Research and Theory*, 13: 413–439.

Rhodes, R. (1997) *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*, Buckingham: Open University Press.

Rhodes, R. (2006) 'The Sour Laws of Network Governance', in J. Fleming and J. Wood (eds) *Fighting Crime Together: The Challenges of Policing and Security Networks*, Sydney: University of New South Wales Press.

Roche, M. (2000) *Mega-events and Modernity: Olympics and Expos in the Growth of Global Culture*, London: Routledge.

Roe, M. (2009) 'Multi-Level and Polycentric Governance: Effective Policymaking for Shipping', *Maritime Policy and Management*, 36: 39–56.

Rose, N. and Miller, P. (1992) 'Political Power Beyond the State: Problematics of Government', *British Journal of Sociology*, 43: 173–205.

Sarre, R. (2010) 'Policing and Security for Major Sporting Events: Models of Cooperation in Australia', paper presented at IPES Conference, Valletta, Malta, 14–19 March.

Sassen, S. (1998) *Globalization and Its Discontents: Essays on the New Mobility of People and Money*, New York: The New Press.

Sassen, S. (2006) *Territory, Authority Rights: From Medieval to Global Assemblages*, Princeton, NJ: Princeton University Press.

Scharpf, F. (1994) 'Community Policy and Autonomy: Multilevel Policymaking in the European Union', EUI Working Paper RSC No. 94/1. Florence: European University Institute, Robert Schumann Centre.

Scholte, J. (2004) 'Globalization and Governance: From Statism to Polycentrism', Centre for the Study of Globalisation and Regionalisation (CSGR) Working Paper No. 130/04 February 2004.

Scholte, J. (2008) 'Civil Society and Sovereignty in a Post-Statist Circumstance', in T. Jacobsen, C. Sampford and R. Thakur (eds) *Re-envisioning Sovereignty: The End of Westphalia?* Aldershot: Ashgate.

Schreier, F. and Caparini, M. (2005) 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies', Geneva Centre for the Democratic Control of Armed Forces (DCAF) Occasional Paper No. 6.

Scott, C. (2000) 'Accountability in the Regulatory State', *Journal of Law and Society*, 27: 38–60.

Scott, C. (2006) 'Spontaneous Accountability', in M. Dowdle (ed.) *Public Accountability: Designs, Dilemmas and Experiences*, Cambridge: Cambridge University Press.

Senn, M. (2011) *Non-State Regulatory Regimes: Understanding Institutional Formation*, Berlin: Springer-Verlag.

Shearing, C. (2006) 'Reflections on the Refusal to Acknowledge Private Governments', in J. Wood and B. Dupont (eds) *Democracy, Society and the Governance of Security*, New York: Cambridge University Press.

Shearing, C. (2007) 'Policing Our Future', in A. Henry and D. Smith (eds) *Transformations of Policing*, Aldershot: Ashgate.

Shearing, C. and Wood, J. (2003) 'Nodal Governance, Democracy, and the New "Denizens"', *Journal of Law and Society*, 30: 400–419.

Sheptycki, J. (2002a) 'Postmodern Power and Transnational Policing: Democracy, the Constabulary Ethic and the Response to Global (In)Security', Geneva Centre for the Democratic Control of Armed Forces (DCAF) Occasional Paper No. 19.

Sheptycki, J. (2002b) *In Search of Transnational Policing: Towards a Sociology of Global Policing*, Aldershot: Ashgate.

Sheptycki, J. (2007) 'The Constabulary Ethic and the Transnational Condition', in A. Goldsmith and J. Sheptycki (eds) *Crafting Transnational Policing: Police Capacity-Building and Global Policing Reform*, Portland, OR: Hart.

Slaughter, A. (2001) 'The Accountability of Government Networks', *Indiana Journal of Global Legal Studies*, 8: 347–367.

Sørensen, E. and Torfing, J. (2005) 'The Democratic Anchorage of Governance Networks', *Scandinavian Political Studies*, 28: 195–218.

Sovacool, B. (2011) 'An International Comparison of Four Polycentric Approaches to Climate and Energy Governance', *Energy Policy*, 39: 3832–3844.

Sport and Recreation and Provincial and Local Government Portfolio Committees (2006) '2010 Agreements with Municipalities: Briefing', Parliamentary Monitoring Group, 6 June 2006. Available at: http://www.pmg.org.za/minutes/20060605-2010-agreements-municipalities-briefing-0 (accessed 15 October 2012).

Stenning, P. and Shearing, C. (2012) 'The Shifting Boundaries of Policing: Globalization and Its Possibilities', in T. Newburn and J. Peay (eds) *Policing: Politics, Culture and Control: Essay in Honour of Robert Reiner*, Oxford: Hart Publishing.

Sullivan, J. P. and Wirtz, J. J. (2009) 'Global Metropolitan Policing: An Emerging Trend in Intelligence Sharing', *Homeland Security Affairs*, 5: 1–7.

Trubek, L. (2006) 'New Governance and Soft Law in Health Care Reform', *Legal Studies Research Paper Series*, Paper 1018.

Valaskakis, K. (2001) 'Long-Term Trends in Global Governance: From "Westphalia" to "Seattle"', in OECD (ed.) *Governance in the 21st Century: Future Studies*, Paris: OECD.

Van Kersbergen, K. and Van Waarden, F. (2004) '"Governance" as a Bridge Between Disciplines: Cross-Disciplinary Inspiration Regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy', *European Journal of Political Research* 43: 143–171.

Walt, S. M. (1998) 'International Relations: One World, Many Theories', *Foreign Policy*, Spring: 29–46.

White, A. (2011) 'The New Political Economy of Private Security', *Theoretical Criminology*, 16: 85–101.

Wood, J. (2006) 'Dark Networks, Bright Networks and the Place of the Police', in J. Fleming and J. Wood (eds) *Fighting Crime Together: The Challenges of Policing and Security Networks*, Sydney: University of New South Wales Press.

Wood, J. and Dupont, B. (2005) *Democracy, Society and the Governance of Security*, Cambridge: Cambridge University Press.

Wood, J. and Shearing, C. (2007) *Imagining Security*, Cullompton: Willan Publishing.

Wright, J. and Head, B. (2009) 'Reconsidering Regulation and Governance Theory: A Learning Approach', *Law & Policy*, 31: 192–216.

Zedner, L. (2006) 'Policing Before and After the Police: The Historical Antecedents of Contemporary Crime Control', *British Journal of Criminology*, 46: 78–96.

Zürn, M. (2004) 'Global Governance and Legitimacy Problems', *Government and Opposition*, 39: 260–287.

5

Policing the globe
International trends and issues in policing

Jude McCulloch and James Martin

Introduction

Policing has undergone rapid and significant changes in recent decades. While national distinctions and local conditions remain critical in shaping police organisations, this chapter focuses on international developments in policing under contemporary conditions of neo-liberal globalisation. It takes the global, cross-border and transnational as its primary points of reference. The literature on what is referred to variously as global, transnational, cross-border or world policing has grown alongside the burgeoning literature on globalisation (Anderson 1989; Nadelmann 1993; Walker 2000; Wood and Kempa 2005; Andreas and Nadelmann 2006; Loader and Walker 2007; Bowling and Sheptycki 2012). Nevertheless there has been little public discussion about the globalisation of policing. This is lamentable given the important social, political and legal implications of policing beyond national borders.

Modern police organisations engage in frequent international exchanges that include deployments to other countries, cooperation in joint operations, training, surveillance, intelligence, investigations and extraditions. In addition, policing organisations at the supranational level, such as the United Nations (UN) Police, Interpol and Europol continue to grow in size and influence (Anderson 1989). While the number and scope of such organisations continue to proliferate, no global police force exists. The remit of these supranational policing organisations is fundamentally limited by a lack of coercive enforcement powers. Global policing, by contrast, which, to adopt Bowling and Sheptycki's formulation, involves 'the capacity to use coercive and surveillance powers around the world in ways that pass right through national boundaries unaffected by them', is a reality (2012: 8).

Today many thousands of police officers work across national borders. These police work in policing organisations that sit above the level of nation-state or in national policing organisations engaged in activities that have impacts beyond national borders (ibid.: 9). Policing beyond borders raises fundamental questions about state power. The growing interdependency of states under conditions of globalisation has eroded the autonomy of states in numerous ways. Policing more than other activities, however, sits at the heart of state power and a change in the way policing takes place across borders raises fundamental questions about the state system. Anderson notes in *Policing the World*:

> Activities on the territories of states are increasingly open to external influences, and even external control, and many agencies of government cannot perform their functions adequately without close international co-operation. But the police function has different implications from, for example, economic management: police and crime control have appeared the expression of state sovereignty in its pure form. To what extent does this remain true?
>
> (1989: 1)

When police or policing practices cross borders, the issues generated move beyond criminal justice, crime and social control into the realm of international relations, foreign policy and political economy on a global scale (Andreas and Nadelmann 2006: viii).

Policing involves a number of controversial issues at the domestic level related to trust, accountability and effectiveness; and all of these issues become even more intractable when policing involves more than one nation. Apart from policing across national borders there are a number of international trends in policing directly linked to globalisation. One of these is policy transfer and convergence, including the harmonisation of legal responses (Aas 2007: 147, 165). The growth in privatisation of state functions, including policing, is another. A third trend, linked to privatisation, is the growing role of market forces in driving developments in policing (see, for example, Spitzer and Skull 1977; Shearing and Stenning 1981; Christie 2000). Policing is itself a product and a market for numerous other products. One final trend is the increasing frequency with which domestic policing impacts internationally. The likelihood of domestic policing resonating beyond borders has increased as more people travel and reside internationally for work, study and leisure. Controversial policing events involving foreign nationals are not uncommon and may become issues in the home country as a result of global media.

The chapter begins with a broad overview of approaches to understanding the growth of global policing. The changing nature and dynamics of crime and justice under conditions of globalisation are then sketched, before considering the major tenets of neo-liberal globalisation and how these are impacting on crime and policing. Transnational policing is defined and analysed and some of the major supranational policing bodies are considered. Key issues related to global policing, including sovereignty, accountability, trust and effectiveness, are then examined. The next sections focus on the 'War on Drugs' as the 'flagship' for the transnational policing enterprise, and the 'War on Terror' which has been responsible for the most recent wave in the intensification of global policing. The final sections cover the issues of policy transfer and convergence, and the commodification of policing and security. The conclusion considers the gaps in the research and sets out some potential future research areas.

Literature review

There are a number of different, often overlapping and interlinked themes and approaches to understanding the growth of policing beyond national borders discernible in the literature. The first considers the growth of policing beyond borders, especially the development of supranational policing organisations, as part of a growing regional and international system of governance. These policing organisations are seen to mirror the growth in global governance structures that began in earnest after the Second World War. From this perspective, transnational policing is understood as an integral part of an emerging global political, economic, legislative and judicial system of governance that includes bodies such as the UN, the World Trade Organization (WTO) and the International Criminal Court (Anderson 1989). A second framework or theme understands the growth in cross-border policing as the inevitable and natural result of the rise

in cross-border crime, which has grown alongside globalisation. Transnational organised crime, particularly drug trafficking and global terrorism, provide the primary source of legitimacy for cross-border policing (Woodiwiss 2001; Aas 2007: 124; Pickering *et al.* 2008; McCulloch and Pickering 2010; Sheptycki 2007: 34). A third strand of the literature seeks to analyse transnational policing in the context of the changing function and meaning of borders under conditions of globalisation. This growing literature on borders and their enforcement focuses on common ideas around globalisation, sovereignty, human rights, violence, mobility and security (Winterdyk and Sundberg 2010; McCulloch and Pickering 2012).

A fourth theme in the literature understands developments in international policing as part of the growth and projection of American power linked to new forms of imperialism. In this frame, what is often referred to as the globalisation of policing is replaced by Americanisation (Andreas and Nadelmann 2006). This theme considers that a pattern has been discernible since the United States (the USA) declared a War on Drugs under President Nixon in the 1970s: a crime problem is 'discovered', and is then amplified to the level of a national security threat against which the lexicon and technology of war are deployed internally and globally. The wars on crime, drugs and terror are seen to reflect the international promotion of US norms, values and interests in ways that parallel in some respect the colonial policing[1] of the previous eras (Nadelmann 1993; Andreas and Price 2001; Woodiwiss 2001). This framework argues that transnational crime has filled a 'threat blank' left at the end of the Cold War and enabled continued growth in the US security budgets, coercive capacities and international interventions (Armstrong 2002). This theme links closely to a fifth theme that conceives transnational crime as a 'productive fiction' that produces a whole range of benefits for state and corporate elites (McCulloch 2007). Police organisations have been influential in setting agendas that expand global policing and have benefited enormously in terms of budgets, prestige and power (Bowling and Sheptycki 2012). Many politicians in the Global South have found it politically profitable to focus on fear of cross-border crimes in ways that inevitably expand the range and intensity of cross-border policing activity (Ruggiero 2000; Massari 2003; McCulloch 2004; Pickering 2004). Part of this theme describes and analyses the ways that fear of transnational crime has progressed corporate and organisational agendas linked to what has been described as the 'prison-military-industrial complex' (Davis 2003), or to adopt Nils Christie's phrase, 'crime control as industry' (2000).These themes in the literature are consolidated and expanded in the recent monograph *Global Policing* by Bowling and Sheptycki (2012), in which they demonstrate how globalisation impacts on crime, security justice and the law, and the implications for policing.

Globalisation, crime and justice

Globalisation has dramatically transformed the relationship between states, particularly evident in the way that territorial borders between states are managed, negotiated and imagined (Pickering and Weber 2006). Despite the efforts of states to intensify and rigidify the borders that surround them, borders are increasingly fluid, shifting, and contradictory physical and discursive spaces. Changes in the configuration and meaning of territorial borders have been the harbinger of a whole range of shifts in state functions related to law enforcement and security, functions that are increasingly intermingled and indistinct. The primary shift has been a breakdown of the border between inside and outside, foreign and domestic, so that policing, once largely confined to inside the border, is now often transnational and increasingly influenced by international trends. Despite this shift the border remains an important symbol of state power and sovereignty, continuing to function as a site for delineating national identity through exclusion (Bigo 2002). Transnational policing plays a critical role in this delineation because it is frequently

through counter-measures that we come to see activities and people as threatening and harmful (McCulloch 2007). As borders become increasingly porous under conditions of globalisation and the volume of both licit and illicit goods, people, finance and images crossing borders increases, police organisations have expanded beyond territorial borders, reaching out into an ever-more fluid and interconnected world (Weber 2012).

Domestic police organisations have moved towards greater engagement with what are constructed as key national security threats. The distinction between national security and law enforcement has narrowed and, related to this, there is a far greater blending of police and both security and military functions (Pickering *et al.* 2008: 17–18; McCulloch and Pickering 2010). In this context, criminal justice concerns are being used increasingly as a tool of foreign policy. Andreas and Price (2001), writing about this tendency prior to the 9/11 attacks, commented on the 'long arm' of US criminal justice policy and how it had operated, particularly in relation to the War on Drugs, as a Trojan Horse for foreign policy goals. While there is no denying that the criminal justice system has always met political ends, there has been a major shift in criminal justice under transnational crime and policing frameworks: it has moved from the 'low politics' of managing internal relations of class, race and gender towards the 'high politics' of managing global power politics (see Beare 2003; Brodeur 2007). The militarisation of policing domestically has manifested most visibly and harshly on the policing of poor, marginalised and vulnerable communities and in the policing of protest (see, for example, Ericson and Doyle 1999).

Neo-liberal globalisation

In a trend that has accelerated steadily since the latter half of the twentieth century, neo-liberal governance has grown to become one of the most consistent and salient features of contemporary globalisation. The central tenets of neo-liberalism include the primacy of free trade, the privatisation and deregulation of industry, and the uninterrupted flow (and flight) of international finance and capital. These principles, once advocated by the staunchest of free marketeers (Friedman 1962; Friedman and Schwartz 1963), are the new orthodoxy. Neo-liberalism has not only overcome significant ideological resistance, but also spread beyond its traditional geographic confines in Western and satellite nations to become a major policy influence globally (Ong 2006). Global financial institutions aggressively pursue a neo-liberal agenda in the developing world (Peet 2003; Ahmed 2011) and, following the collapse of the Soviet Union, former and current communist powers have rushed to embrace their own versions (Ong 2006; Aas 2007; Manzetti 2010). Across much of the globe, national governance is now marked by the deregulation of industry, the privatisation of state institutions and functions, including security and policing, and a massive shift in the distribution and global fluidity of capital and wealth.

Neo-liberalism affects interest groups and social classes in different ways, producing 'winners' and 'losers'. Those benefiting most are small groups of wealthy elites and multinational corporations – the '1 per cent' in the parlance of the Occupy Movement – whose profit-making capacity is less constricted by the fetters of financial and industrial regulation. Losers are more numerous, including the world's poorest as the gulf in global wealth inequality expands (Milanovic 2012). Contrary to the claims of neo-liberal advocates, neo-liberalism has not proved a 'rising tide that lifts all boats'. Rather, those deprived of the benefits of globalisation have been pushed into deprivation, subsistence and dependency (Fraser 2010). Standing (2011) eloquently captures this shift towards economic uncertainty with his popularisation of the term 'precariat' – an emerging social class whose vulnerability and marginalisation are defined by life at the mercy of market 'flexibility'.

A lack of regulation and the ease with which corporate dollars flow from one desperate labour pool to the next have resulted in a worldwide 'race to the bottom' with regard to human and worker rights (Klein 1999; 2002). The combined effects of rapid industrialisation, expansion of large-scale mining and agriculture, and associated deforestation have resulted in the destruction of traditional agrarian and nomadic communities (van Solinge 2010), contributing to a population drift from rural to urban areas (Aas 2007: 18, 45), ensuring a steady supply of itinerant workers, particularly vulnerable to exploitation from both big business and criminal organisations.

Even within relatively affluent countries, neo-liberalism compounds the difficulties faced by the economic and socially marginalised by fundamentally realigning their relationship with the state. The traditional welfare state, in which national governments assumed responsibility for the social welfare of citizens, has been eroded in countries that have implemented neo-liberal policies. In its place, a hollowed-out 'garrison state' focuses on the protection of property rights and threats to 'national security'. A hallmark of the neo-liberal state is a national security fetishism, in which marginalised social groups are defined pre-emptively according to perceived risk (McCulloch 2005; Greener 2009: 124); disaffected and unemployed youths are recast as delinquent crime gangs; asylum seekers and undocumented migrants become 'illegals'; and minority religious groups, particularly Muslims, are perceived as terrorists-in-waiting (Sentas 2006; Aas 2007).

The economic uncertainties associated with neo-liberal globalisation also stimulate forms of transnational crime that provide the rationale for an intensified transnational policing response. Historically, criminology only explored a narrow range of these crimes, such as the proliferation of illicit drug markets. One of the weaknesses of this approach is that the majority of harms associated with neo-liberalism, such as environmental damage and human rights violations by states and corporations, are left unexamined (Green and Ward 2004; Whyte 2009; van Solinge 2010; White 2011).

The negative aspects of globalisation have been subject to popular resistance, including anti-capitalist protests. Since the early 1990s, with their genesis in the 'battle of Seattle', protests have taken place at meetings of those institutions – the WTO, the IMF and the World Economic Forum – at the forefront of driving free trade, market deregulation and privatisation globally (Mackenzie 2006; Fernandez 2008; 2009). Occupy, anti-capitalist protests developed in various Western cities throughout 2011. The global anti-capitalist protests have been met by paramilitary policing involving high levels of coercive force, including less lethal weapons, such as capsicum spray, mass arrests, exclusion zones, and detention and intense surveillance of protestors and organisers (Sheptycki 2005; Greenberg 2012; Vakalis and McCulloch 2012).

Transnational policing

Modern transnational policing is as old as the first metropolitan police forces in nineteenth-century Europe. Bowling and Sheptycki define transnational policing as 'any form of order maintenance, law enforcement, peacekeeping, crime investigation, intelligence sharing, or other forms of police work that transcends or traverses national boundaries' (2012: 1). Early transnational policing was informal rather than institutional, and included intelligence sharing between law enforcement officials tracking suspects across national jurisdictions (Barnett and Coleman 2005: 603). The first major attempt at creating a transnational policing institution was the International Criminal Police Commission (ICC), the forerunner of Interpol, in 1923 (ibid.: 603). Interpol established control bureaus in each member country so that police forces were able to obtain international information concerning the latest crimes and suspects. While police

could not physically pursue offenders across borders, they could at least forewarn their foreign counterparts and share information.

While transnational crime was an important catalyst for cooperation between national police forces, early developments in transnational policing were also driven by advances in technology, including transformations in mass transport, international trade and communications, which shrank distances between nations (Bowling 2009). The birth of Interpol mirrored the proliferation of other aspects of 'internationalisation' such as the League of Nations, the forerunner to the UN, and the rise of multinational corporations and trade unions.

Today, transnational cooperation between law enforcement agencies continues to be driven by broader global processes. Transnational policing is undertaken on a bilateral or multilateral basis and assumes a variety of forms and functions, with intelligence sharing still the central focus because, similar to a century ago, it is easier politically and practically to share information between nations than it is to permit foreign police an operational role in another state. While the pressures of globalisation and the growth of global and regional governance structures (such as the UN, the European Union and Asia–Pacific Economic Cooperation) have eroded the individual power of nation-states, they remain the central loci of power. Police deployed to foreign states are therefore often assigned non-operational training, intelligence and liaison roles. Many law enforcement agencies maintain significant overseas contingents specifically for these purposes. Notable examples include the Royal Canadian Mounted Police, which has offices in 25 foreign countries, the Australian Federal Police (with offices in 30 countries) and the Federal Bureau of Investigation (represented in 61 countries) (FBI website 2011: 6).

Given the difficulties associated with deploying operational police to foreign nations (see section on accountability and sovereignty below), missions requiring the use of coercive police powers against foreign civilians are usually undertaken only during periods of crisis (for instance, war, natural disaster or turbulent political transition). They may be organised through the UN, or through permanent or ad hoc regional assemblages. UN policing or peacekeeping missions have a mixed history of success. While they are the only transnational policing missions involving the coercive use of force that are organised at a global level, disputes between UN member states and in the Security Council can paralyse a peacekeeping force (Fenton 2004). Permanent regional assemblages face similar difficulties. The ill-fated European Rapid Reaction Force, for example, has been operational since 2007, yet disagreements as to the potential suitability of foreign missions complicated its deployment (Gowan 2011: 594).

Regional ad hoc assemblages may prove the most efficacious form of transnational policing intervention. States are free to join or abstain according to their own political prerogatives, meaning only participating governments have a direct say as to the mandate and mission of deployed forces. They also share many of the benefits of other types of multinational deployment, including the ability to share costs and risks with other states. Further, the presence of partner forces provides important multilateral symbolism crucial to alleviating negative perceptions of foreign occupation. This latter point is particularly salient due to the combined presence of police and military personnel in operations-focused transnational policing. Military support may be a necessary component of these missions because: (1) national police organisations by themselves typically lack the logistical capabilities to deploy to distant foreign locations; and (2) security in crisis-affected regions is often so precarious as to render lightly armed police vulnerable in the face of serious threats (Greener 2009: 112–113). In combating these threats, transnational operations that combine police and military are similar to domestic deployments of troops which, in extreme circumstances, are also used to assist civil agencies to respond to crises and large-scale threats to public order (Sheptycki 2007: 35).

Key issues in transnational policing

There are a number of key issues related to transnational policing, of which sovereignty, accountability, trust and effectiveness are each considered in turn below.

Sovereignty

Notions of sovereignty are brought into sharp relief by transnational policing. National sovereignty, a term closely related to the concept of jurisdiction, is at the heart of the policing exercise. As Anderson asserts, 'the police and criminal justice system may be regarded as the last bastion of the doctrine of sovereignty – the absolute control by the state in its territory, untrammelled by external agencies, except for reasons of self-interest' (1989: 4). While a wide range of the international bodies increasingly impacts on a whole range of state activities, policing in particular engages issues of sovereignty because coercive force has been one of the defining characteristics of states. If a state is characterised by its monopoly over the legitimate use of force (Weber 1948), the use of coercive powers by the police of one state inside another state brings sovereignty squarely into question. Issues of self-determination and independence – issues closely linked to sovereignty – will almost inevitably arise within this transnational policing context (Goldsmith and Harris 2012). These issues are likely to be felt particularly acutely where histories of colonialism are relevant.

Accountability

Police, through their vast array of powers and coercive resources, have enormous capacity to impact on human rights (Green and Ward 2004: Chapter 5). At a national level, how best to respond to and prevent police brutality, corruption, abuse of powers, racism and negligence is complex and politically fraught (see, for example, Goldsmith and Lewis 2000). The even more difficult conversation about how to maintain the rule of law in transnational and global policing contexts is less advanced, with the impediments to effective oversight more numerous and arguably the impact of police corruption and abuse of power even greater (Brodeur 2000; Sheptycki 2007).

   The problems of accountability are magnified exponentially in the realm of transnational policing. The lack of accountability begins in the political realm where policing organisations have substantially set the agenda for transnational approaches to what are constructed as transnational crime problems (Bowling and Sheptycki 2012: 44–45). National parliaments are more or less rubber stamps to transnational policing agendas, so transnational policing organisations have become the arbiters of the types of global problems that are constructed as crime problems – drug trafficking rather than global pollution, for example – and of the ways to best solve these problems, such as law enforcement and security rather than the provision of social programs, welfare and development aid to poorer countries. Of course it is unlikely that these agendas would gain any traction if they were not supported politically, and national police forces have likewise been successful in setting political agendas. However, the process is taken even further beyond the realms of political accountability when the agenda setting is distanced from the national democratic process. While global policing is an on-the-ground reality, there is no democratic equivalent of on-the-ground political participation at the international level.

   Supranational policing organisations such as Europol typically have highly fragmented accountability mechanisms (den Boer 2010).There are numerous documented cases of international police engaged in UN missions becoming involved in corruption and engaging in sexual

exploitation of local people (Odello 2010). The challenges of police accountability where policing operations are part of an international mission are great. The law relating to international missions is extremely complex and police involved may be immune from prosecution or protected by home countries unwilling to pursue prosecutions or other punitive measures (ibid.). Where national police operate in overseas countries, the home country's police accountability bodies find it challenging to effectively oversee these missions (see, for example, Knaus 2012).

Corruption is a significant issue in transnational policing in part because of the focus on drug trafficking. A number of aspects of the drug trade, most notably the enormous sums of money involved, place drug law enforcement at the 'invitational edge of corruption' (Manning and Redlinger 1977). The powers available to police at the transnational level, combined with the profits associated with the drug trade and the ability of police to hide behind the complex inter-jurisdictional environment, mean that transnational drug policing is intimately bound with police corruption (Wilson and McCulloch 2012).

National security policing linked to the War on Terror also raises questions about police accountability. The breadth of the laws and the focus on pre-empting terrorism raise issues of profiling and coercive police action based on identity rather than behaviour (Cole 2003; McSherry 2004; Pickering *et al.* 2008). The increased hybridisation of law enforcement and national security, in particular, the integration of intelligence and policing functions, especially in relation to changes that have occurred in the post-9/11 context, also raise serious issues for police accountability (McCulloch and Tham 2005; Roach 2010; 2011). The militarisation of policing, which has progressed markedly post 9/11, also has implications for democracy in Anglo-American countries, which traditionally have severely restricted the use of military force against citizens (Jefferson 1990; Kraska and Kappeler 1997; McCulloch 2001). While evidence is generally gathered to detect offenders and prove harms that have taken place, intelligence is used in an effort to forecast risk. The transnational policing framework generally, and the counter-terrorism framework in particular, have seen an erosion of the distinction between intelligence and evidence and the merging of the functions of police and intelligence agencies. Intelligence has traditionally been gathered by security agencies while police have gathered evidence about criminal activity. Intelligence agencies and the intelligence they gather have historically been covert, while the police and the processes they use to gather evidence are understood to be open and accountable (McCulloch and Pickering 2010; Roach 2010). The normalisation of the integration of policing and intelligence under transnational crime policing frameworks is anathema to transparent, democratic and accountable policing.

The development of a transnational policing environment has advanced well ahead of any structures aimed at ensuring that such policing is accountable to the law, and national parliaments. It can be convincingly argued that a lawless space has opened up between national jurisdictions where transnational policing takes place. The lack of effective accountability attached to trans-national policing potentially has enormous implications for human rights. As in the realm of domestic policing, the abuse of human rights in the international policing realm will fall most heavily on the poor and marginalised. Bowling and Sheptycki argue: 'Concealed behind the façade of "suitable enemies" the general public could only assume that the [transnational policing] agencies' response was necessary, appropriate and focused on the most harmful practices' (2012: 49).

Trust

Trust is recognised as an important issue in national policing contexts, integral to police legitimacy and effectiveness. When police operate outside national borders, trust with local people and

local and other national police in joint deployments is complicated by differences in culture, politics and language. Historical and ongoing political and economic contexts, including the relationship between colonial powers and colonised people, may also come into play. Domestically, police rely on collaboration and cooperation from the public and other police, yet suspicion and distrust are basic tenets of police work (Reiner 2010: 121–122). Gaining and maintaining trust are not easy in the national policing environment. Marginalised communities with a history of hostile relations with police may be reluctant to cooperate or collaborate with police (see, for example, Cunneen 2001). The rivalry between different national and state policing bodies is legend, particularly in the USA, where competition and conflict, rather than collaboration and cooperation, have historically characterised such relationships (Andreas and Nadelmann 2006). All the challenges of trust in the national policing environment are greatly multiplied in the international policing environment. As Anderson points out, 'Certain basic factors create barriers to international police cooperation: varying state traditions, different levels of economic and social development, ideological and foreign policy conflicts' (1989: 12). Police forces from different countries may find it difficult to trust each other. The population may view police from other countries with suspicion, perhaps because their experience of local police has not inspired confidence or because the overseas police are resented as a continuation or throwback to colonial rule (Goldsmith and Harris 2012). The challenges of accountability referred to above and the involvement of police in corruption, abuse of human rights or crime may add to problems with trust.

There is another dimension to policing in the context of globalisation that links to trust in police. The mass movement of people between countries means that many more foreign nationals today will be subject to police action in host countries. Issues of over-policing, under-servicing or brutality may take on international dimensions when they relate to foreign nationals. When, for example, police in one country kill a national from another country, particularly in controversial circumstances, the incident may generate popular or official protests from outside countries (McCulloch and Sentas 2006). Likewise, if police are perceived to be responding inappropriately to crimes committed against non-nationals, particularly if those crimes are seen to be motivated by prejudice, the impacts of domestic policing may resonate internationally (see, for example, Mason 2012). Different criminal justice norms and cultural expectations can contribute to international friction linked to the domestic policing of foreign nationals.

Effectiveness

Although transnational policing in its various manifestations is constructed and implemented as a primary response to many global problems, its effectiveness as a sustainable solution is questionable. There is evidence that transnational policing counter-measures are often ineffective or counter-productive (Woodiwiss and Bewley-Taylor 2005; McCulloch 2007; Segrave *et al.* 2009). Policing counter-measures may also be poorly calibrated. The popular image of transnational crime is of well-organised, ruthless, powerful exploiters as perpetrators, and powerless people, often women and children, as victims, yet the reality is far more complex. Those at the top of transnational crime organisations or networks use their power and influence to create a façade of legitimacy and manipulate or corrupt politicians, regulators and law enforcers. Powerful criminal operators are also able to shift risks downwards onto far less powerful actors who sometimes face difficult choices between subsistence and criminalised activities. Illegal activities may be the only pathway available to poor communities of the Global South to attain the type of relatively modest consumer lifestyles taken for granted in the Global North. Misunderstanding about the nature and dynamics of transnational crime, and who is involved

and what their motivations and experiences are, means that counter-measures often fall most heavily on those who are actually victims requiring humanitarian aid and human rights protection (see, for example, Wonders 2007). Transnational crime counter-measures, even those purportedly aimed at enhancing the human rights of those deemed victims of these crimes, frequently impact negatively and undermine the human rights of these same victims. International protocols and national measures often impact harshly on those who might reasonably be understood to be the victims of transnational crime. For example, the UN Convention against Transnational Organized Crime and its accompanying Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children have restricted women's opportunity to cross borders, expanded the policing apparatus of the state and infantilised and demonised those women it is intended to rescue or defend. The Protocol, aimed at enhancing human rights, has diminished the rights of a significant number of women (Segrave and Milivojevic 2010; Pickering 2011: 10–11; True 2012).

A similarly counter-productive dynamic is evident in the War on Drugs which has been responsible for the incarceration of vast numbers of mainly poor and coloured people worldwide. Approximately one in five people in US prisons are there for drug-related offences and as many as one quarter of the world's imprisoned population are imprisoned because of illegal drugs (Stern 2006). Despite the intensity of the law and order response to drugs, the vast powers given to law enforcement and its status as the flagship of the transnational policing exercise, this response has been entirely ineffective in limiting the supply of illegal drugs or minimising the harms associated with them (Lee and South 2003; Woodiwiss and Bewley-Taylor 2005). In the 'global war on terror', all the available research similarly points to counter-measures, including vastly expanded policing powers, being largely ineffective or counter-productive in terms of the purported aim of suppressing terrorism (Cole 2006a; 2006b; Lum *et al*. 2009). Many counter-terrorism measures, in common with transnational crime counter-measures generally, have had significant negative consequences on civil liberties, due process and human rights (see, for example, Cole and Dempsey 2006). The measures taken against people smugglers in many countries in the Global North are also largely ineffective or counter-productive in reducing the flow of undocumented migrants. Instead, these measures impact harshly on the human rights of refugees and asylum seekers (see, for example, Pickering 2005; Grewcock 2009). In addition, it appears likely that some people prosecuted as people smugglers may indeed be victims of trafficking themselves – such as poor fishermen, sometimes juveniles, who have been dragooned or duped into crewing boats carrying human cargo (see, for example, Gordon 2012). Other aspects of the transnational policing exercise, including the global export industry (discussed below), are of dubious value to importers, typically countries in the Global South.

Every manifestation of the transnational policing exercise entails opportunity costs. Costs attach to funnelling vast amounts of resources into policing at the expense of other types of interventions that might more adequately address or minimise the harms associated with globalisation. Improved welfare, employment and development opportunities in the Global South would, for example, reduce the vulnerability and incentives that force people to seek the services of people smugglers, to fall prey to sex or people traffickers, or to become growers, manufacturers, mules or distributors of drugs (see, for example, Stern 2006; Segrave *et al*. 2009; True 2012: 53–76).

Transnational crimes could in many cases more effectively be dealt with as issues related to human vulnerability and economic development rather than policing issues. A move away from the War on Drugs towards a harm minimisation and development would have greater potential for the human costs of drug use (Stern 2006). A process that focused on labour exploitation and the social and economic needs of women in developing countries would be more effective

in impacting on sex trafficking (Segrave *et al.* 2009; True 2012: 53–76). People smuggling would be more constructively addressed as an issue of forced migration, thus requiring the developed world to consider the push factors that underlie people's global movement (Pickering 2005), and global terrorism might be constructively addressed through a process of dealing with 'root causes' rather than rooting out terrorists (see, for example, Cole 2006a; 2006b).

The War on Drugs

The War on Drugs has been deemed the 'flagship of the transnational policing enterprise' (Sheptycki 2000a: 18). The War on Drugs was declared by US President Richard Nixon in 1971, and was subsequently relaunched and expanded internationally in the 1980s and 1990s by presidents Ronald Reagan and George Bush Senior. This aggressive iteration of transnational drug prohibition differs from earlier approaches in a few important respects. In the domestic sphere, particularly in the USA, but also to a more limited degree in other participating nations such as the United Kingdom and Australia, the 'war' has been fought with a significantly growing emphasis on deterrence through mass incarceration. Over the past four decades, rates of incarceration for non-violent drug offences, particularly among non-whites, have increased dramatically (Bobo and Thompson 2006: 450–1; Aas 2007: 121). This has prompted many to interpret seemingly 'neutral' anti-drug policies as part of a deliberate assault on racial minorities (Provine 2007; Lynch 2012). The massive expansion of corrections facilities over this period has been accompanied by alarming (and often misleading) government propaganda campaigns about the dangers associated with illicit drugs (Buchanan and Young 2000). These serve to stigmatise drug users, while also helping maintain public support for punitive and repressive policies that, on any sober assessment, have clearly and comprehensively failed to either significantly deter drug use or inhibit supply.

Scholars arguing a racial interpretation of the War on Drugs centred on domestic concerns should remain mindful of its international dimensions. While the USA is undoubtedly the ideological centre of the global War on Drugs, other states bear many of the costs associated with its execution. Some, particularly Mexico, as well as other Latin and South American states, are damned by proximity to a country that has the distinction of being the world's largest illicit drug market and its most prolific arms dealer. In recent years, transnational organised crime groups operating across source or transit countries supplying the USA and other consumer markets have battled with local law enforcement, state military forces, rival gangs, and others opposing their control of drug markets, the worldwide value of which are estimated at around US$332 billion per year (UNODC 2005: 143). In the worst affected state, Mexico, some 60,000 people have died in drug-related violence over the past eight years – a figure that significantly exceeds the combined deaths in 'real' war zones in Afghanistan and Iraq over the same period.

These statistics highlight the point that the War on Drugs is not simply a civil conflict but also a global one. States are co-opted into the US-led initiative either willingly or through coercive measures. Attempts to pressure foreign states into joining prohibition include a certification process whereby levels of foreign aid are determined by alignment with US anti-drug policies (Goldsmith *et al.* 2007: 90). Once an inter-governmental agreement is established, aid provided by the USA may include provision of intelligence, and training and military equipment, as per standard transnational policing protocols. More direct and intensive operations involve the direct application of US military power, for example, through the use of drone strikes or the deployment of special operations troops, the shooting down of suspect aircraft, and the widespread use of chemical defoliants on drug plantations. As with other aspects of the War on Drugs, these measures have had little success in controlling the supply of prohibited drugs. While

illegal operations may be disrupted in the short term, the vast profits associated with these markets ensure that new ventures and avenues are always being developed (see, for example, Rouse and Acre 2006).

The failure of the state to keep up with the emerging technologies and the dynamism of the illicit drug economy is powerfully illustrated by recent developments on the internet. Websites such as *Silk Road* offer drug retailers and consumers a relatively safe, anonymous online marketplace where all manner of illicit substances are readily available:

> The front page of Silk Road looks a great deal like the front page of eBay. Goods and services for sale are categorized and all manner of drugs are available under the following categories: ecstasy, cannabis, dissociatives, psychedelics, opioids, stimulants, benzodiazepines and others. Sellers receive ratings from buyers and comments about the quality of their products, how fast they ship and the level of professionalism and discretion of the transaction.
>
> (Barratt 2012: 1)

Transactions executed through *Silk Road* employ an online and highly encrypted form of currency – Bitcoin – to ensure that the identity of buyers and sellers remains difficult to trace. Once the transaction is complete, illicit goods are simply mailed through the international post. Detection is unlikely due to the professional appearance of small quantity packages and the relatively low rate of postal package screening (Ormsby 2012). The brazen operation of websites such as this serves as a stark reminder that despite more than 40 years of punitive policies, hundreds of thousands of lives lost or negatively impacted by incarceration, and hundreds of billions of dollars spent on law enforcement, victory in the War on Drugs remains as elusive as ever.

The War on Terror

The 'war on crime', and most particularly the War on Drugs, provided a template for the post-9/11-declared War on Terror. The rhetoric mobilised in the War on Terror parallels the lexicon used in previous and continuing wars, including previous iterations of the War on Terror. As Chomsky points out, the original war on terror was declared by George Bush Senior 20 years before it was declared again by Bush Junior in the weeks after the 2001 attacks (2002: 2). The War on Terror continued and accelerated two major developments in policing. The first was the integration of policing and security, particularly policing and national security. Terrorism is understood to sit between crime and war and therefore has been addressed as both a military and criminal justice issue, advancing the growing hybridity of the police and military, crime and politics, and external and internal affairs. Setting out the US national security strategy in 2002, President Bush argued that '[t]oday, the distinction between domestic and foreign affairs is diminishing' (Bush 2002). The second major development in policing that the War on Terror has accelerated has been a shift in focus away from individual offending towards pre-emptive strategies that aim to identify risks and intervene before they manifest. This trend was identified well before the 2001 announcement of the War on Terror but has expanded in the context of counter-terrorism policing frameworks (Amoore and de Goede 2008: 8). Lucia Zedner refers to this development as a shift towards a pre-crime society 'in which the possibility of forestalling risks competes with and even takes precedence over responding to wrongs done', and where 'the post-crime orientation of criminal justice is increasingly overshadowed by the pre-crime logic of security' (2007: 261–262). Anticipating future crime raises a myriad of practical concerns for policing. Pre-empting risk relies heavily on intelligence so that counter-terrorism policing has seen the growing integration of police and security or intelligence agencies. While policing

in democratic societies aspires to the ideals of being open and accountable to the law, intelligence agencies have always operated in the shadows, based on political calculations about people considered to be potential enemies (Hocking 2003; Marx 2003). Covert secret policing harnessed to various transnational crimes, particularly counter-terrorism, has moved more fully into the mainstream of policing. The blending of police and security functions raises the prospect of anti-democratic 'secret police' (McCulloch and Tham 2005; Roach 2010; 2011).

While democracies have always had intelligence agencies, previously these were officially confined to gathering information, frequently based on political affiliations, which was justified on the basis that such political activities or attitudes could potentially form the basis of politically motivated violence (see, for example, Hocking 2003). Under the new hybrid frameworks, coercive policing powers are attached to some intelligence agencies, such that they can detain and question suspects, and police have increasingly gained a remit to gather intelligence that can be used to identify suspects and charge them under 'pre-crime' laws (McCulloch and Pickering 2010).

Export policing

Neo-liberalism drives not only the conditions that produce crime, but also the systems intended to constrain it. One of the most significant changes resulting from the advance of neo-liberalism is the global shift in the bulk of security and policing services from the state to the private sector. In a trend reproduced to varying degrees around the world, the numbers of private security personnel have grown to consistently and significantly outnumber state police. State police forces are also changing, as crime-fighting tactics are packaged, commodified and disseminated through the global 'export policing' industry, as part of international aid or intervention packages (Greener 2009).

Export policing, whereby policing ideals, strategies and training are transplanted from affluent, predominantly Western states to nations that are recipients of foreign aid, is now an important and broadly acknowledged aspect of international development assistance (Marenin 1998; Bayley 2005). Due to a growing recognition that effective policing and the provision of security are crucial to the success of other aid and development initiatives, the role of export policing has expanded dramatically in recent decades (Ellison and O'Reilly 2008). Thus, those elements that comprise the export policing industry – such as state police forces, private security/policing firms, non-government organisations (NGOs), and individual, entrepreneurial specialists – now often sit alongside more traditional aid representatives from the health, construction and financial sectors, assisting with the 'hands-on' delivery of foreign aid:

> Police assistance programs have become core elements in bi-lateral and international security and development assistance in the post cold war era. It has become an accepted idea and policy goal that the promotion and development of democratic political (and economic) reforms must include efforts to recreate, restructure and retrain abusive, corrupt and ineffective police forces. International police assistance, in the form of training, equipment, advisors and (occasionally) actual police work, has a number of goals . . . [including] teaching existing police forces the norms, procedures and values appropriate to a free-market economy.
>
> (Marenin 1998: 159)

The transfer of policing methods and personnel from more affluent states to poorer nations is not new. Up until the mid-twentieth century, European imperial states imposed colonial policing

around the world. The apparent similarities between colonial-era policing and contemporary policing programs and multilateral peacekeeping initiatives have prompted some to see these latter initiatives as examples of modern–day 'imperial policing' (Foster 2002; Last 2006; 2003). These perspectives may, however, oversimplify the contemporary mechanisms of global hegemony. The realities of neo-liberal globalisation mean that nation-states no longer possess the concentrated power of old imperial colossi. Power is now more diffuse and transmitted globally via a multiplicity of mechanisms, of which export policing is just one. Furthermore, twentieth-century imperial policing, as opposed to regular *colonial policing*, was premised upon the use of overwhelming military force to subjugate the citizens of imperial possessions.

Notwithstanding, contemporary export policing does share characteristics with colonial policing practices. Notably, the aims and priorities of international policing assistance are not value neutral, but rather must reflect broader policy objectives of the donor nation (Marenin 1998: 164). Export policing then is inextricably linked to furthering foreign economic and political imperatives of exporting states. In the case of the USA, by far the largest funder of export policing, a commitment to neo-liberal ideology is often an institutionalised precondition of development assistance (Easterly 2003). Indeed, commitment to the free movement of financial capital appears, upon inspection, a much more important guarantor of US aid than a much-hyped commitment to democratic governance (see, for example, Abrams 2011; Bennis 2011; Mustafa 2011).

Export policing is not just about policing; it is also associated with promoting other dimensions of national transformation, including political and, above all, economic ideologies. These ideologies, or discourses, are no longer simply transferred through monolithic imperial bureaucracy or colonial-military adventurism, but through a complex conglomeration of state and multinational aid agencies, NGOs, corporate and financial bodies and academic institutions (Brogden 2005). While the preconditions associated with export policing are not as overtly onerous as those imposed during colonial times, they still have the power to impact negatively on vulnerable societies. The rubric of imported specialist expertise, international aid and development helps conceal the imposition of foreign norms, influence and capital. Recipients of foreign aid, many of whom are former colonial states, have reason to be wary of international policing assistance and associated preconditions.

Export policing programs are often found to be culturally inappropriate and unworkable when transplanted to their destination societies. Brogden (2004; 2005) notes the failure of internationally backed community policing initiatives across the former Soviet Union, Latin America, Asia and South Africa, as well as in other African states. These failures are all the more remarkable considering the inflated rhetoric surrounding the supposed success of many international community policing initiatives. Brogden (2002; 2004; 2005) explains the overly optimistic and sometimes misleading claims concerning the success of international policing initiatives by pointing to the growing commodification of the export policing 'industry'. According to one estimate, the USA spends approximately US$750 million per year on export policing (Bayley 2005: 206). This has created an export policing economy, 'in which private multinational corporations as well as individual entrepreneurs straddle the world in quest for a market share of law enforcement commodities' (Brogden 2005: 67). The expansion of the export policing industry has been accelerated by neo-liberalism and globalisation. Both of these forces undermine the power of states to control domestic policy areas (including policing), while simultaneously fuelling the rapid global transmission of ideas, influence and capital (Koenig-Archibugi 2003). International trends foster ideal conditions for policing to become big business.

The term 'crime control as industry' was coined by Christie (2000) to underline the commercial interests behind coercive technologies used in prisons. The idea of the 'prison-military-industrial complex' in a similar vein highlights the way that private profits and vested

interests drive punitive penal policy and mass incarceration (Davis 2003). Crime control as an industry extends beyond prisons to policing. Security is no longer a public good but 'a commodity reflecting the hegemony of consumerism in contemporary culture and society' (Aas 2007: 138). While policing has long been differentiated on the lines of social position, the contemporary nexus between money and security provision makes this differentiation more stark – exemplified in gated communities for the well-off, and radical insecurity and punitive policing for the rest (see, for example, Davis 1990).

Policing itself is a market, as the discussion above demonstrates. Private policing or security, which in terms of sheer numbers has eclipsed public policing, is emblematic of policing as a product subject to market forces. Although the extent and mode of private security vary greatly between countries, the phenomenon of the privatisation of security has grown throughout many parts of the world, particularly in the West. In many cases the border between private and public interests in policing is hard to accurately map (Rigakos 2002). Private interests are involved in a whole range of aspects of policing, such as uniforms, transport and the feeding of prisoners. The proliferation of less-lethal weapons provides just one example of the influence of market forces on policing, New police weapons such as capsicum spray and conductive energy devices like tasers are aggressively marketed by global corporations as safe alternatives to deadly force. Since the early 1990s, these weapons have been adopted by thousands of police forces around the world (Bailey 1996; Rejali 2007). Corporate interests have seriously undermined the communication of independent information on the disadvantages and risks associated with such weapons and blurred the line between marketing and research with regard to safety and effectiveness (see, for example, Rhodes 1996). Despite many deaths and lawsuits arising from police use of capsicum spray and tasers, corporate profits continue to influence public debate and drive the search for new markets in private and public policing.

Policy convergence

The trade in policing as a commodity in itself and as a market for commodities does not account for the full range of strategic and tactical homogenisation witnessed across the world's national police forces. Local politicians, law enforcement professionals and scholars, often lay the foundations for this trade. The prominence of local elites in the implementation of the policing trade suggests a more sophisticated global interaction of ideas and policy development. As van der Spuy explains:

> A neo-colonial depiction of policy transfer, as a one-way process whereby Western hegemonic ideas are superimposed on local settings, fails to appreciate the diversity of policy exchanges in the contemporary era. Epistemic communities and knowledge networks situated at local, regional and transnational levels interact with policy elites and a wide range of international and local constituencies with an interest in the reform of police agencies.
>
> (2006: 15)

The tendency for these domestic and international 'epistemic communities' or 'knowledge networks' to interact and produce synchronicity is known as policy convergence (Holzinger and Knill 2005: 776). This increasing international trend has been much commented upon in recent years (Drezner 2001; Jones and Newburn 2002; Marenin 2005). Some scholars, such as Marenin (2005), have actively encouraged the development of such trends and have sought to foster the development of a 'global police studies community'. This kind of epistemic community poses a number of potential benefits, including the pooling of a diverse range of international

talent; more rigorous interrogation and testing of theoretical issues and systems; and, with the aid of contemporary communications technology, a more rapid and prolific dissemination of ideas. Perhaps most controversial and ambitious of all are claims that international policing debates could assist with the spread of liberal democracy (ibid.: 125–126).

Researchers such as van der Spuy (2006), Dixon (2004) and Agozino (2004) provide a critical alternative view, more circumspect about the 'possibility of mutual and reciprocal learning under conditions of interactive globalisation' (Dixon 2004: 359). While noting the *possibility* of the flow of ideas from the Global South to the Global North, they suggest it is unlikely that such exchanges will be equal, while stark contrasts in levels of development remain. Explanations as to why knowledge exchange is biased in favour of the Global North vary. Van der Spuy (2006) claims that the commodification of policing imposes a structural obstacle that impedes the equal exchange of ideas from affluent knowledge centres to poorer ones. Dixon (2004) and Agozino (2004), by contrast, suggest that prejudice skews academic discourse. Whatever the explanation, it is true that non-Western ideas struggle to penetrate international academic debate and policy discourse. The sheer volume of criminological scholarship produced in the West, particularly in the USA and Europe, suggests that any international criminological discussion will take place mainly on Western terms, utilising Western ideas.

The growth of policy convergence is particularly relevant for developing nations lacking resources necessary to develop or implement policies of their own. In a domestic 'policy vacuum', importing policies may be attractive. This is particularly so when considering: (1) the prestige and impressive academic credentials of many foreign policy advocates; (2) the apparent (often unsubstantiated) success of programs implemented in the countries in which they were developed (Brogden 2002: 168); and (3) perhaps, most importantly, when programs come with their own external sources of funding (van der Spuy 2000; Brogden 2002: 174). These factors mean that offers of transitional policing are often accepted even when there may be reasons to suppose that they will not work effectively, or when they come with exigent preconditions.

The international proliferation of policy convergence provides a sophisticated benefit to the export policing industry. In South Africa, for example, a global fondness for community policing rapidly translated into the nationwide introduction of Community Police Forces (CPF), despite significant domestic limitations that would have been obvious to many local observers. The fact that the CPF program was implemented at all demonstrates the significant peril associated with the introduction of policies that do not have any record of success within a host society or culture, as well as the power, influence and attraction of foreign aid and policy innovation. Interestingly, contemporary research suggests that the international dominance of community policing is coming under threat from revitalised forms of paramilitary policing (Murray 2005). This trend is again led by the USA, where 'softer' policing philosophies have come under pressure from politicians and a public spooked by the threat of international terrorism. This new development does not bode well for those wishing to see a more consultative engagement with the recipients of foreign policing aid. Without a substantive challenge to the financial incentives undermining the efficacy of export policing, as well as the agendas distorting international debates, we may simply see one insufficient policing ideology replaced by another equally limited one.

Conclusion

This chapter focuses on developments in policing under contemporary conditions of globalisation. Taking the international, transnational and global as its primary focus, it describes and analyses the ways that policing increasingly transcends national borders. Contemporary policing takes place and impacts outside of national borders in a variety of different ways. National

police are increasingly involved in investigating crimes that involve more than one country and are far more likely today to be working in other countries or with police from other countries in a range of different capacities. There are also a growing number of supranational policing organisations operating above the level of nation-states, although these organisations mainly focus on coordination and information sharing. Beyond this, the mobility of global populations means that policing inside national borders is more likely than ever to impact on nationals from foreign countries and relations between countries. There are also a number of international trends, such as privatisation, and commodification and, linked to this, an export trade in policing, that have profound implications for policing. Policing, along with many other state functions, is increasingly big business under conditions of neo-liberal globalisation.

While states are increasingly interconnected in various ways, the growth of a transnational dimension within policing raises particularly acute issues in relation to sovereignty. This is so because the monopoly over the use of force has traditionally been understood as a defining characteristic of states. Policing within another country's national borders brings into play issues of politics and international relations as well as criminal justice. Transnational policing challenges and changes the nature and meaning of the borders between states and blurs the distinctions between the traditionally distinct spheres of national security and criminal justice and the police and military.

Transnational policing also raises key issues around trust and effectiveness. Trust is difficult to build and maintain in the domestic policing setting, it becomes even more problematic where different cultures, and languages, social expectations and laws must also be considered. Accountability, an issue linked to trust, is also a vexed issue in national policing. It becomes far more complicated in the context of policing beyond borders where accountability mechanisms are often weak, ineffective or unworkable. Policing beyond borders can effectively mean policing beyond law, with implications for human rights.

Another key policy issue in relation to transnational policing is effectiveness. Transnational crime, particularly organised crime, drug trafficking and global terrorism are the primary rationale for the rapid growth in transnational policing. A widely accepted narrative is that the expansion of cross-border policing follows naturally and logically in the wake of the growth of cross-border crimes that are intimately linked with the growth of global markets. The effectiveness of a law and order approach to such crimes is, however, frequently brought into question. Beyond this, many argue that the focus on transnational crime is a fig leaf for other agendas related to foreign policy and vested interests. Critics also point out that, apart from failing to deal effectively with transnational crime, transnational policing approaches are often counter-productive, exacerbating the problems they were purportedly aimed at addressing and even impacting negatively on victims of the very crimes that are said to be countered. The growth in the scope and powers of policing linked to transnational crime could reasonably be characterised as a war on human rights. Policing counter-measures frequently impact harshly on vulnerable people who find that their need for protection and support are eclipsed by the transnational crime and policing frameworks. Given that many of the markets for transnational crime are fuelled by the negative impacts of globalisation, development opportunities and support for the poorest countries and people would potentially be more effective in dealing with what are constructed as transnational crime problems. At a conceptual and practical level, it is clear that the law enforcement approach frequently trumps human rights as a framework to deal with what are in many cases the negative consequences of neo-liberal globalisation.

Despite the key political, social and economic issues raised by transnational policing, and a growing literature on the subject, there are still many issues that remain under-researched or altogether unexamined. In part, this is because the criminology has traditionally focused on

domestic issues while international relations has focused on politics in the international sphere. These disciplines are struggling to catch up with the growing integration of crime and politics, criminal justice and national security and police and military that has grown in the space of transnational policing. In addition, researching international phenomena is more resource-intensive and complicated than national issues and there may be particularly difficult issues related to access and security when it comes to transnational policing. Nevertheless, as this chapter demonstrates, there are many researchers who have negotiated these barriers and laid trails for others to follow. The future research agendas in this arena are vast. There is a glaring need for empirical studies to flesh out the emerging conceptual frameworks. It is impossible to set out a comprehensive future research agenda but a small sample of issues ripe for research are suggested below.

Criminology has been interested in policing and law enforcement as part of the criminal justice system, but less interested in the military – largely considered the remit of security studies or international relations. There are studies on the militarisation of policing (Jefferson 1990; Kraska and Kappeler 1997; McCulloch 2001), but few related to the increasing integration of the military into 'internal security' roles (see, however, Hillyard and Percy-Smith 1988; Head 2006). Angela Davis (2003), and Nils Christie (2000), have undertaken ground-breaking studies on the prison-military-industrial complex that extends our understanding of the links between the military establishment, major corporations and domestic criminal justice, particularly in relation to mass imprisonment and racialised punishment in the USA. However, there remains much to be done in analysing the extended range of hybrid military and police actions that have emerged, consolidated and intensified in recent decades particularly in the context of the War on Terror.

While the policing of anti-capitalists protests in Western countries has been the subject of research and analysis, less attention has been paid to state responses to protest by communities and individuals in developing countries against the negative impact of Western corporations. There are, however, an increasing number of case studies that point to the operation of paramilitary forces (both state and private) in these contexts and their impact on the human rights of local populations (Ruggie 2006; Lasslett 2012).

Finally, there is a great need for independent research into the effectiveness of various international policing programs, the transnational policing enterprise more generally and the impact of global corporations and the profit motive as a driver for innovations in policing. Much of the popular discussion about transnational policing is distorted by politics and the vested interests of policing organisations and global corporations. Research would assist in countering these distorted dialogues.

Contemporary globalisation and dominant policy responses to illicit markets, in goods, people, money and images along with counter-terrorist activities mean that transnational policing is going to continue to grow in significance. Global policing is an on-the-ground reality which has overtaken many of the policy frameworks designed to balance law enforcement imperatives with human rights concerns.

Discussion questions

1   What are the central features of neo-liberalism?
2   What impact has neo-liberalism had on crime and policing?
3   How are policing strategies exported between countries?
4   What factors precipitated the development of transnational policing?
5   Describe two key issues in transnational policing and the policy challenges they pose.

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Websites

Australian Federal Police: http://www.afp.gov.au/international.html.
EUROPOL: http://www.europol.europa.eu/.
INTERPOL: http://www.interpol.int/.
UN Convention against Transnational Organized Crime: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf.

Note

1   Colonial policing refers to policing styles and strategies exported from European imperial states, principally Great Britain, from the age of eighteenth-century colonial expansion. Colonial policing was characterised by the imposition of European norms and practices, and the destruction of indigenous cultures in many colonial possessions, including those in Australia, Africa, Asia and the Americas (Agozino 2004). Imperial policing, by contrast, refers to a divergent form of colonial policing that was advocated in the early twentieth century as the economic pressures of maintaining vast overseas territories began to exceed the capacity of imperial states. Advocates of imperial policing suggested using military forces (principally air power but also chemical weapons) as a more economic tool of social order than the deployment of expensive police forces (Buckley and Holmes 2001). Thankfully, with the outbreak of the Second World War and the emergence of more formidable challenges for the various imperial armed forces, this particularly ruthless aspect of imperial hegemony seems to have been consigned to the dustbin of history.

References

Aas, K. (2007) *Globalisation and Crime*, London: Sage Publications.
Abrams, E. (2011) 'Should the US Cut Off Aid to the Egyptian Military?' *The Atlantic*, available at: http://www.theatlantic.com/international/archive/2011/12/should-the-us-cut-off-aid-to-the-egyptian-military/250726/ (accessed 31 December 2011).
Agozino, B. (2004) 'Imperialism, Crime and Criminology: Towards the Decolonisation of Criminology', *Crime, Law and Social Change*, 41: 343–358.
Ahmed, W. (2011) 'Neoliberalism and Contested Policies of the Power Industry in India', *The Industrial Geographer*, 5(1): 44–57.
Al-Jazeera (2012) 'The Cost of the "War on Drugs"', available at: http://www.aljazeera.com/programmes/countingthecost/2012/04/20124158040361814.html.
Amoore, L. and M. De Goede (2008) 'Introduction: Governing by Risk in the War on Terror,' in L. Amoore and M. De Goede (eds) *Risk and the War on Terror*, London: Routledge, pp. 5–19.
Anderson, M. (1989) *Policing the World*, Oxford: Oxford University Press.
Andreas, P. and Nadelmann, E. (2006) *Policing the Globe: Criminalization and Crime Control in International Relations*, Oxford: Oxford University Press.
Andreas, P. and Price, R. (2001) 'From War Fighting to Crime Fighting: Transforming the American National Security State', *The International Studies Review*, 3(3): 31–52.
Armstrong, D. (2002) 'Dick Cheney's Song of America: Drafting a Plan for Global Dominance', *Harper's Magazine*, October: 76–83.
Bailey, W. (1996) 'Less-than-lethal Weapons and Police-Citizen Killings in US Urban Areas', *Crime and Delinquency*, 42(4): 535–552.
Barnett, M. and Coleman, L. (2005) 'Designing Police: Interpol and the Study of Change in International Organisations', *International Studies Quarterly*, 49: 593–619.
Barratt, M. (2012) 'Silk Road: Ebay for Drugs', *Addiction*, 107: 683–684.
Bayley, D. (2005) 'Police Reform as Foreign Policy', *Australian and New Zealand Journal of Criminology*, 38(2): 206–215.
Beare, M. (ed.) (2003) 'Introduction', in M. Beare (ed.) *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption*. Toronto: University of Toronto Press.
Bennis, P. (2011) 'Tunisia's Spark and Egypt's Flame: The Middle East Is Rising', *Foreign Policy in Focus*, available at: http://www.fpif.org/articles/tunisias_spark_egypts_flame_the_middle_east_is_rising (accessed 20 November 2011).

Bigo, D. (2002) 'Security and Immigration: Towards a Critique of the Governmentality of Unease', *Alternatives: Global, Local, Political*, 27: 63.

Bobo, L. and Thompson, V. (2006) 'Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System', *Social Research*, 73(2): 445–472.

Bowling, B. (2009) 'Transnational Policing: The Globalisation Thesis, a Typology and a Research Agenda', *Policing*, 3(2): 149–160.

Bowling, B. and Sheptycki, J. (2012) *Global Policing*, London: Sage.

Brodeur, J. P. (2000) 'Transnational Policing and Human Rights: A Case Study', in J. Sheptycki (ed.) *Issues in Transnational Policing*, New York: Routledge.

Brodeur, J. P. (2007) 'High and Low Policing in Post 9/11 Times', *Policing*, 1(1): 25–37.

Brogden, M. (2002) 'Implanting Community Policing in South Africa: A Failure of History, of Context, and of Theory', *Liverpool Law Review*, 24(3): 157–179.

Brogden, M. (2004) 'Community Policing: A Panacea from the West', *African Affairs*, 103(413): 635–649.

Brogden, M. (2005) '"Horses for Courses" and "Thin Blue Lines": Community Policing in Transitional Society', *Policing Quarterly*, 8(1): 64–98.

Buchanan, J. and Young, L. (2000) 'The War on Drugs: A War on Drug Users', *Education, Prevention Policy*, 7(4): 409–422.

Buckley, J. and Holmes, R. (2001) 'Imperial Policing', in R. Holmes (ed.) *Oxford Companion to Military History*, Oxford: Oxford University Press.

Bush, G. (2002) *The National Security Strategy of the United States of America*, Washington, DC: The White House.

Chomsky, N. (2002) *Pirates and Emperors, Old and New: International Terrorism in the Real World*, London: Pluto Press.

Christie, N. (2000) *Crime Control as Industry: Towards Gulags, Western Style*, 3rd edn, London: Routledge.

Cole, D. (2003) *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terror*, New York: The New Press.

Cole, D. (2006a) 'Are We Safer?' *The New York Review of Books*, 15, 17: LIII (4).

Cole, D. (2006b) 'Are We Safer?: An Epilogue', *The New York Review of Books*, 15, 17: LIII (5).

Cole, D. and Dempsey, J. (2006) *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, New York: New Press.

Cunneen, C. (2001) *Conflict, Politics and Crime: Aboriginal Communities and the Police*, New South Wales: Allen and Unwin.

Davis, A. (2003) *Are Prisons Obsolete?* New York: Seven Stories Press.

Davis, M. (1990) *City of Quartz: Excavating the Future in Los Angeles*, New York: Verso.

Den Boer, M. (2010) 'Towards an Accountability Regime for an Emerging European Policing Governance', *Policing and Society*, 15(3): 275–289.

Dixon, B. (2004) 'In Search of Interactive Globalisation: Critical Criminology in South Africa's Transition', *Crime, Law and Social Change*, 41(4): 359–384.

Drezner, D. (2001) 'Globalisation and Policy Convergence', *International Studies Review*, 3(1): 53–78.

Easterly, W. (2003) 'Can Foreign Aid Buy Growth?', *Journal of Economic Perspectives*, 17(3): 23–48.

Ellison, G. and O'Reilly, C. (2008) 'From Empire to Iraq and the "War on Terror": The Transplantation and Commodification of the (Northern) Irish Policing Experience', *Police Quarterly*, 11(4): 395–426.

Ericson, R. and Doyle, A. (1999) 'Globalisation and the Policing of Protest: The Case of APEC 1997', *The British Journal of Sociology*, 50(4): 589–608.

FBI website. (2011) *Facts and Figures 2010–2011: International Offices/FBI Budget*, available at: http://www.fbi.gov/stats-services/publications/facts-and-figures-2010-2011/international-offices-fbi-budget.

FBI website (2012) available at: http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/property-crime/mvtheftmain.

Fenton, N. (2004) *Understanding the UN Security Council*, Aldershot: Ashgate.

Fernandez, L. (2008) 'Policing Dissent: Social Control and the Anti-Globalisation Movement', in *Critical Issues in Crime and Society 2*, New Brunswick, NJ: Rutgers University Press, pp. 70–73.

Fernandez, L. (2009) 'Toward an Ethnography of Protest: Policing Dissent: Social Control and Anti-Globalisation', *Journal of Progressive Human Services*, 20(2): 189–193.

Foster, J. (2002) 'The Rediscovery of Imperialism', *Monthly Review*, 54(6): 1–10.

Fraser, N. (2010) 'Injustice at Intersecting Scales: On "Social Exclusion" and the "Global Poor"', *The European Journal of Social Theory*, 13: 363.

Friedman, M. (1962) *Capitalism and Freedom*, Chicago: University of Chicago Press.

Friedman, M. and Schwartz, A. J. (1963) *A Monetary History of the United States, 1867–1960*, Princeton, NJ: Princeton University Press.

Goldsmith, A. and Harris, V. (2012) 'Trust, Trustworthiness and Trust-Building in International Policing Missions', *Australian and New Zealand Journal of Criminology*, 45(2): 231–254.

Goldsmith, A. and Lewis, C. (eds) (2000) 'Introduction', in A. Goldsmith and C. Lewis (eds) *Civilian Oversight of Policing: Governance, Democracy and Human Rights*, Portland, OR: Hart Publishing, pp. 1–18.

Goldsmith, A., Llorente, M. and Rivas, A. (2007) 'Making Sense of Transnational Police-Building: Foreign Assistance in Colombian Policing', in A. Goldsmith and J. Sheptycki (eds) *Crafting Transnational Policing*, Oxford: Hart Publishing.

Gordon, M. (2012) 'Indonesians Innocent of People Smuggling', *The Age*, 2 August.

Gowan, R. (2011) 'From Rapid Reaction to Delayed Inaction? Congo, the UN and the EU', *International Peacekeeping*, 18(5): 593–611.

Green, P. and Ward, T. (2004) 'Organised Crime and the "Deep State"', in P. Green and T. Ward, *State Crime: Governments, Violence and Corruption*, New York: Pluto Press, pp. 86–104.

Greenberg, M. (2012) 'What Future for Occupy Wall Street?', *New York Review of Books*, available at: http://www.nybooks.com/articles/archives/2012/feb/09/what-future-occupy-wall-street/?pagination=false.

Greener, B. (2009) *The New International Policing*, Basingstoke: Palgrave Macmillan.

Grewcock, M. (2009) *Border Crimes: Australia's War on Illicit Migrants*, Sydney: Institute of Criminology Press.

Head, M. (2006) 'Military Call-Out Powers Expanded: Disturbing Questions Posed', *Alternative Law Journal*, 31: 83–87.

Hillyard, P. and Percy-Smith, J. (1988) *The Coercive State: The Decline of Democracy in Britain*, London: Collins.

Hocking, J. (2003) 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control', *Australian Journal of Politics and History*, 49(3): 355–371.

Holzinger, K. and Knill, C. (2005) 'Causes and Conditions of Cross-National Policy Convergence', *Journal of European Public Policy*, 12(5): 775–796.

Jefferson, T. (1990) *The Case Against Paramilitary Policing*, Philadelphia, PA: Open University Press.

Jones, T. and Newburn, T. (2002) 'Policy Convergence and Crime Control in the USA and the UK: Streams of Influence and Levels of Impact', *Criminology and Criminal Justice*, 2(2): 173–203.

Klein, N. (1999) *No Logo*, New York: Picador.

Klein, N. (2002) 'IMF Go to Hell,' Klein website, available at: http://www.naomiklein.org/articles/2002/03/imf-go-hell (accessed 4 September 2012).

Knaus, C. (2012) 'Cloud on AFP Conduct Abroad', *The Age*, available at: http://www.theage.com.au/national/cloud-on-afp-conduct-abroad-20120321-1vija.html (accessed 21 March 2012).

Koenig-Archibugi, M. (2003) 'The Challenge to Governance', in A. Koenig-Archibugi and D. Held (eds) *Taming Globalisation: Frontiers of Governance*, Cambridge: Polity Press.

Kraska, P. and Kappeler, V. (1997) 'Militarizing American Police: The Rise and Normalization of Paramilitary Units', *Social Problems*, 44(1): 1–18.

Lasslett, K. (2012) 'State Crime by Proxy: Australia and the Bougainville Conflict', *British Journal of Criminology*, 52(4): 705–723.

Last, D. (2003) 'From Peacekeeping to Peace Building', *The Online Journal of Peace and Conflict Resolution*, 5(1): 1–8.

Last, D. (2006) 'Walking the Line: Peacekeeping and Imperial Policing', Seminar Paper Prepared for 'What Is a Peace Operation?', hosted by Reseau francophone de recherche sur les opérations de paix and the Pearson Peacekeeping Centre, UNESCO, Montreal, Canada.

Lee, M. and South, N. (2003) 'Drugs Policing', in T. Newburn (ed.) *Handbook of Policing*, Cullompton: Willan.

Loader, I. and Walker, N. (2007) 'Locating the Public Interest in Transnational Policing', in A. Goldsmith and J. Sheptycki (eds) *Crafting Transnational Policing: Police Capacity-Building and Global Policing Reform*, Oxford: Hart Publishing, pp. 111–145.

Lum, C., Haberfield, M., Fachner, G. and Lieberman, C. (2009) 'Police Activities to Counter Terrorism: What We Know and What We Need to Know', in D. Weisburd, T. Feucht, I. Hakimi, L. Mock and S. Perry (eds) *To Protect and to Serve: Police and Policing in an Age of Terrorism and Beyond*, New York: Springer.

Lynch, M. (2012) 'Theorizing the Role of the "War on Drugs" in US Punishment', *Theoretical Criminology*, 16(2): 175–199.

Mackenzie, S. (2006) 'Systematic Crimes of the Powerful: Criminal Aspects of the Global Economy', *Social Justice*, 33(1): 162–182.

Manning, P. K. and Redlinger, L. J. (1977) 'Invitational Edges', in C. B. Klockars (ed.) *Thinking about Police*, New York: McGraw-Hill.

Manzetti, L. (2010) *Neoliberalism, Accountability, and Reform Failures in Emerging Markets*, University Park, PA: Pennsylvania State University Press.

Marenin, O. (1998) 'The Goal of Democracy in International Police Assistance Programs', *Policing*, 21(1): 159–177.

Marenin, O. (2005) 'Building a Global Police Studies Community', *Police Quarterly*, 8: 99–136.

Marx, G. (2003) 'Developments in Undercover Policing', in T. Blomberg and S. Cohen (eds) *Punishment and Social Control*, New York: Aldine de Gruyter, pp. 159–190.

Mason, G. (2012) '"I Am Tomorrow": Violence Against Indian Students in Australia and Political Denial', *Australian and New Zealand Journal of Criminology*, 45(1): 4–25.

Massari, M. (2003) 'Transnational Organized Crime Between Myth and Reality: The Social Construction of a Threat', in F. Allum and R. Siebert (eds), *Organized Crime and the Challenge to Democracy*, London: Routledge.

McCulloch, J. (2001) *Blue Army: Paramilitary Policing in Australia*, Carlton: Melbourne University Press.

McCulloch, J. (2004) 'National (In)Security Politics in Australia: Fear and the Federal Election', *Alternative Law Journal*, 29(2): 87–91.

McCulloch, J. (2005) '(In)security in the Age of Globalisation: Human Precariousness in the Move from Welfare to Warfare State', *Just Policy*, 37: 19–24.

McCulloch, J. (2007) 'Transnational Crime as Productive Fiction', *Social Justice*, 34(2): 19–32.

McCulloch, J. and Pickering, S. (2010) 'Counter-Terrorism: The Law and Policing of Pre-Emption', in A. Lynch, N. McGarrity and G. Williams (eds) *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11*, London: Routledge, pp. 13–29.

McCulloch, J. and Pickering, S. (2012) 'Introduction', in J. McCulloch and S. Pickering (eds) *Borders and Crime: Pre-crime, Mobility and Serious Harm in an Age of Globalisation*, Basingstoke: Palgrave Macmillan.

McCulloch, J. and Sentas, V. (2006) 'The Killing of Jean Charles De Menezes: Hyper-Militarism in the Neo-Liberal Free-Fire Zone', *Social Justice*, 33(4): 92–106.

McCulloch, J. and Tham, J. (2005) 'Secret State, Transparent State: The Australian Security Intelligence Organisation in the Age of Terror', *Australian and New Zealand Journal of Criminology*, 38(3): 400–415.

McSherry, B. (2004) 'Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Law', *UNSW Law Journal*, 27: 355–357.

Milanovic, B. (2012) 'Global Inequality Recalculated and Updated: The Effect of New PPP Estimates on Global Inequality and 2005 Estimates', *The Journal of Economic Inequality*, 10(1): 1–18.

Murray, J. (2005) 'Policing Terrorism: A Threat to Community Policing Or Just a Shift in Priorities?' *Police Practice and Research*, 6(4): 347–361.

Mustafa, A. (2011) 'Revolutionary Hope and Change Across the Arab World', *New Socialist*, available at: http://www.newsocialist.org/index.php?option=com_content andview=article andid=392: revolutionary-hope-and-change-across-the-arab-world-10-questions-with-gilbert-achcar andcatid=51: analysis andItemid=98 (accessed 23 April 2011).

Nadelmann, E. (1993) *Cops Across Borders: The Internationalization of US Criminal Law Enforcement*, University Park, PA: Pennsylvania State University Press.

Odello, M. (2010) 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers', *Journal of Conflict and Security Law*, 15(2): 347–391.

Ong, A. (2006) *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty*, Durham, NC: Duke University Press.

Ormsby, E. (2012) 'The Drug's in the Mail', *The Age*, 27 April.

Peet, R. (2003) *Unholy Trinity: The IMF, World Bank and WTO*, New York: Palgrave Macmillan.

Pickering, S. (2004) 'The Production of Sovereignty and the Rise of Transversal Policing: People Smuggling and Federal Policing', *Australian and New Zealand Journal of Criminology*, 37(1): 362–379.

Pickering, S. (2005) *Refugees and State Crime*, Sydney: The Federation Press.

Pickering, S. (2011) *Women, Borders, and Violence: Current Issues in Asylum, Forced Migration and Trafficking*, New York: Springer.

Pickering, S. and Weber, L. (2006) 'Borders, Mobility and Technologies of Control', in S. Pickering and L. Weber (eds) *Borders, Mobility and Technologies of Control*, Dordrecht: Springer.

Pickering, S., McCulloch, J. and Wright-Neville, D. (2008) *Counter-Terrorism Policing*, New York: Springer.

Provine, D. (2007) *Unequal Under Law: Race in the War on Drugs*, Chicago: University of Chicago Press.

Reiner, R. (2010) *The Politics of Police*, 4th edn, Oxford: Oxford University Press.

Rejali, D. (2007) *Torture and Democracy*, Princeton, NJ: Princeton University Press.

Rhodes, N. (1996) 'Cap-Stun Kickbacks: FBI's Top Expert Convicted of Felony, Took Money for Approving Pepper Spray', *Policing by Consent*, 10.

Rigakos, G. (2002) *The New Parapolice: Risks Markets and Commodified Social Control*, Toronto: University of Toronto Press.

Roach, K. (2010) 'The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations', in N. McGarrity, A. Lynch and G. Williams (eds) *Counter-terrorism and Beyond: The Culture of Law and Justice after 9/11*, New York: Routledge.

Roach, K. (2011) 'Secret Evidence and Its Alternatives', in A. Masferrer (ed.) *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism*, Berlin: Springer.

Rouse, S. and Acre, M. (2006) 'The Drug-Laden Balloon: U.S. Military Assistance and Coca Production in the Central Andes', *Social Science Quarterly*, 87(3): 540–557.

Ruggie, J. (2006) *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (U.N. Doc. E/CN.4/2006/97), Geneva: UN Human Rights Council.

Ruggiero, V. (2000) 'Transnational Crime: Official and Alternative Fears', *International Journal of the Sociology of the Law*, 28(3): 187–199.

Segrave, M. and Milivojevic, S. (2010) 'Auditing the Australian Response to Trafficking', *Current Issues in Criminal Justice*, 22(1): 63–80.

Segrave, M., Milivojevic, S. and Pickering, S. (2009) *Sex Trafficking: International Context and Response*, Cullompton: Willan Publishing.

Sentas, V. (2006) 'Counter Terrorism Policing: Investing the Racial State', *Australian Critical Race and Whiteness Studies Association*, e-journal, available at: http://acrawsa.org.au/files/ejournalfiles/86Vicki Sentas.pdf (accessed 31 August 2012).

Shearing, C. and Stenning, P. (1981) 'Modern Private Security: Its Growth and Implications', in M. Tonry and N. Morris (eds) *Crime and Justice: An Annual Review of Research*, Chicago: University of Chicago Press, pp. 193–245.

Sheptycki, J. (2000a) 'The Drug War: Learning from the Paradigm Example of Transnational Policing', in J. Sheptycki (ed.) *Issues in Transnational Policing*, London: Routledge.

Sheptycki, J. (2000b) 'Policing and the Transnational Order', in J. Sheptycki (ed.) *Issues in Transnational Policing*, London: Routledge.

Sheptycki, J. (2005) 'Policing Political Protest When Politics Goes Global: Comparing Public Order Policing in Canada and Bolivia', *Policing and Society*, 15: 3.

Sheptycki, J. (2007) 'The Constabulary Ethic and the Transnational Condition', in A. Goldsmith and J. Sheptycki (eds) *Crafting Transnational Policing: Police Capacity-Building and Global Policing Reform*, Oxford: Hart Publishing, pp. 31–71.

Spitzer, S. and Skull, A. (1977) 'Privatization and Capitalist Development: The Case of the Private Police', *Social Problems*, 25: 18–29.

Standing, G. (2011) *The Precariat: The New Dangerous Class*, London: Bloomsbury Academic.

Stern, V. (2006) *Creating Criminals: Prisons and People in a Market Society*, London: Zed Books.

True, J. (2012) *The Political Economy of Violence Against Women*, Oxford: Oxford University Press.

United Nations Office of Drugs and Crime (2005) *World Drug Report 2005*, Vienna: United Nations Office of Drugs and Crime.

Vakalis, D. and McCulloch, J. (2012) 'Something Old, Something New, Something Borrowed, Something Blue: Militarized Policing and Occupy Melbourne', *Overland*, available at: http://overland.org.au/previous-issues/issue-occupy/feature-jude-mcculloch-and-david-vakalis/, (accessed 30 January 2012).

Van der Spuy, E. (2000) 'Foreign Donor Assistance And Policing Reform in South Africa', *Policing and Society*, 10(4): 343–366.

Van der Spuy, E. (2006) 'Reading South African Police Reform Through the Lens of Policy Convergence', paper delivered at regional workshop 'South African cities for Research Programme: governing cities in Africa: law, local institutions and urban identified since 1945', pp. 16–17.

Van Solinge, T.B. (2010) 'Deforestation Crimes and Conflicts in the Amazon', *Critical Criminology*, 18: 263–277.

Walker, N. (2000) 'Transnational Contexts', in F. Leishman *et al.* (eds) *Core Issues in Policing*, Harlow: Pearson Longman, pp. 83–104.

Weber, L. (2012) 'Policing a World in Motion', in J. McCulloch and S. Pickering (eds) *Borders and Crime: Pre-crime, Mobility and Serious Harm in an Age of Globalisation*, Basingstoke: Palgrave Macmillan.

Weber, M. (1948) *From Max Weber: Essays in Sociology*, London: Routledge & Kegan Paul.

White, R. (2011) *Transnational Environmental Crime: Toward an Eco-Global Criminology*, London: Routledge.

Whyte, D. (2009) *Crimes of the Powerful: A Reader*, Maidenhead: Open University Press.

Wilson, D. and McCulloch, J. (2012) '(Un)Controlled Operations: Undercover in the Security Control Society', in J. McCulloch and S. Pickering (eds) *Borders and Crime: Pre-crime, Mobility and Serious Harm in an Age of Globalisation*, Basingstoke: Palgrave Macmillan.

Winterdyk, J. and Sundberg, K. (eds) (2010) *Border Security in the Al-Qaeda Era*, Boca Raton, FL: CRC Press.

Wonders, N. (2007) 'Globalization, Border Reconstruction Projects, and Transnational Crime', *Social Justice* 34(2): 33–46.

Wood, J. and Kempa, M. (2005) 'Understanding Global Trends in Policing: Explanatory and Normative Dimensions', in J. Sheptycki and A. Wardak (eds) *Transnational and Comparative Criminology*, London: Glasshouse Press, pp. 287–316.

Woodiwiss, M. (2001) *Organized Crime and American Power: A History*, Toronto: University of Toronto Press.

Woodiwiss, M. and Bewley-Taylor, D. (2005) 'The Global Fix: The Construction of a Global Enforcement Regime', Transnational Institute/TNI Briefing Series.

Zedner, L. (2007) 'Pre-Crime and Post-Criminology?' *Theoretical Criminology*, 11(2): 261–281.

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Part III

The industries of crime and justice

Systems of law

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6

The politics of international criminal justice

David Armstrong and Florencia Montal

Introduction: law and power in global politics

The essential context within which international criminal justice has evolved is well stated by Geoffrey Robertson, QC (2002: xxx): 'The movement for global justice has been a struggle against sovereignty – the doctrine of non-intervention in the internal affairs of nation states asserted by all governments which have refused to subject the treatment they mete out to their citizens to any independent scrutiny.' However, where Robertson and others see deference to sovereignty by the UN and other international bodies as a 'systemic defect' (ibid.: xxxi) and are equally scathing about the cynical and self-serving motives they see as underpinning states' insistence on sovereignty, a more nuanced perspective is possible. In this view, five key factors are at the heart of arguments, such as those advanced by Rabkin (2007: 98–132), that seek to refute the more idealistic assertions to the effect that amoral, power-seeking states are all that stand in the way of a global legal system capable of ensuring that those violating human rights can be brought to justice as effectively as criminals inside states.

The first factor is that the – admittedly vague and malleable – concept of sovereignty embodies principles such as self-determination and the equality of states under international law that in themselves have some clear moral content. If justice is, as Rawls suggests (1971: 3), 'the first virtue of social institutions', can states, taken together, be seen as constituting a particular form of society, as argued most notably by Bull (1977), but with the various norms that define justice – reciprocity, fairness, equality – applied to the society of states and deriving from their fundamental rights as *states*? Or is the natural law conception of a 'great community of mankind', with each individual *person* enjoying the same right to justice, the only valid basis for a theory of *international* justice? Or, as some writers are increasingly arguing, if states are members of a society which, in the final analysis, grants them membership as sovereign equals, does such membership entail rules, and can such rules include the 'responsibility to protect' their own citizens, and if they seriously violate that requirement does the society of states have the right to intervene (Armstrong *et al.* 2012: 144–146)?

Second, if a criminal justice system is built on a foundation of the underlying values of a particular society, are there, in reality, *universal* values or are all values culturally specific? Radically opposing attitudes to abortion, capital punishment, homosexuality, adultery and women's rights in different countries are just a few of the areas that suggest the latter. Furthermore, given the dominance of Western states over several centuries, is the normative underpinning of

international society, including the more interventionist tendencies since the end of the Cold War, essentially a reflection of Western values – and power – rather than the outcome of what any reasonable group of people would arrive at through deliberation, as natural law's advocates have long asserted? Does the fact that the individuals targeted by international criminal legal proceedings are overwhelmingly African mean that what is really taking place is merely another form of neo-imperialism? Some of these issues were very apparent in the 1993 UN Human Rights Conference, when a number of Asian states, led by China, initially opposed any reference to 'universal' rights.

Third, it might not always be the case that criminal justice should prevail over other objectives. South Africa, after the fall of apartheid, opted for 'truth and reconciliation' rather than putting on trial white leaders and soldiers who were undoubtedly guilty of major crimes. Similarly, several leaders of the Sinn Fein Party in Northern Ireland have been accused of involvement in the murder of innocent people but to put them on trial there would almost certainly endanger the peace process. To take a more recent case, in 2009, the International Criminal Court (ICC) issued its first ever arrest warrant against a sitting head of state, Sudan's Omar al-Bashir for war crimes and crimes against humanity. However, this merely had the effect of causing al-Bashir to expel various aid agencies that had been a significant source of assistance in the desperate situation there, which he accused of being involved in conspiracies against him. Most other states in the region condemned the warrant and several permitted al-Bashir to visit their countries. Was the ICC, which lacked the means of implementing its warrant, merely indulging in gesture politics which, in the event, did more harm than good? More generally, in the frequently complex and volatile arena of real-world politics, should pragmatic considerations normally outweigh legal ones?

Fourth, the issue of precise responsibility for a crime is inevitably complicated when the alleged criminal was acting in the name of a state. International law traditionally held *states* rather than *individuals* accountable for offences. Indeed, in a strictly formal sense individuals had no status in international law. One illustration of this is that, since ancient times, aliens – foreigners living within a particular country – had certain immunities, for example, from military service. But even here, strictly speaking, it was not the aliens as individual human beings who were being given the rights since they were not allowed to sue governments who violated this rule but the legal fiction was created that a state could be injured in the person of one of its nationals, so as an injured *state* it could demand compensation from the offending state that had violated the law relating to aliens. The Nuremberg trials had to confront a far more serious aspect of this traditional position when they put German leaders on trial for war crimes. Given that innocent people are invariably killed and injured in wars without state leaders incurring legal penalties, what distinguished this conflict from its predecessors? The chief prosecutor at Nuremberg, Robert Jackson, offered several arguments in support of what he clearly appreciated was a highly significant shift from traditional international law relating to war, including a classical distinction between just and unjust wars (Teitel 2011: 76). The victorious powers were, of course, in a position to enforce their will in the context of a widespread horror at the evils committed by the Nazis but it was not until 2010 that the state members of the International Criminal Court – after years of fruitless debate since Nuremberg – were able to reach agreement on what constituted the crime of aggression: what the precise legal principles were that might enable individuals to be brought to court.

Finally, a system of international criminal justice as effective as the most developed domestic systems would cost many billions of dollars to implement. To take just one example: the International Criminal Tribunal for Rwanda has so far indicted around 90 individuals for war crimes, genocide or crimes against humanity. In the 18 years of its existence, some 30 individuals

have been convicted. However tens of thousands committed crimes during this period but the costs of bringing all of them to trial within a reasonable period and in accordance with the best legal standards and then imprisoning all those found guilty would be far greater than the international community would ever accept (Wippman 2006: 861–881). Similarly, the International Criminal Tribunal for the former Yugoslavia (ICTY) found in the 1990s that even the cost of translating all relevant documents into all Yugoslav languages as well as those of the judges was beyond its available resources, while the International Criminal Court had spent $1 billion by the time it delivered its first judgment against the Congolese militia leader, Thomas Lubanga. At a time of general economic pressure, when the costs of domestic justice systems are increasingly coming into question in a number of countries, it is hard to envisage an international equivalent obtaining sufficient funding to fulfil its responsibilities.

Some of these issues were apparent in the first major attempt to apply international criminal justice: the Nuremberg trials. Both the recent experience of Allied casualties during the war and the revelations of the extent of the horrors perpetrated by the Nazis combined to brush aside any possible objections to the trials but the passage of time enabled more considered discussion to take place. One interesting contribution in a debate in the British House of Lords in 1949 was made by Lord Hankey, a former civil servant and government minister. He began by criticizing the Allied statements in 1943 that insisted on unconditional surrender and stated that the Nazi leaders would face criminal trials. This, he argued, merely strengthened the German determination to fight on and, by extending the war, enabled the Soviet Union to expand its power in Europe. The trials he saw as simply an example of 'victors' justice', and he was particularly enraged by the presence as judges of citizens of the Soviet Union – 'a country which before, during and since the trials has perpetrated half the political crimes in the calendar' (Hankey, HL Debates, 5 May 1949). Other objections against the Nuremberg trials and the later trials of accused German war criminals concerned the reliability of evidence and the fact that the allies were, in effect, applying law retroactively – it being a fundamental principle of the rule of law that a new law cannot apply to acts committed *before* its promulgation. At Nuremburg, the Allies effectively created the law and then applied it to acts committed in the previous six years. Hankey and others argued that it was wrong to prosecute officers who had simply been responsible for military planning, and it was also wrong not to accept the plea from junior officers that they were acting under orders when they committed atrocities, for example, a young sub-lieutenant on a German submarine was executed for obeying his commander's orders to fire at seamen clinging to the wreckage of a merchant ship – he received the order and had little time to consider or discuss whether what he was asked to do was illegal. In any case, if ordinary soldiers were able to dispute orders from superiors, normal conduct of warfare would become impossible. Was the submarine incident any different from a case in Burma where a British patrol had captured 20 Japanese soldiers and because they could neither march them with the patrol nor abandon them in the jungle, they had taken the decision to kill them? Was the use of the atom bomb against Japan not a war crime?

Yet, despite all such reservations about the applicability of criminal justice to the international arena, the post-Cold War era has witnessed a virtual explosion of interest in this subject, alongside the creation of numerous *ad hoc* and standing institutions designed to enforce criminal justice. In this chapter we consider in more depth the two most important – and in many ways most controversial – developments. The first is the concept of universal justice, which stems from the argument that all states have obligations, or at least the right, to bring to justice individuals who have committed certain types of crime deemed to be crimes against humanity: torture, genocide, etc. We will outline the main trends in this context and analyse the landmarks of recent universal justice history: the Pinochet and Yerodia cases. Universal jurisdiction has always

been a controversial concept and has been criticized by Henry Kissinger and others as a violation of state sovereignty. The second development is the creation and evolution of the International Criminal Court, which has slowly overcome earlier obstacles, notably fierce US opposition, to a point where it convicted its first accused war criminal, Thomas Lubanga Dyilo, one of the warlords in the Congolese Ituri conflict (1999–2007). In the Conclusion we will return to the five controversies outlined above.

Universal jurisdiction

The impact of the end of the Cold War on the enforcement of human rights, whether judicially through the creation of *ad hoc* tribunals or forcefully through humanitarian intervention, has been widely analysed (Wheeler 2000; Foot *et al.* 2003; Forsythe 2006; Cassese 2008b). Regardless of the political factors behind this development and its various rights and wrongs, it is indisputable that concerns with ending impunity and achieving accountability were now increasingly prominent. However, it was evident that even if nations had a common goal of ending impunity for massive atrocities, there were substantial differences over precisely how to achieve that goal. Some states decided that they could take matters in their own hands, and armed with the universality principle, they decided to prosecute individuals in their domestic courts for atrocity crimes.

The more controversial the matter, the harder it is to arrive to an unequivocal definition in international law. That is the case of 'universal jurisdiction'. While its conceptual history may be traced back to earlier notions of a 'great community of mankind' – that is to say, a society whose constituents are people rather than states – which should supposedly observe fundamental natural laws, that is of little help in the quest to elevate it to a more formal legal standing.

The nature and sources of jurisdiction

Sovereignty entails an authority for the state to, among other things, regulate the conduct of persons (O'Keefe 2004: 736), hence, to exercise criminal jurisdiction. Traditionally, states are not able to exercise jurisdiction over any act committed by any person anywhere in the world at any given time. There are multiple 'heads' or bases for jurisdiction recognized by international law whose function is to trace a clear link between the alleged offence and the state exercising jurisdiction.

The least controversial source of jurisdiction is the territoriality principle by which a state has a right to exercise jurisdiction over crimes committed in its territory. It is the most frequently invoked and its importance lies mainly in the commonplace fact that prosecutions tend to be easier to carry out in the place where the act was committed due to better access to evidence. If the alleged crime is initiated outside the territory but completed inside it, it is said that the state in question has 'objective' territorial jurisdiction. If it is the contrary – the crime originates inside the territory but is completed abroad – the state has jurisdiction under 'subjective' territoriality (Cryer *et al.* 2010: 46).[1]

Another widely recognized basis of jurisdiction is the nationality principle by which states have the right to exercise jurisdiction over crimes committed by their nationals in the territory of another state. It is rooted in the conception of a state as a people that it is bound by common laws, regardless of where each individual citizen is (Ryngaert 2008: 90). However, a further distinction is necessary: between active and passive personality. Generally, when referring to the nationality principle, one is talking about the authority of a state to regulate what their nationals do abroad and not what is done to them, that is, active personality. But if a state was

to exercise jurisdiction over a crime committed against one of its nationals by a citizen of another state while in a different territory, then that state would be claiming jurisdiction under the passive personality principle. It is important to differentiate between these two because, while 'a State has an unlimited right to base jurisdiction on the nationality of the accused' (Akehurst 1974: 156), to do it on the nationality of the victim would certainly generate controversy as the passive personality principle is, after universal jurisdiction, 'the most aggressive basis for extraterritorial jurisdiction' (Ryngaert 2008: 92).

In the practice of international affairs, political considerations frequently outweigh purely legal ones. In the not uncommon situation where an international crime has been committed in the territory of one state, by one of its nationals and against its own population, the hope for justice rests on that one sovereign state. States have often dragged their feet when it comes to prosecuting these offences. For this reason, in order to avoid impunity for international crimes when those states with direct jurisdiction appear unwilling or unable to exercise it, not only have the traditional principles been stretched by state practice but also further principles have been developed to allow states other than the territorial or national to prosecute these crimes. The principle of universality is the most ambitious and overarching jurisdictional principle, and as such, a highly controversial development in international law.

What is universal jurisdiction?

Up to this point in the argument, the authority of a state to exercise jurisdiction would require some form of link between the state and the act in question. The principles elaborated above articulate the different links that have traditionally been considered as sources of jurisdiction. Universal jurisdiction follows a different logic. It is not about the 'where' (territoriality) or the 'who' (nationality) but the 'what'. That is, it is the very nature of the offence which creates a right for any state to exercise jurisdiction over it, even when the offence has no connection with that state whatsoever. Universal jurisdiction is limitless in terms of which state can exercise it, but highly restricted in its subject matter. Only crimes under international law are offences open to prosecution under the universality principle, and these are, at least for now, very serious, though very few.

Given that it is the nature of certain crimes which justifies a universal right to exercise jurisdiction over them, it is necessary to take a closer look at the concept of international crimes. According to Judge Antonio Casesse:

> There exists a universal interest in repressing these crimes. Subject to certain conditions, under international law, their alleged authors may in principle be prosecuted and punished by any state, regardless of any territorial or nationality link with the perpetrator or the victim.
> (2008b:11–12)

This means that it is the international character of an offence that makes it automatically subject to the jurisdiction of any state. William Schabas distinguishes between those crimes that are international because they are criminalized in an international convention and international crimes that have an atrocious quality to them. In the first case, their designation as international crimes, and the obligations that result from this, are set out in treaties that apply, in principle, to the parties only (Schabas 2009: 269). The second kind is a more recent notion (though not at all a recent practice) and their codification is more a feature of the post-World War II period. They are termed 'international' because they are believed to 'shock the conscience of humanity' and the international community has a duty to provide mechanisms for the punishment of these crimes.

Extradite or prosecute

Universality is related to the principle of *aut dedere aut judicare.* This obligation *to extradite or to prosecute* is included in many treaties on international crimes and imposes an obligation on signatory states to prosecute an alleged offender who is present in their territory if they do not extradite him/her to a state with a stronger link to the crime. It is meant to serve as a guard against the shielding of suspects. As a clause codified in international conventions, it is technically only a duty of state parties to those conventions to prosecute alleged offenders when found in their territories, differing in this sense from universality which allows *any* state to exercise its jurisdiction.

Some authors argue that even when a treaty codifying these crimes includes the *aut dedere, aut judicare* clause it is not true universal jurisdiction because it would only apply to signatory states (Kreß 2006; Cryer *et al.* 2010), unless it could be proved that a specific convention reflects customary law. Others differentiate between treaty-based universality and universality based on customary law but affirm that 'universal jurisdiction is primarily based on customary international law' (Institute of International Law 2005: 2). It is clear that an instrument of conventional law containing an *extradite or prosecute* clause is not a prerequisite to establish a universal right to jurisdiction since genocide, crimes against humanity and war crimes in general are not codified in a treaty including an *aut dedere, aut judicare* clause, but there is little doubt that for those crimes universal jurisdiction can be exercised.

This also brings to play the distinction between two notions of universality: conditional universality and universality *in absentia.* In the former case, it is a condition for the exercise of jurisdiction that the accused is in the territory of the exercising state. The second notion, much broader, does not require the accused to be present. However, it is an important fact that most countries do not allow trials *in absentia*; therefore, a case against an individual can be initiated when he/she is not in the territory but for the trial stage to take place, the accused has to appear before the judge (Cassese 2008a: 338).

Universal jurisdiction and immunities

Different terminology has been used to refer to specific offences: core international crimes, atrocity crimes, crimes that shock the conscience of humanity, crimes against the peace and security of nations, serious violations of humanitarian law, among others. The acts these terms incorporate are genocide, crimes against humanity, aggression, war crimes and torture. Because of their scale and organizational features, they are considered crimes of state. They usually involve state actors turning the machinery of the state against their own or foreign populations. Since under international criminal law what is adjudicated is individual responsibility, universal jurisdiction in practice means that state officials could be prosecuted by foreign courts for international crimes. This brings into consideration the issue of immunities: the most hotly debated issue relating to universal jurisdiction, rather than the broader questions surrounding the actual lawfulness of universality under customary international law.

In early 1996, a Spanish lawyer filed a complaint against the former Chilean dictator, General Augusto Pinochet for crimes against humanity. The law which Spanish prosecutors and magistrates were enacting did not require any jurisdictional link, not even passive nationality, in the case of genocide, crimes against humanity and other crimes included in international treaties. This was the first case based on universal jurisdiction which was not about crimes committed in one of the situations under consideration by any of the *ad hoc* tribunals.

An arrest warrant was eventually issued in March 1998 against Pinochet on counts of torture, disappearance and hostage taking. When Pinochet visited the United Kingdom for medical reasons and the Spanish judge notified the UK police of the arrest warrant, a British magistrate found it to be proper to execute it. Pinochet was arrested, with extradition to follow. His lawyers invoked Pinochet's immunity as head of state when the crimes where committed and the first British court which heard this case decided that he had immunity for official functions and that the crimes that he had allegedly committed fell under that category. The matter reached the British highest legal authority, the House of Lords, which convened a panel of five Law Lords to decide whether Pinochet could be arrested and extradited or if he was protected from foreign jurisdiction over crimes committed at the time he had immunity as head of state. Even though the British government indicated that it preferred an outcome that would not upset relations with the Chilean government, which opposed the extradition to Spain, and the Chilean military, which had been an important buyer of British equipment, this was a decision to be made by the judicial branch of government, not the executive. The Lords appointed to this case had shown progressive attitudes towards these matters and the final decision was to strip Pinochet of his immunity because the acts he was accused of were too heinous to be acceptable from anyone, not even a head of state. The decision had to be revisited by a second panel which sustained the first ruling but took a more restrictive view on the scope of the crimes Pinochet could be extradited for. The majority stated that the British courts could exercise universal jurisdiction only for the crime of torture, and only for offences committed after 1988, the year the United Kingdom signed the Torture Convention, which included an obligation to prosecute or to extradite. But even so, Pinochet could still be extradited to Spain for acts of torture committed after that year. In the end, Pinochet never got to appear before Spanish judges and was allowed to go back to Chile but this was a decision made on grounds of poor health.

It could seem that the House of Lords' decision was futile but there are two reasons to think otherwise. First, it showed that the principle of immunity was not all-powerful. Second, and more importantly, the Spanish proceedings, together with the British decision in favour of extradition, worked as a catalyst for domestic trials (Pion-Berlin 2004; Roth-Arriaza 2009). Pinochet's trial at home should not be solely attributed to external factors because Chile was undergoing its own process of coming to terms with past atrocities. However, the shame that world opinion would have inflicted on the Chilean government if after allowing Pinochet to return home, he had been allowed to remain unaccountable, made the process advance at a faster and more determined pace (Pion-Berlin 2004). It was also portrayed as an argument against the view that universal jurisdiction would interfere with national transitions to democracy and reconciliation processes; 'far from destabilizing democracy, the main effect was to improve the chances for justice at home' (Roth-Arriaza 2009: 91).

The *Arrest Warrant* case, also known as *Yerodia* case, is the closest the International Court of Justice (ICJ) got to deciding on the matter of universal jurisdiction. In the end, it did not do so, therefore, a chance to clarify international customary law on this matter was missed, but in their separate and dissenting opinions several of the judges shed some light on the issue. Enacting its 1993/99 law of universal jurisdiction,[2] in April 2000, a Belgian investigating judge issued an arrest warrant *in absentia* against the Foreign Affairs Minister of the Democratic Republic of the Congo, Abdulaye Yerodia Ndombasi for his actions during the fight against rebellious groups which, allegedly, amounted to grave breaches of the Geneva Conventions and crimes against humanity. A few months later, the Congo filed an application before the ICJ to start a case against Belgium, arguing that by issuing the warrant it had violated international law in two different senses: by going against the principle that a state cannot exercise its authority on the sovereign territory of another, and by violating the diplomatic immunity of a Minister of State.

In the first sense, the Congo was arguing that, by exercising universal jurisdiction, Belgium was breaking a cornerstone of international society: the principle of sovereign equality. However, in its subsequent submissions the Congo focused only on the immunity issue. The majority of judges decided that Belgium had violated international law by issuing the arrest warrant because at that time Yerodia enjoyed immunity from criminal jurisdiction and the warrant of arrest issued against him hindered his capacity to perform his official duties. After examining both state practice and the law of international criminal tribunals, they did not find any sign under customary international law of an exception to the principle of immunity of ministers of state before national courts. Although Yerodia was no longer in office by the time of the ruling, the Court's judgment determined that the arrest warrant, issued when he did have immunity, was unlawful and therefore Belgium had to annul it. The final judgment, however, sought to make it clear that 'immunity' is not 'impunity'; immunity does not exonerate and could be overcome in particular circumstances, like a domestic trial.

Even though the majority of the judges addressed only the question of immunity, some of them did not miss the chance to comment on the first part of the original submission by Congo, that is, whether the exercise of universal jurisdiction by Belgium was lawful or not. Some even criticized the Court's decision to focus on the more technical and narrow question: by not saying whether Belgium had jurisdiction over these alleged crimes under universality, the decision ended up being an abstract consideration over immunity – as distinct from the more complex concept of universal jurisdiction.[3] They also considered that the Belgian exercise of universal jurisdiction was lawful because of the type of crimes that Yerodia had allegedly committed: war crimes and crimes against humanity are subject to universal jurisdiction under customary international law. Judge Van den Wyngaert went on to affirm that 'international law permits and even encourages States to assert this form of jurisdiction in order to ensure that suspects of war crimes and crimes against humanity do not find safe havens' and that 'the Congo did not come to the Court with clean hands' because, as the territorial and nationality state, it was the Congo that should have prosecuted those crimes in the first place, and this way, the judge was criticizing as a purely abstract statement the majority's view that immunity does not mean impunity (Dissenting Opinion). However, President Guillaume took a conservative stand by saying that the only offence subject to universal jurisdiction was piracy and that international conventions that provide for universal jurisdiction only allow it with the condition that the accused is present in the exercising state. Judge Guillaume therefore took a clear position against universal jurisdiction *in absentia*, a view shared by others, including Judge Rezek, who also called for restraint when domestic courts decide to exercise international criminal law, 'a restraint in line with the notion of a decentralized international community' (Separate Opinion).

Justifications for universal jurisdiction

When thinking about universal jurisdiction as a right or as an obligation, one has to bear in mind the difference between the legal and moral dimensions of this question. It would be hard to argue that, legally speaking, states have an obligation to exercise universal jurisdiction, which would imply that, every state that does not, is in violation of international law. However, when the same matter is approached from the moral side, it would make more sense to think that states do have an obligation, or, better put, a duty, to bring to justice the perpetrators of the most awful crimes. States, or even individuals, do not just do things because they can, they also have moral preferences.

The 'deterrence argument' provides another possible justification: a court might prosecute an individual for acts with no links or consequences for that state in order to send a message

that it is not possible to get away with these crimes. However, if states exercise universal jurisdiction to deter future crimes, it is worth asking if they are thinking about preventing crimes in their own states and by their own nationals or whether they are sending a message abroad to foreign political leaders. Looking at the states which have been more active in these matters, mostly Western and/or European nations with established democratic governments and good human right records, it is more reasonable to think that this is not a purely self-referential act.[4] Universal jurisdiction could then be justified on moral grounds by saying that these crimes are so heinous that humanity as a whole is affected by them, 'some acts are considered as so morally reprehensible that any State should be authorized, or even required, to prosecute them' (Ryngaert 2008: 107–108).

However, a shared goal of justice does not necessarily explain the practice of universal jurisdiction because if it did, then it would be a goal shared only by a small number of nations, which clearly it is not. That some states do not exercise universal jurisdiction does not mean they do not regard justice and the end of impunity as important, if not essential, values of the international community. It is more the case that they do not regard universal jurisdiction as the best tool for achieving them and they would prefer international criminal justice to be administered in different ways, either *ad hoc* by Security Council-created tribunals or by a permanent court like the ICC. When states decide to prosecute foreign nationals for international crimes committed elsewhere, it looks more like a projection of certain elements of their identities, such as an active civil society or an emphasis on the rule of law. They see themselves as direct agents of the international community promoting greater justice and respect for human rights through universal jurisdiction.

Critics of absolute universal jurisdiction are afraid of the consequences this could have for orderly international relations because it opens the door to prosecutions based solely on political motivations. Others would point to the Western character of those states exercising it and warn against the danger of universal jurisdiction being used as a tool of cultural imperialism. In 2008, the African Union expressed its concerns about what it considered an abusive use of the principle of universal jurisdiction and urged those states which exercise it to bear in mind the need not to upset friendly international relations. It also stressed the question of immunities, the idea that the best forum for criminal proceedings is the territorial or active nationality state and that universal jurisdiction should only be resorted to when the preferred forum is unwilling or unable to carry them out.[5]

In the end, the status of universal jurisdiction in international law is defined by the status of universal jurisdiction in the international community, something that is strongly influenced by political and moral understandings. It is not just an objective reading of what the law says; otherwise law would not change. Those understandings are shaped by a constant interplay of forces going in different directions and operating on different levels. At the individual level, there are particular judges or prosecutors with progressive views who are interested in what happens outside their territorial jurisdiction. At the national level, some states have more progressive laws than others which empower magistrates to act. The identity of a particular state, especially its national history, political structure and civil society, predisposes its attitude towards international law, sovereignty and external accountability. Attention must also be paid to the interactions between the judicial and executive branch of the state. In the case of Belgium, although magistrates showed little restraint in deciding whom to start investigations against, the Belgian government felt the need to step in when the political costs were perceived to be too high and the Belgian law was eventually toned down. Similarly, the British government was worried about its political and economic ties with Chile. Though not determinant, in the Pinochet case, the regional level had implications. The UK and Spain were part of the

European Convention on Extradition which made the execution of the arrest warrant a lot faster than it could have otherwise been. The depth of European integration could also account for a less rigid attitude towards sovereignty; therefore predisposing states to behave in a more cosmopolitan way.

Finally, various important factors are located at the global level. It is not coincidental that during the early post–Cold War period the entire regime of international criminal justice advanced more than in the previous four decades. More and more countries were passing laws providing for extraterritorial jurisdiction and a few were actually implementing them. However, the status of universal jurisdiction is not a fixed one and it has not evolved at a steady pace either. In the same way that the universality principle had its rise, it appeared to be in retreat a few years later with the Yerodia ruling and the restrictive changes in Belgian legislation and in Spanish jurisprudence. Additionally, a permanent criminal court working in full-mode added another dimension to international criminal justice which would also influence the evolution of universal jurisdiction. But the uniqueness of universal jurisdiction, as opposed to the circumscribed jurisdictions of the *ad hoc* tribunals for Rwanda and former Yugoslavia and, to a lesser extent, the ICC, is that it can reach anyone anywhere requiring only one willing judge.

The law and practice of the International Criminal Court

The International Criminal Court is the first permanent tribunal created to assign individual responsibility for international crimes. This institution was created by states but, contrary to universal jurisdiction, it operates independently from them and could, under certain conditions, even work against their will. The Court has been operational for little more than ten years now, but some interesting developments can be considered in terms of both the Court's own working and its relation to states.

The creation of the Court and its jurisdictional regime

The Statute of the International Criminal Court, also known as the Rome Statute, was adopted in 1998 after several days of debates and negotiations. It may be seen as a project that goes back to the aftermath of the Nuremberg and Tokyo Tribunals, or even earlier.[6] The International Law Commission (ILC) began to work on a draft statute for a permanent international criminal tribunal which would function as an organ of the UN soon after World War II but this enterprise got lost amid Cold War tensions. These also provided the setting for traditional legal positivism, with its emphasis on state sovereignty and state consent, to make a strong comeback and made an already difficult task practically impossible (Weller 2002: 695).

As soon as the Cold War strains started to lose strength, the attitude towards international criminal justice in general – and a permanent court in particular – changed. In 1989, the UN General Assembly requested the ILC to recommence their drafting activities after an initial push by Trinidad and Tobago. After early discussions about procedural matters, the first Gulf War helped to shift attention to the issue of accountability for humanitarian law violations. Decisive impetus was given to the ILC work by the creation of the *ad hoc* tribunals for Rwanda and former Yugoslavia but the option of continuing on an *ad hoc* basis was considered inefficient and too expensive, quite apart from potential problems with securing successive agreements among the permanent members of the Security Council.

Finally, it was decided to hold a conference in Rome to adopt the statute and the ILC draft was subjected to thorough revision. A major change was that the ILC's original vision of a court with primacy over national jurisdictions, like the *ad hoc* ones, gave way to the idea of a

complementary system. The Court's jurisdiction would only function as a last resort where states were unwilling or unable to exercise it themselves. At the conference there were two major forces, both of which pointed to new features of global politics. These were, first, the 'like-minded' group of more than 60 states from all regions of the world, among which Canada had a leading role, which pushed, among other things, for a court independent from the Security Council. Second, civil society groups, also present in large numbers, which worked closely with the like-minded caucus campaigned for a Court with the widest jurisdiction and the greatest independence possible (Schabas 2011: 19).

Gradually the different issues were settled by consensus. First were the crimes over which the court would exercise jurisdiction, with attention gradually shifting from treaty crimes, which are more transnational in their nature, to crimes that are international in the sense that they are so atrocious they affect humanity as a whole. A supranational layer of jurisdiction was justified for these crimes as they tend to be committed by state officials or locally powerful individuals, reducing the chances for local proceedings. The final agreement was on a list of four core crimes: genocide, war crimes, crimes against humanity and aggression. Although aggression was included, it was not defined due to a complete lack of consensus, so it could not be prosecuted by the Court until a review conference in 2010 adopted the necessary amendments.[7] The crimes were not only enumerated, they were also defined in detail as some states wanted to reduce as much as possible the margin for judicial discretion.

The question that was going to define how independent the Court would be was what precisely would trigger its jurisdiction. The United States and others preferred that the Court would only be able to act if the Security Council referred a situation to it (Scheffer 2011: 77). That would have amounted to a perpetuation of the *ad hoc* system, but with a tribunal already in place waiting for the green light to investigate. This was unacceptable for those states and NGOs that were supporting this project precisely to break away from the administration of international criminal justice being dominated by the permanent members. No one objected to the role of the Security Council,[8] but they also needed other ways to activate the Court's work. Following the different human rights regimes, another possible trigger was state party referrals,[9] that is, individual states asking the court to look for criminal responsibility in a particular situation. However, as the human rights regimes proved, states do not tend to accuse each other; even less do they subject their peers to the prospect of criminal proceedings. Therefore, what was needed was a Court with complete independence from the state system. With that aim, the Statute provided for the Prosecutor to launch an investigation on its own initiative, only requiring an internal filter, that is, the approval of three Judges composing a Pre-Trial Chamber.

The other major debate was about the jurisdictional requirements: what jurisdictional sources would be recognized for the tribunal? Much anxiety revolved around this question because if the Prosecutor were to be given the power to act on their own initiative, then it was vital to define conditions where they could open investigations and against whom charges could be brought. Germany wanted a court with universal jurisdiction, that is, able to act over those four crimes, no matter where they were committed and by whom. The idea was that, since customary law provided for universal jurisdiction, states acting collectively could delegate to a supranational body that same authority (Schabas 2011: 65). This limitless jurisdiction was not supported by most states; therefore, what happened was a sort of trade-off between jurisdictional scope and independence. Universal jurisdiction was only provided for in cases of UNSC referrals. If individual states were to refer a situation or if the Prosecutor was to launch an investigation on their own initiative (*propio motu*), those cases could only concern crimes committed on the territory of a state party or when the accused was a national of a state party.

The territorial principle opens up the possibility of proceedings against nationals of a non-party if they are suspected of having committed crimes on the territory of a party, even in absence of a UNSC referral. The territorial principle is the most invoked jurisdictional source by states; the question was whether states could delegate that authority to an international institution. It was argued that nearly all states were present at the Rome Conference so, what was decided there could be considered an act of the international community (Weller 2002: 703), therefore, territorial jurisdiction could be delegated to an international criminal court without giving way to claims of unlawful subjection of non-party states to laws to which they have not consented.[10] Nonetheless, the US delegation, given its global military presence, considered this arrangement unacceptable and, with six others,[11] decided to vote against the Statute. Moreover, once the Court was operational, Washington started to sign agreements with state parties that would shield American citizens from the ICC's jurisdiction for crimes committed on their territories.

Some 120 states voted in favour of establishing a permanent International Criminal Court with jurisdiction over the crimes of genocide, war crimes, crimes against humanity and aggression (the last requiring further negotiation). The Court would be based on the complementarity principle, that is, it should be a last resort for justice, when states were 'unwilling or unable' to take the initiative. Also, it would not have retroactive jurisdiction: it could only investigate crimes after the Statute's entry into force.[12] Moreover, the Court would exercise universal jurisdiction for situations referred to it by the Security Council and territorial and active nationality jurisdiction for state referrals and *propio motu* investigations by the Prosecutor, that is, that either the state where the crimes were committed or the state of nationality of the accused needed to be signatories of the Rome Statute. Among other decisions, the UNSC was granted the power to delay a particular case for 12 months. Being a sensitive issue in matters of international criminal justice, it was also established that immunities cannot be invoked by a State Party in order to refuse to surrender one of its own officials,[13] but they were recognized as in potential conflict with a State Party's mandate to execute the Court's warrants of arrest if the person in question was an official of a non-Party.[14] In order to foster the independence of the Court from States, the provisions about 'communications', enabled affected individuals or victims organizations to communicate alleged crimes to the Prosecutor.

Situations and jurisdictional triggers

The Statute entered into force on 1 July 2002, following its sixtieth ratification. Exactly 10 years later the Court had 121 state parties. The biggest regional groups are Africa, with 33 state parties and Latin America and the Caribbean, with 27. There are significant numbers from Western countries, Eastern Europe, and Central and East Asia. However, only Jordan has joined the ICC from the Middle East and the Maghreb countries.

Table 6.1 shows the practice of the ICC so far. It is considering seven situations involving some 29 individuals. All of them have been accepted under the territoriality principle and some involve individuals accused of crimes committed on the territory of a country they are not nationals of, as is the case of Jean-Pierre Bemba, a Congolese accused of crimes committed in Central African Republic, or the case against Callixte Mbarushimana, a Rwandan accused of actions committed in Congo. The Office of the Prosecutor considered the possibility of investigating crimes committed in Iraq, not a party to the Statute, by nationals of State Parties. However, Luis Moreno-Ocampo, then Chief Prosecutor, concluded the gravity threshold required by the Statute had not been satisfied.[15]

In terms of triggers, out of the eight situations, two have been referred to the Court by the UNSC: Darfur (Sudan) and Libya. While the UNSC resolution referring Darfur was approved

Table 6.1 ICC practice

Situation		Warrants of arrest (according to available information)					Suspects before the Judges		Verdicts	
(chronological order)	Trigger	Summons to appear	Issued	Rejected by the Judges	Executed	Pending	Charges confirmed	Charges dismissed	Convictions	Acquittals
Uganda	State referral	–	5	–	0	4*	–	–	–	–
Congo	State referral	–	7**	1	4	3	3	1	1	–
Darfur (Sudan)	UNSC referral	3	5**	–	0	5	2	1	–	–
Central African Republic	State referral	–	1	–	1	–	1	–	–	–
Kenya	Propio motu	6	–	–	–	–	4	2	–	–
Libya	UNSC referral	–	3	–	0	2*	–	–	–	–
Ivory Coast	Propio motu	–	1	–	1	–	–	–	–	–
Mali	State referral	–	–	–	–	–	–	–	–	–

Notes: As to 18 July 2012.

* One case terminated due to the death of the accused.

** More than one warrant against the same individual but on different counts.

with four abstentions, the Libyan situation in 2011 was referred with the positive vote of every Council member, including the United States. In relation to UNSC referrals, there are two things to consider. First, were the referrals a substitute for more forceful measures? In a situation like Rwanda where genocide was occurring and no intervention took place, the creation of the *ad hoc* tribunal could be seen as a façade for international unwillingness to compromise soldiers' lives. One view of the Darfur referral is as 'a low-cost way of responding to the crisis in Darfur without engaging in a more costly form of intervention' (Eckert 2009: 222). Second, in the situations where the UNSC did not act, if what was restraining the Court from getting involved in situations of grave humanitarian abuses was the lack of authority when crimes are being committed in a non-State Party by their own nationals, then a Security Council referral would fill that jurisdictional void. The most recent example is the civil conflict in Syria, where many were calling for a referral while the Council was unable to agree on any strong measures, whether juridical or otherwise. This shows how the Security Council role makes international criminal justice subject to political constraints and still lacking in practice the universality it theoretically supposes.

Four situations came to the Court from state referrals: Uganda, Congo, Central African Republic and Mali. Surprisingly, they all have been self-referrals, which means that a State Party asks the ICC to step in. This is an interesting development given that under the complementarity principle, the Court should only proceed when the jurisdictional states are unwilling or unable. Theoretically, the decision to refer confirms the will of the state in question to see justice done; therefore it becomes more an issue of ability. However, it has become prosecutorial policy to invite states involved in a situation that the Prosecutor is looking into to make a referral.[16] That way, they are given the chance to avoid the shame of appearing to be unwilling states, and this would work as a means to engage those states in the process and promote their cooperation. This was the case of the Congolese referral. As early as 2003, the Prosecutor announced that the situation in Ituri was his first priority and that he was conducting a preliminary examination (Congo is a State Party) and was ready to ask the Judges for authorization to proceed with a

formal investigation. A few months later the Congolese President ended up referring the situation to the ICC.[17] It is difficult to know if these four referrals would have happened even if the Prosecutor had not been already looking, but it is not necessarily a negative development if the result is that crimes are being investigated, no matter who kicked off the process, and it is preferable that states are not antagonized by the Court. Against this, some argue that self-referrals have been used by governments as weapons against internal rebel factions whose leaders would more likely be the object of investigations than government officials. For example, in Uganda, the Court initiated cases only against the leadership of the infamous Lord's Resistance Army (LRA). NGOs have vociferously claimed that crimes committed by government troops should be investigated as well.[18] The Prosecutor does not have any mandate to ignore crimes committed by the military, government officials or pro-governmental militias just because it was the state in question who referred the situation (Roach 2009: 16). But it proved tougher to execute arrest warrants when the individual in question was an ally of the government.

The other two situations, Kenya and the Ivory Coast, have been brought to the ICC by the Prosecutor acting under his *propio motu* powers. Kenya is a State Party and the Ivory Coast, although not a member, had lodged a declaration in 2003 accepting the Court's jurisdiction. Both situations deal with post-electoral violence and show the different fates of those who are on the losing side and those who still hold some political power. In the Ivory Coast, the Prosecutor decided to step in after the December 2010 crisis, when incumbent President Laurent Gbagbo refused to recognize the victory of opponent Allasane Outtara, sweeping the country into a violent struggle between pro-Gbagbo and opposition forces. With international support, the opposition prevailed and Gbagbo was sent to prison. A few months later, President Outtara sent a letter to the ICC expressing his desire to have the Court involved even though they are not a State Party, and Gbagbo became the first former Head of State to appear before ICC Judges.

In the case of Kenya, the Court became involved after the failure of the government to prosecute those responsible for the crimes committed during the wave of post-election violence between December 2007 and February 2008. The conflict began similarly to the Ivorian crisis. After pre-electoral polls indicated the opposition candidate, Raila Odinga, would likely prevail, the electoral commission announced incumbent Mwai Kibaki to be the winner. Odinga's supporters immediately denounced fraud, along with international observers who also questioned the integrity of the election, and rejected the results. In this case, an agreement between the two parties was reached and a coalition government was formed. As a result, members of both sides of the conflict ended up in power. Part of the agreement was to implement some form of accountability mechanism and Kenyan Judge Philip Waki was tasked with investigating the crimes. His work resulted in a report which, among other things, included a list of suspects known as the 'Waki list'. This report was supposed to be the foundation for domestic prosecutions, something that would have kept the ICC out of Kenya. At the beginning, the President said they were going to establish a special tribunal and, if that was not possible, they were going to refer the situation themselves. With little progress on this matter, after the ICC Prosecutor received the Waki list, he requested authorization to open an investigation. Six Kenyans were summoned to appear before the Judges, including cabinet members, the head of the Police and the richest man in Kenya and four of them ended up having the charges against them confirmed, two of whom were strong candidates for the next election. Logically, preparations for a full trial would now be underway. However, there are some indications that the suspects might not have their day in Court after all. So far they have showed up voluntarily but it has yet to be seen if they will appear again for the trial or if arrest warrants will be needed and whether they will ever be executed. Meanwhile there was still talk in Kenya about a local judicial mechanism being more appropriate, some parliamentarians even proposing that Kenya should

withdraw from the Rome Statute, and the President tried, unsuccessfully, to mobilize the African Union to ask the UNSC to defer the ICC cases.[19] The government, along with other African countries, is now exploring the possibility of expanding the jurisdiction of the East African Court to include genocide, war crimes and crimes against humanity with the idea of transferring the cases from the ICC to the region.

Up to its tenth anniversary only one verdict has been heard from the Judges, on April 2012, when they found Congolese warlord Thomas Lubanga guilty of enlisting child soldiers and sentenced him to 14 years in prison. These meagre numerical results have been pointed to whenever the Court's efficiency is discussed, especially in relation to budgetary issues (Mettraux 2009; Kaye 2011). If these numerical results are used to take issue with Prosecutor Luis Moreno-Ocampo's performance, it has to be acknowledged that, as the first man in a position that did not previously exist, he had the task of creating the Office of the Prosecutor from the ground up. His successor and former Deputy Prosecutor, Fatou Bensouda, is stepping in only a couple of months away from the verdict of the second trial in the Congo situation, with charges confirmed for two Sudanese and four Kenyans and with former Ivory Coast President Laurent Gbagbo already in custody. Other issues involving the Prosecutorial strategy and particular case decisions and the management style of the Head of the Office are a different story and have been raised regularly by commentators. That a second Prosecutor had just begun her mandate will give us the chance to weigh the impact of personal attributes in the functioning of this particular institution: the first global prosecutor.

The Rome Statute in action

To understand the Court's practice, it is important to be familiar with the statutory provisions but also to see how they work when the Statute is set in motion. As we have seen, there are three ways to trigger the Court's action. The Office of the Prosecutor is the first stage that is activated. When the Security Council or a State Party makes a referral, what they are doing is asking the Prosecutor to look into a particular situation where they consider there are reasonable grounds to believe international crimes have been committed, and determine which individuals are responsible and initiate the necessary process to bring them to justice. The first step for the Prosecution is to examine the information available in order to determine whether the situation in question meets the statutory criteria to necessitate an investigation by the Court. The questions the Prosecutor tries to answer during this phase are:[20]

1   Does the Court have jurisdiction?
2   Is the situation admissible according to the principle of complementarity? Does the situation meet the gravity threshold?
3   Is it in the interests of justice to proceed with an investigation?

This stage is referred to as preliminary examination and current situations under preliminary examination are Afghanistan, Colombia, Georgia, Guinea, Palestine and South Korea. Not all preliminary examinations proceed onto the next stage of investigation, as was the case with Iraq and Venezuela.

Given that state referrals and, specially, UNSC referrals are hard decisions to make, and require much political will, they happen when atrocities are committed on such a massive scale that it is almost impossible to deny material jurisdiction, that is, when at least one of the core crimes is being committed. If it is the Security Council referring, the issue of personal/territorial jurisdiction is not relevant because for that trigger the Court has jurisdiction over crimes involving

any UN member state. So far, all state referrals have been self-referrals. That means that a state is asking the Court to look at certain acts committed on their territory, and since only State Parties can refer situations, then the territoriality requirement needs no examination. For that reason, the preliminary examination phases of the situations referred so far by the UNSC or a member state have been very short. That has not been the case when the Office of the Prosecutor decided, on its own initiative, to look at a given situation. First, because they tend to be situations of a lesser scale, as in the case of the alleged murder of 20 civilians during the ousting of former President Manuel Zelaya in 2009. At the same time, the Court is involved in Uganda, where thousands have perished due to the actions of Joseph Kony and the LRA in Northern Uganda. One is not less unjust than the other but it makes a difference when discussing issues of material jurisdiction or even the gravity threshold in order to decide whether an investigation by an international tribunal with limited resources is warranted. Also, when there is no state or UNSC referral for situations which meet the jurisdictional criteria, the complementarity question about the existence of national proceedings takes considerably more time to answer. In the case of Colombia, where the jurisdictional requirements, including material, are clearly fulfilled, after observing that Colombia has sufficient institutional infrastructure to carry out proceedings and that they have been doing so against actors from different sides of the conflict, the Office of the Prosecutor, concluded that: 'There is no basis at this stage to conclude that the existing proceedings are not genuine.'[21] The other reason why preliminary examinations arising from *propio motu* powers take longer is that, if the Prosecutor concludes all jurisdictional requirements are met, that there are no genuine national proceedings, that the situation is grave enough and that it is in the interest of justice to proceed, that is, if the Prosecutor answers all the preliminary questions affirmatively, the Prosecutor still needs to request authorization from a Pre-Trial Chamber for the situation to advance to the next phase of investigation and the Prosecutor to be able to present cases.[22] When there is a UNSC or a state referral, such authorization is not required; the mandate follows from the referral itself.

Once the investigation begins, it is presumed that crimes under the Court's jurisdiction have been committed; therefore, the task of the Prosecution is then to identify the individuals responsible and make a case against them. It has been the policy of the Office of the Prosecutor to concentrate on those who bear the greatest responsibility for the worst crimes.[23] This responds to efficiency issues, since with limited resources and a global mandate, the Court cannot deal with every individual accused of criminal behaviour in situations of massive violence. But it also seeks to avoid appearing to collude in situations when those responsible hold power by prosecuting lower-scale perpetrators in order to show some level of accountability, while those who gave the orders from above stay free.

Once the Prosecution has identified a suspect, he or she needs to appear before the judges. For that to happen, the Prosecution applies for either a summons to appear, if it is believed that a suspect would appear voluntarily and would cooperate with the Court, or an arrest warrant. In both cases a chamber of three Judges considers cases brought against the suspects by the Prosecutor and issue the summons or the warrant or decline it. The ICC, in contrast to a domestic criminal tribunal, cannot count on a police force executing its decisions. Therefore, in order to bring a suspect under its custody, it relies on the police and armed forces of sovereign states. Suspects have been surrendered by their own governments, like Gbagbo by Ivory Coast or Lubanga by Congo and arrested by foreign governments when they are found on their territories, like Jean-Pierre Bemba or Callixte Mbarushimana, who were arrested by the Belgian and French authorities respectively.

State cooperation in the detention and extradition of suspects presents a problem in relation to diplomatic immunity and other obligations under international law because of the existence

of Article 98. This sets out two situations in which a member state is not under an obligation to extradite to the Court an individual of a non-party: if doing so would require that state to act counter to its obligations with respect to diplomatic immunity or other obligations it might have acquired by signing specific agreements. This latter caveat was exploited by the United States to try to exclude American citizens from the Court's jurisdiction since, under territoriality, they could be liable for crimes committed in the territory of any member state. Through a series of bilateral agreements with other states, the USA enabled them to resist requests from the Court by arguing that to execute that request was inconsistent with their treaty obligations. However, this practice was not sustained by the American government and did not have real consequences for the activities of the Court. Besides, those countries with the highest numbers of residents of American nationality did not cave in to signing these agreements, so even in potential terms the threat was not large (Schabas 2011: 29).

The provision about immunity has proven to be more significant since it generates the problem of 'travelling tyrants' who are able to move freely to sympathetic states (Ralph 2004: 242), a predicament that for the ICC has been embodied in the President of Sudan Omar Al Bashir, against whom the Judges issued two arrest warrants for crimes allegedly committed in the Darfur region. These warrants are still pending and Bashir has been able to go on official trips outside Sudan, including to some State Parties. African nations are the biggest regional group of member states and have been among the strongest advocates for a permanent criminal court. Nonetheless, after the indictment of an African Head of State, their attitude changed somewhat. Sudan gathered support for an African Union resolution calling for noncompliance with the arrest warrant,[24] and they also requested the UNSC to defer the work of the ICC in Darfur. Additionally, ICC parties like Djibouti, Chad, Kenya, and Malawi, failed to arrest Bashir when he visited their countries after the indictment. However, this behaviour by African states can be explained less by a technical assessment of the status of immunities in relation to international criminal law than by their apprehension about a particular exercise of international criminal justice which they perceive as excessively focused on African situations and involving a sitting Head of State. This concern underlies the whole regime of international criminal justice, not just the ICC, as seen in the African claim against the abuse of universal jurisdiction. Notwithstanding the African discomfort with the arrest warrant, it is true that Bashir has been able to travel a lot less than his non-indicted peers and even those State Parties which failed to arrest him now seem not-so-safe havens.[25] Although there is a mandate to arrest Bashir, or any other individual sought by the ICC, the Prosecutor has recognized that what is required from states is mainly to sever as much as possible contact with accused: 'Arresting a serving head of State is neither a police operation nor a military intervention; it requires a process of marginalization both at the national and international levels.'[26] Logic seems to point to the fate of former Ivorian President Gbagbo as the paradigm for bringing Heads of States to the ICC. Once they are out of power, perhaps in part as a product of that marginalization the Prosecutor is calling for, it would be for their successors to surrender them to the Court, unless they prove to be willing and able to prosecute them locally.

Conclusion

International criminal justice is best seen as a work in progress, whose evolution is not going to take the form of a steady advance along a straight road towards the ultimate goal of universal jurisdiction. Of the issues raised in our Introduction, three seem likely to be permanent features of the larger context within which the discourse about international criminal justice takes place. The first is state sovereignty. However much some writers and NGOs, accompanied by a few

politicians, fulminate against an international order founded on sovereignty and pronounce its imminent demise, there is no realistic progress of a new global legal foundation emerging in the foreseeable future. States will continue jealously to guard their sovereign rights and privileges. Yet, that is not the whole story because we need to take account of two interlinked phenomena: globalization and regionalism. The first involves the seemingly inexorable processes through which the world is becoming ever more inter-connected in many domains but especially economics, finance, culture and information, with each sphere of activity involving increasingly important transnational actors. The discourse about international criminal justice will inevitably be affected by these processes and by the non-state actors participating in them. Indeed, even the more restricted, inter-state concept of an international society should be seen not simply as a juridical structure but as a context within which a particular type of social interaction takes place. States need to be seen not merely as legal entities but as social actors, capable of knowing, learning, valuing and ordering and, moreover, of doing all these things through an intersubjective process of socialization that is characteristic of their unique 'society' (Armstrong 1998: 461–478). Regionalism may be seen as an aspect of the impact of globalization on how states inter-relate. While the European experience is unique for many reasons, the fact that it has involved former great powers accepting numerous constraints on their sovereignty will inevitably impact upon the conduct of international relations in the world as a whole. Both the Americas and Africa, for example, have human rights courts.

The two other permanent features of international relations that will influence the development of a global criminal justice system are power and limited resources. We have seen how even the leaders of very poor states have been able to use self-referrals to the ICC as a weapon against their internal enemies, even when both sides in an internal conflict may have been at fault. In other respects, the permanent five on the Security Council will retain their veto over juridical interventions in cases where they perceive a vital national interest and there is not the remotest prospect of any of their leaders appearing before an international tribunal, much as some fantasize about that. Yet, here too, while, ultimately, they all remain willing and able to employ their military might even in the face of widespread condemnation, they are also conscious that they are performing on a world stage whose underlying rules and values have radically changed from a century ago, when individual justice was considered a purely domestic matter of no concern for the international community, and when a state's international reputation was closely related to its prowess on the battlefield rather than its moral standing. However, while they retain control of the purse strings and while there are many other pressing calls upon their funds, the enormous costs of an effective international criminal justice system will not be met.

The issue of whether the international criminal justice system essentially reflects Western values and power is more complex. It probably does, although it may be added that these values are all ones that most states have signed up to in various documents like the civil and political rights covenant, the Geneva Conventions and numerous declarations and General Assembly resolutions as well as, frequently, in their own national constitutions. That, however, does not mean that all states comply with these commitments. As a general rule, compliance varies directly in accordance with the strength of a state's own democratic and legal procedures. It is true that there are cases – most notably the American prison camp on Guantánamo Bay – where clear violations of humanitarian values and rules take place despite the USA having one of the world's strongest democratic and legal systems, partly, and ironically, because of a legal loophole about the exact status of the camp and its prisoners. But, in general, Western states have taken the lead in this area precisely because of the strength of their politico-legal systems, although that does not mean that the international system could not reflect other values and approaches such

as those found in Chinese, Hindu or Muslim societies. The final issue raised in our Introduction was whether pragmatic considerations should override strictly legal ones in many cases. In this case the balance in the international system between the rights and powers of states and the workings of an international legal system should not be seen simply as a cynical reflection of power realities but as the most appropriate way of making some progress towards the goal of international justice in a world that is still characterized by many complexities including, sometimes, the need to deal with a particular situation through political rather legal means or informal rather than formal procedures.

Notwithstanding reservations of the kind we have discussed to this point, the international criminal justice system may still be seen as a glass half full rather than half empty. If we compare the current era with any previous one it is undeniable that the essential values underpinning the system are firmly entrenched in the ongoing international discourse and that they have become increasingly embodied in numerous rules, institutions and procedures in ways that at least bear comparison with the ways in which moral norms become translated into law in any society. It may well be that what we are talking about here is best characterized as 'soft law' – the term used when referring to the vast array of non-binding instruments and processes that have some legal consequence without actually constituting legally binding obligations. However, if we accept that even in the case of a municipal legal system what actually makes it work is the totality of rules, norms, orderly procedures, popular expectations and assumptions and routinized habits that developed over many years – and not just the actual laws and enforcement structures that back them up – the gap between an effective domestic legal system and its international equivalent may not be as wide as many believe.

Discussion questions

1   Do states have an obligation to bring to justice perpetrators of international crimes no matter where they committed their crimes and against whom? Is that a legal obligation or a moral imperative?
2   Does the risk of politically motivated prosecutions taint the whole idea of universal jurisdiction?
3   Would international criminal justice always be victors' justice?
4   How independent from states and politics is the ICC?
5   Does the fact that all the situations the ICC is investigating are located in Africa mean the ICC has an anti–African bias?

Websites

Coalition for the International Criminal Court: http://www.iccnow.org.

The Coalition for the International Criminal Court (CICC) includes 2500 civil society organizations in 150 different countries working in partnership to strengthen international cooperation with the ICC. In addition to information about the Coalition's actions and programmes, it gathers relevant documents from the ICC, states, NGOs and international organizations. It is a great tool to locate individual countries or regional groups' positions on issues relating to the Court.
International Criminal Court website: http://www.icc-cpi.int/.

All ICC public legal documents such as the Rome Statute, the judgments, motions and decisions are available online. Non-legal elements like press releases and speeches can be accessed as well. Additionally, all public hearings are broadcast live from the courtroom.
Universal Jurisdiction. Resources for Practitioners: http://www.universaljurisdiction.org/.

The site provides descriptions of the 'universal jurisdiction' laws in a range of countries and lists practitioners who have brought cases in those states. It also has links to basic background reports on a particular conflict or situation and information about particular cases.

Notes

 1 A current example of an act of this kind would be the launching of a rocket from the Gaza Strip into Israeli territory, here the Palestine National Authority would have subjective territorial jurisdiction whereas Israel could exercise jurisdiction under objective territoriality.

 2 The law provided for the prosecution of individuals accused of war crimes, crimes against humanity or genocide. At the beginning it worked as a complement of the ad hoc tribunals, but it also allowed for suits against a series of high-ranking international leaders such as Ariel Sharon, Yasser Arafat, Fidel Castro, George W. Bush, Colin Powell and Dick Cheney. The special concern of the United States, whose highest-ranking officials would have been incapable of attending NATO meetings in Brussels if arrest warrants were to be eventually issued, put the Belgian government under pressure and the law ended up being replaced in 2003 by a more restrictive one that only recognizes the active and passive nationality principle as sources for extraterritorial jurisdiction. However, suits filed before the law was repealed continued, as in the case of the arrest warrant issued against Chadian ex-President Hissène Habré for crimes against humanity, torture and war crimes. Habré was arrested by Senegalese authorities who refused to extradite him to Belgium arguing that he would be prosecuted in Senegal for the same offences. Due to the lack of progress Belgium took the matter to the ICJ, arguing that Senegal is in violation of its obligations under the Torture Convention by neither carrying out proper procedures nor extraditing Habré to Belgium. In July 2012, the Court ruled that, according to the *aut dedere, aut judicare* principle, Senegal must prosecute Habré at home if it does not extradite him. According to Senegalese officials, conversations with the African Union were immediately established to start a trial as soon as possible.

 3 According to Judges Higgins, Kooijmans, Buergenthal: 'Such elucidation was necessary because immunities and universal jurisdiction are closely interrelated in this case and bear on the maintenance of stability in international relations without perpetuating impunity for international crimes' (Joint Separate Opinion). In the view of Judge Van den Wyngaert, this case was about 'balancing two divergent interests in modern international (criminal) law: the need of international accountability for such crimes as torture, terrorism, war crimes and crimes against humanity and the principle of sovereign equality of States, which presupposes a system of immunities' (Dissenting Opinion).

 4 According to Amnesty International's report (2010: 29), international crimes investigations or prosecutions based on universal jurisdiction have taken place in Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom and the United States. The case of Israel is a particular one; and for Argentina, though a younger democracy, it is precisely its recent authoritarian past which made accountability for human rights abuses a strong element of its national identity, something important in the case of Spain as well.

 5 African Union, Executive Council, *Progress Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, EX.CL/540 (XVI), 25–29 January 2010.

 6 A first call for a permanent tribunal with jurisdiction over breaches of the 1864 Geneva Convention can be traced to the late nineteenth century by one of the founders of the Red Cross.

 7 The jurisdictional regime adopted for the crime aggression is a bit different than for the other three crimes. Non-Party states are completely excluded whereas for the other crimes nationals of a non-Party could be prosecuted under the territoriality principle. Also, UN Security Council was granted the first word in the determination of an act of aggression. If a situation calls for his attention, the Prosecutor has to first check if the Council has made a determination. If it hasn't, the Prosecutor must notify the Council and wait six months after that notification if he still wants to proceed without a UNSC determination.

 8 Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Art. 13(b).

 9 Ibid, Art. 14.

10 Vienna Convention on the Law of Treaties, (1979) 1155 UNTS 331.Art. 34.

11 The United States, Israel, China, Yemen, Iraq, Sudan and Libya voted against the Statute.

12 For those states that joined after the entry into force temporal jurisdiction starts after their ratifications.

13 Rome Statute, Art. 27(2).

14 Ibid., Art. 98(1).

15 OTP response to communications received concerning Iraq, 9 February 2006, The Hague, available at: http://icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

16 Report on Preliminary Examination activities, 13 December 2011, The Hague, para. 14, available at: http://icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPReportonPreliminaryExaminations13December2011.pdf.

17 Office of the Prosecutor, 'Prosecutor receives referral of the situation in the Democratic Republic of Congo', 19 April 2004, The Hague, available at: http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB.

18 Amnesty International, 'Uganda: Government cannot prevent the International Criminal Court from investigating crimes', 16 November 2004, available at: http://amnesty.org/en/library/asset/AFR59/008/2004/en/0fb64121-d55d-11dd-bb24-1fb85fe8fa05/afr590082004en.html; Human Rights Watch, 'ICC: Investigate All Sides in Uganda Chance for Impartial ICC Investigation into Serious Crimes a Welcome Step', 5 February 2004, available at: http://www.hrw.org/news/2004/02/04/icc-investigate-all-sides-uganda.

19 Human Rights Watch, '"Turning Pebbles" Evading Accountability for Post-Election Violence in Kenya', 9 December 2011, available at: http://www.unhcr.org/refworld/docid/4ee7577a2.html.

20 Report on Preliminary Examination activities.

21 Preliminary Examinations Report, para. 87.

22 Rome Statute, Art. 15(3).

23 Prosecutorial Strategy, 2009–2012, 1 February 2010, The Hague, para. 19, available at: http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf .

24 On July 2009, the African Union adopted by consensus a resolution saying that 'The AU member states shall not co-operate . . . relating to immunities for the arrest and surrender of Sudanese President Omar al-Bashir to the ICC.' 'Decision on the Meeting of African States parties to the Rome Statute of the International Criminal Court', Assembly of the African Union. Adopted on 8 July 2006.

25 Malawi, whose previous lack of cooperation was brought to the UNSC by the ICC Judges, backtracked from hosting an African Union summit because Sudan's President was going to be invited. Also, in November 2011, a Kenyan judge issued a domestic arrest warrant for Bashir two months after the Kenyan government failed to execute the ICC warrant.

26 Address by the ICC Prosecutor to the Assembly of States Parties, Eight Session of the Assembly of States Parties, 18 November 2009, available at: http://www.icc-cpi.int/NR/rdonlyres/CDF496C7-7BA7-4AA3-B670-.

References

Akehurst, M. (1974) 'Jurisdiction in International Law', *British Year Book of International Law*, 46: 145–157.

Amnesty International (2010) 'Universal Jurisdiction: UN General Assembly Should Support This Essential International Justice Tool,' available at: http://www.amnesty.org/fr/library/asset/IOR53/015/2010/en/72ab4ccf-4407-42d3-8cfb-46ad6aada059/ior530152010en.pdf (accessed 5 June 2012).

Armstrong, D. (1998) 'Globalization and the Social State', *Review of International Studies*, 24, 461–478.

Armstrong, D., Farrell, T. and Lambert, H. (2012) *International Law and International Relations*, 2nd edn, Cambridge: Cambridge University Press.

Bull, H. (1977) *The Anarchical Society: A Study of Order in World Politics*, London: Macmillan.

Byers, M. (2000) 'The Law and Politics of the Pinochet Case', *Duke Journal of Comparative & International Law*, 10: 415–441.

Cassese, A. (2002) 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Belgium v. Congo Case', *European Journal of International Law*, 13: 853–875.

Cassese, A. (2003) 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', *Journal of International Criminal Justice*, 1: 589–595.

Cassese, A. (2008a) *International Criminal Law*, 2nd edn, Oxford: Oxford University Press.

Cassese, A. (2008b) *The Human Dimension of International Law: Selected Papers*, Oxford: Oxford University Press.

Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E. (2010) *An Introduction to International Criminal Law and Procedure*, 2nd edn, Cambridge: Cambridge University Press.

Eckert, A. E. (2009) 'The Cosmopolitan Test: Universal Morality and the Challenge of the Darfur Genocide', in S. C. Roach (ed.) *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, Oxford: Oxford University Press.

Foot, R., Gaddis, J. and Hurrell, A. (2003) *Order and Justice in International Relations*, Oxford: Oxford University Press.

Forsythe, D. P. (2006) *Human Rights in International Relations*, Cambridge: Cambridge University Press.

Hall, C. K. (2003) 'Universal Jurisdiction: New Uses for an Old Tool', in M. Lattimer and P. Sands (eds) *Justice for Crimes Against Humanity*, Portland, OR: Hart Publishing.

Hankey, Lord (1949) 'German War Crimes Trials', House of Lords Debates, *Hansard*, 5 May, Vol. 162.

Institute of International Law (2005) *Seventeenth Commission: Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes*, available at: http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf (accessed 22 May 2012).

Kaye, D. (2011) 'Who's Afraid of the International Criminal Court? Finding the Prosecutor Who Can Set It Straight', *Foreign Affairs*, 90: 118–129.

Kreß, C. (2006) 'Universal Jurisdiction over International Crimes and the Institut de Droit International', *Journal of International Criminal Justice*, 4: 561–585.

Mettraux, G. (2009) 'The Cost of Justice: Is the ICC Living Beyond Its Means?', *International Criminal Law Bureau*, available at: http://www.internationallawbureau.com/blog/?p=503.

O'Keefe, R. (2004) 'Universal Jurisdiction: Clarifying the Basic Concept', *Journal of International Criminal Justice*, 2: 735–760.

Pion-Berlin, D. (2004) 'The Pinochet Case and Human Rights Progress in Chile: Was Europe a Catalyst, Cause or Inconsequential?', *Journal of Latin American Studies*, 36: 479–505.

Rabkin, J. (2007) 'No Substitute for Sovereignty: Why International Criminal Justice Has a Bleak Future – and Deserves It', in E. Hughes, W. A. Schabas and R. Thakur (eds) *Atrocities and International Accountability: Beyond Transitional Justice*, New York: United Nations University Press.

Ralph, J. (2004) 'The International Criminal Court and the "Uneasy Revolution" in International Society", *The International Journal of Human Rights*, 8: 235–247.

Rawls, J. (1971) *A Theory of Justice*, Oxford: Oxford University Press.

Roach, S. C. (2009) 'Introduction: Global Governance in Context', in S. C. Roach (ed.), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, Oxford: Oxford University Press.

Robertson, G. (2002) *Crimes Against Humanity: The Struggle for Global Justice*, 2nd edn, London: Penguin.

Roth-Arriaza, N. (2009) 'The Multiple Prosecutions of Augusto Pinochet', in E. L. Lutz and C. Reiger (eds) *Prosecuting Heads of State*, Cambridge: Cambridge University Press.

Ryngaert, C. (2008) *Jurisdiction in International Law*, Oxford: Oxford University Press.

Schabas, W. (2007) *An Introduction to the International Criminal Court*, 3rd edn, Cambridge: Cambridge University Press.

Schabas, W. (2009) 'International Crimes', in D. Armstrong (ed.) *Routledge Handbook of International Law*, London: Routledge.

Schabas, W. (2011) 'International Crimes', in D. Armstrong (ed.) *Routledge Handbook of International Law*, London: Routledge.

Scheffer, D. (2011) 'The International Criminal Court', in W. Schabas and N. Bernaz (eds) *Routledge Handbook of International Criminal Law*, London: Routledge.

Teitel, R. G. (2011) *Humanity's Law*, Oxford: Oxford University Press.

Weller, M. (2002) 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court', *International Affairs (Royal Institute of International Affairs 1944–)*, 4: 693–712.

Wheeler, N. (2000) *Saving Strangers*, Oxford: Oxford University Press.

Wippman, D. (2006) 'The Costs of International Justice', *American Journal of International Law*, 100: 861–881.

The challenges of international criminal law in addressing mass atrocity

Phil Clark

Introduction: parameters of the debate

For nearly fifty years after the Nuremberg and Tokyo trials, international justice fell out of favour as a response to atrocities such as genocide, war crimes and crimes against humanity. In the past twenty years, however, international criminal law has become a ubiquitous feature of societies recovering from mass conflict. Today it takes various forms, including the *ad hoc* tribunals for the former Yugoslavia and Rwanda; the hybrid international-domestic courts for Sierra Leone, Cambodia, Timor-Leste, Lebanon and Kosovo; and the permanent International Criminal Court (ICC).

While this proliferation of international courts and tribunals has led some commentators to proclaim a 'new era of global accountability' (Over 1999: 257), these institutions have continually faced similar challenges. In particular, they have struggled to define clear objectives for their legal pursuits, to come to terms with new forms of violence in the post-Cold War era, to forge effective relationships with domestic governments, to coordinate their work with that of national and community-level transitional justice mechanisms, and to deliver tangible benefits to local populations affected by conflict. Drawing on a review of the relevant literature and the author's ten years of fieldwork into post-conflict justice, particularly in Africa, and more than 1000 interviews with international lawyers, judges, state officials and affected communities, this chapter shows that international criminal justice institutions have made key missteps in the delivery of justice for mass atrocity and have largely failed to learn critical lessons from earlier courts and tribunals. While achieving some degree of accountability for serious crimes, these institutions have ultimately fallen well short of their stated objectives. Especially in the cases of the International Criminal Tribunal for Rwanda (ICTR) and ICC, they have regularly undermined efforts at domestic justice within conflict societies, with lasting consequences for the affected populations.

This chapter explores these issues through the theoretical and empirical lens of 'transitional justice', which is the broad field concerned with concepts, processes and institutions designed to address the legacies of conflict or repressive rule (Kritz 1995; Teitel 1999; Elster 2004). Since the mid-1990s, transitional justice has been part and parcel of international and domestic responses to societal fracture. Incorporating a wide range of legal and non-legal processes, including war crimes tribunals, truth commissions, reparations programmes and community-based reintegration

rituals, transitional justice is central to efforts to usher societies from violence and authoritarianism to stability and democracy. Nearly all peace negotiations today involve calls for accountability for atrocity perpetrators on the basis that dealing with the past is critical to securing the future, highlighting the centrality of transitional justice in current debates and policy-making.

The ubiquity, variety and scope of transitional justice have generated considerable controversy. This chapter, while not attempting a comprehensive survey of current debates, explores five key issues regarding the role of international criminal law within transitional justice. First, it examines the ill-defined objectives of international justice institutions. This opening section highlights that, while these transitional justice mechanisms are commonly advocated to address the legacies of a divided past, their precise aims are rarely clear.

Second, connected to the first issue, tensions between the specific aims of peace and justice have generated heated debates in a wide range of transitional settings and challenged the role of international criminal law after atrocity. This issue is especially prevalent following the advent of the ICC and the growing expectation that transitional justice processes should operate during ongoing conflict and delicate peace negotiations.

Third, this chapter examines the challenges that international criminal law faces in responding to new forms of violent conflict in the past twenty years. Specifically, this section focuses on the limitations of international courts and tribunals in addressing the legacies of increasingly diffuse violence around the world, which involves a wide range of state and non-state actors, including large numbers of citizen perpetrators.

Fourth, this chapter explores issues of neo-colonialism and problems of external transitional justice interventions, including questions of power, domination, agency and ownership. Such issues are paramount in many parts of the Global South where international criminal law operates, given long histories of colonial rule and fraught interactions with foreign donors, multilateral financial institutions, peacekeeping missions and multinational corporations. A key component of this theme is the extent to which international institutions can navigate difficult political relations with domestic governments in societies recovering from mass conflict.

Fifth, the chapter explores tensions inherent in attempts to combine international, national and community-level approaches to transitional justice. This section highlights recent trends toward 'holistic' responses to conflict which propose combinations of these different levels of processes. In many parts of the globe, such approaches have so far proven highly problematic, necessitating clearer thinking about the coordination of different types of actors and mechanisms and certain assumptions underpinning international criminal law that complicate these efforts.

The chapter closes by exploring some important future avenues for research into the role of international criminal law within transitional justice, followed by the implications of current and future trends in this area for international policy-makers.

Literature review

This section critically examines these five key debates in the current literature concerning the theory and practice of international criminal law in the wider realm of transitional justice. It outlines the contours of the main problems and contestations in this realm, while providing some critical evaluation of these issues.

Unclear objectives

There is no doubting the vastness of transitional justice aspirations. The immense challenges faced by societies recovering from conflict or draconian rule have not dampened the enthusiasm

for transitional justice internationally or the expectations of what these processes can achieve. Such ambitions, however, have rarely coincided with clarity about the objectives of these mechanisms. Transitional justice has tended to emphasise the importance of particular institutions – for example, a widespread belief in the need for prosecutions of atrocity perpetrators – without coherently articulating their ultimate purposes. This lack of clarity manifests in two forms: confusion over the meaning of common transitional justice objectives; and uncertainty over which objectives are best pursued by which transitional processes.

In scholarly and policy debates over justice, peace, truth, reconciliation, healing and other core transitional justice concepts, it is not always clear what these terms mean. Both the South African Truth and Reconciliation Commission (TRC) and the ICTR, for example, claim to pursue 'reconciliation'; the former through exchanging amnesty for truth about apartheid crimes, the latter through the prosecution of the most senior genocide suspects (UN 1995). In the TRC case, punishment and reconciliation were deemed to be incompatible, while the ICTR holds that punishment is a prerequisite of reconciliation. Such examples highlight that different transitional institutions often aim for different political, social or legal outcomes. However, even when institutions claim to pursue the same objectives – as in the South African TRC's and the ICTR's stated pursuit of reconciliation – they (often unconsciously) define these objectives, and the means for achieving them, in very different ways. Judging such institutions according to their own stated aims and comparing them meaningfully when they claim to pursue similar objectives requires greater theoretical precision and clearer conceptions of key terms.

Compounding a lack of conceptual clarity, transitional justice is replete with institutional 'toolkits', 'toolboxes', 'menus' and 'templates' (Franke 2006; Hamber 2009; ICTJ n.d.), proposing universal methods of addressing past atrocity, which invariably involve some recourse – sometimes exclusively – to international criminal law. This tendency to implement certain ready-made models has precluded careful consideration of the *needs* of particular transitional settings, the *aims* they engender and *which processes* are most appropriate to pursue particular objectives. The toolkit approach to transitional justice begins with institutions and appears to work backwards through questions of needs and objectives.

Regarding the justifications for transitional justice templates, their short-term objectives are often overly ambitious – such as the ICTR's stated aim of reconciliation in Rwanda – and their ultimate objectives are rarely explicit. In the short term, there is still major disagreement among transitional justice scholars and practitioners over what particular 'toolkit' institutions can feasibly achieve: Should international courts and tribunals aim only to prosecute suspects of serious crimes or pursue more ambitious ends such as reconciliation? Can truth commissions feasibly aim to recover the truth about the past as well as facilitate healing, reconciliation and some form of catharsis? Can single institutions realistically pursue multiple objectives and are those objectives themselves compatible? Connected to the earlier concern over conceptual clarity in transitional justice, the field still struggles to elucidate the precise purposes of common transitional processes. Expectations of such processes are often too high, necessitating clearer understandings of what particular approaches to transitional justice can practicably achieve.

Frequently, the broader aim of transitional justice – including international criminal law – is assumed to be democratisation, facilitating the transition of societies toward governance and institutional structures that reflect liberal democratic concerns for individual freedoms, the protection of human rights and the rule of law (Kritz 1995; Minow 1999; Teitel 1999). This tendency no doubt derives from prevailing modernisation and democratisation theories in the early years of transitional justice. The close link between transitional justice and democratisation, however, makes a teleological assumption that all societies should be encouraged toward similar forms of democracy. Such a view proves problematic when translated to the diverse political,

social, cultural and historical settings in which transitional justice takes place. Furthermore, it emphasises forward- over backward-looking concerns, holding that redress for past wrongs should always contribute to future democratic entrenchment. The implied objective of democratisation also privileges – with insufficient justification – society-wide concerns over the harm done to discrete individuals and groups. These concerns regarding objectives highlight important conceptual weaknesses at the heart of the entire transitional justice agenda. As argued below, these theoretical problems substantially affect the practice of transitional justice, especially in the realm of international criminal law.

Peace versus justice and the role of human rights advocates

A symptom of under-developed transitional justice theory is a tendency toward binary debates: accountability versus amnesty, justice versus forgiveness, punishment versus reconciliation, retributive versus restorative justice, law versus politics, international versus local. In most cases, these terms are not mutually exclusive and conceiving them as such prevents the possibility of combining different objectives and approaches. It narrows the options and generates unhelpfully polarised discussions.

A central transitional justice debate in Africa concerns the tension between justice and peace. The conundrum of 'peace versus justice' has possessed the field from its earliest years, with scholars and practitioners debating whether justice – and especially punishment through international criminal proceedings – will contribute to peace by deterring potential perpetrators or impede it by prosecuting the same political and military leaders who are essential for viable negotiations (Nino 1991; Orentlicher 1991). The debate pits 'realists', who believe the quest for peace and security should take precedence over justice, against 'idealists' and 'legalists', who argue that justice is both a good in and of itself and necessary for long-term stability.

Such tensions were apparent in the early years of transitional justice processes in Africa. The South African TRC, drawing heavily on the experience of truth commissions in Central and South America during the 1980s and 1990s, held that attempts to prosecute those responsible for egregious crimes would only increase the likelihood of further violence (Asmal 2000). The political compromises that were central to the post-apartheid transition in South Africa barred the prosecution of apartheid leaders, provided they fully disclosed their political crimes. In the South African case, amnesty was seen as crucial to long-term stability and reconciliation. In contrast, the ICTR held that punishment of high-level Rwandan *génocidaires* was essential for reconciliation and durable peace, especially in terms of eradicating the culture of impunity that was considered a key enabler of the genocide in Rwanda.

While deployed by advocates on both sides of the 'peace versus justice' debate to support their respective positions, the South African and Rwandan examples say more about the impact of different types of political transitions on the choice of transitional justice mechanisms. In the South African case, amnesty was considered a necessity and justice a virtual impossibility during a pacted transition characterised by political compromise. In the Rwandan case, where an outright military victory by the Rwandan Patriotic Front (RPF) had ended the genocide and facilitated transition to a new government, punishing the previous regime was viable (and desirable for both the RPF and the UN, still smarting from its embarrassing failure to intervene militarily during the genocide). In these instances, decisions regarding peace or justice were determined more by political exigencies during transition than by high principle normative considerations.

The political scenario that has most energised the international field of transitional justice in recent years – and in which the language of 'peace versus justice' was definitive – was the Juba peace talks between the Ugandan government and the Lord's Resistance Army (LRA) in

2006–2008 (Waddell and Clark 2008; Wrange and Onyango 2011). Advocates of 'retributive justice' through the ICC claimed that law should supersede politics and that any attempts to defer or remove the ICC indictments of the LRA leadership would contravene international law. On the other side, supporters of 'restorative justice' advocated the use of community cleansing and reintegration rituals for LRA combatants returning from the bush and claimed that support for the ICC elevated abstract legal norms over the practical necessity of achieving peace in northern Uganda. Confined by the narrow conceptual architecture of the debate, the parties continually talked past each other, undermining the potential for creative solutions to the serious problems on the table in Juba.

These examples highlight the problems of the binary framing of debates such as 'peace versus justice'. Such a conceptualisation suggests stark choices between polarised policy options. It precludes the possibility of sequencing, for example, negotiating a lasting ceasefire before considering justice. It also presupposes that justice must entail punishment rather than other forms of accountability such as perpetrator apologies, public acknowledgement of harm and material reparation. During the Juba talks, these alternative formulations garnered some attention – principally among northern Ugandan civil society actors – but were stymied by the polarised debates among the negotiators and their principal interlocutors.

A key generator of this polarisation at Juba was the influence of human rights organisations, which prescribed narrow legal responses to the northern Ugandan conflict. A constant stream of advocacy reports and press releases from Amnesty International (AI), Human Rights Watch (HRW) and others throughout the negotiations proclaimed the ICC as the only justifiable response to crimes committed during the conflict and rejected outright other potential approaches, including local reintegration rituals, reform of the national civilian and military courts and national reparations programmes (AI February 2008; AI March 2008; HRW 2008). Such claims were made on the basis of generalised legal principles and obligations, rather than the specific political and social circumstances in Uganda and the key sticking points during the peace talks.

This issue underscores a larger problem in transitional justice. The field balances uneasily between analysis and advocacy, which is further complicated by the fact that many academics and practitioners engage in both processes. Human rights actors have been powerful in transitional justice from the outset, providing many of its intellectual, institutional and financial resources. Advocacy organisations such as AI and HRW play a central role in many transitional justice debates. The influence of such advocates, however, has not been universally positive. Human rights ideology – a firm belief, for example, in the need for international judicial responses to human rights violations – has often trumped finer-grained theoretical and empirical analysis, leading to 'faith-based' rather than 'fact-based' prescriptions (Thoms *et al.* 2008: 5). These ideologically-based influences undermine the ability to objectively question certain assumptions. In particular, what if the advocated responses to massive violations diverge from particular conditions and context-specific needs within transitional societies? The fervent certainty of much human rights advocacy has generated unnecessarily polarised debates and often hampered the tasks of impartial research and informed policy-making.

International criminal law, diffuse conflict and the challenge of 'local' justice

In responding to mass atrocity, international criminal law today continues to draw inspiration from the experience of the Nuremberg and Tokyo trials following the Second World War. Underpinning the trials was a belief that punishing elite perpetrators of grave crimes was necessary to publicly acknowledge their actions and to deter similar atrocities in the future. The resonances

of Nuremberg and Tokyo – especially the emphasis on prosecuting senior political and military officials – can be seen in all international justice institutions today.

Serious questions arise, however, over the applicability of the Nuremberg model of international law when confronted with new forms of decentralised conflict since the end of the Cold War. Modern warfare involves a wide range of state and non-state perpetrators, including political and military elites, rebel, militia and paramilitary groups and everyday citizens, with varying degrees of cohesive orchestration of violence (Kalyvas 2006; Straus 2006; Fujii 2009). Whereas the Nuremberg model assumes top-down violence and therefore focuses on small numbers of elite perpetrators, modern conflict is often more diffuse, which necessitates new thinking on appropriate legal responses. Furthermore, for transitional justice, decentralised conflict and its impact on civilian populations raise important questions about the most effective non-legal responses, including pursuing broader social objectives such as truth recovery, psychosocial healing and reconciliation. These objectives highlight the multiple forms of harm that individuals and groups suffer following mass conflict and are likely to extend far beyond the remit of conventional court processes.

Responding to these two concerns – that accountability for non-elite perpetrators is also required and that international trials will not adequately address the complex needs of transitional societies – an important challenge to the Nuremberg model has emerged recently in the form of 'local' or 'community-based' approaches to transitional justice. It is becoming increasingly common, particularly in Africa, to employ forms of local, customary or traditional justice and dispute resolution in response to serious atrocity. Two of the most prominent examples of this approach are the gacaca courts in Rwanda, where 11,000 community-level jurisdictions prosecuted around 400,000 genocide suspects over ten years, and a range of northern Ugandan reconciliation and reintegration rituals, including the Acholi practices of *mato oput* and *gomo tong*, which have been used in the context of LRA combatants returning from the bush (Waldorf 2006; Harlacher *et al.* 2007; Clark 2010). The impetus for community-level transitional justice emanates from various sources, including the need for faster and cheaper mechanisms to handle enormous backlogs of community-level perpetrators; a frustration with expensive, often distanced international approaches to transitional justice, especially war crimes tribunals, which focus only on high-level suspects; and a desire for local ownership in situations where a wide range of external interventions have historically constrained domestic sovereignty.

First, community-based approaches to transitional justice are crucial for reflecting the agency of community actors in the forms of conflict evident in Rwanda, Uganda and elsewhere. This highlights a key shortcoming of the Nuremberg model of post-conflict accountability favoured by many human rights and legal advocates and embodied in today's international justice institutions, which focus on only a handful of elite suspects (Drumbl 2000). It is not self-evident that elites who are accused of orchestrating and inciting violence should be considered more worthy of accountability than the everyday citizens who killed, raped or maimed their victims at the community level. In many interviews with atrocity survivors in Rwanda and Uganda, when asked whom they view as the principal perpetrators in the conflict, they cite the specific neighbour who wielded the machete or threw the grenade, rather than the faceless government or military official who may have given the order to attack (OHCHR 2007; Clark 2010). For many survivors, the overriding concern regarding justice is desert for the immediate individual perpetrators of crimes. As Romain, a Rwandan genocide survivor in Butare, said, 'Punishment is absolutely necessary at gacaca. We must punish the bad people for what they did. We can't simply let them go free after everything they did to us.'[1] Given the intimacy of violence in settings such as Rwanda and Uganda, the widespread desire for accountability for individuals at the community level is not surprising.

Furthermore, much of the recent literature on the Rwanda and Uganda conflicts highlights the fluidity and variety of violence, with some episodes driven by elite incitement but others by local agency motivated by a wide range of factors, including greed and opportunism (Longman 1995; Straus 2006; OHCHR 2007; Fujii 2009). Many individuals used the cover of mass conflict to settle personal scores, to increase their political standing within their communities or to grab land and possessions. In such cases, it is again unclear why we should consider justice only for elites. Such a view does not cohere with local populations' understandings of conflict, which account for different levels of perpetrators, or with external analyses of the agency and causes of these conflicts. Implicit in community-based approaches to transitional justice such as gacaca and the northern Ugandan rituals is the recognition that everyday citizens committed horrendous crimes and must – in some form – be called to account for those actions.

Second, community-based transitional justice responds to another perceived shortcoming in international criminal justice by seeking to contribute to social objectives that are broader than punitive accountability for crimes. Diffuse forms of violence affect societies in economic, relational and psychosocial terms at regional, national, provincial, communal, inter-personal and individual levels. Underpinning gacaca and the northern Ugandan rituals is a view that community-based transitional processes are required to address these various dimensions of conflict. In particular, these processes emphasise the need for intimate engagement among parties involved in conflict – especially between perpetrators and victims – in the pursuit of objectives such as truth and reconciliation (Porter 2003; Clark 2010).

Engagement is a critical component of gacaca and the Ugandan rituals, for example, given the degree to which the entire community is encouraged to interact face-to-face during hearings and ceremonies. In particular, engagement entails antagonistic parties debating the root causes of their conflicts. It recognises that there will be deep-seated animosity between individuals and between groups after an event as destructive as genocide. Fieldwork in Rwanda and Uganda indicates that many participants in gacaca and local rituals view direct engagement in these transitional processes as important for the pursuit of truth, reconciliation and other societal aims (OHCHR 2007; Clark 2010). In the case of Uganda, my research as well as the findings of a 2007 study by the United Nations Office of the High Commissioner for Human Rights (for which I was the technical advisor and co-author) found that IDPs in northern Uganda viewed local rituals as important for truth recovery, given their emphasis on former combatants' confessions, and their encouragement of reparations from perpetrators (OHCHR 2007).

In the case of gacaca, many interviewees state that truth-telling at gacaca serves an important therapeutic function. Both suspects and survivors argue that the opportunity to speak openly at gacaca about events and emotions concerning the genocide has contributed to their personal healing. Many guilty suspects claim to have gained a sense of release from feelings of shame and dislocation by confessing to, and apologising for, their crimes in front of their victims and the General Assembly at gacaca. Many survivors, on the other hand, claim to have overcome feelings of loneliness by publicly describing the personal impact of genocide crimes and receiving communal acknowledgement of their pain. As Paul, a survivor whose father, two brothers and one sister were killed during the genocide, said after a gacaca hearing in Ruhengeri in northern Rwanda,

> Gacaca is important for us survivors because it helps us live and work in the community again . . . All the survivors come together and talk about what has happened. We realise that we are in the same situation, that we have all had family who were killed. We understand each other and we realise that we are not alone.[2]

Much of the Rwandan population argues that truth-telling at gacaca contributes to the restoration of relationships between individuals and to broader reconciliation (de Brouwer and Chu 2009; Clark 2010). In particular, much of the population interprets gacaca as an important dialogical forum in which various individuals and groups discuss issues that the community might otherwise avoid. Implicit in gacaca and the Ugandan rituals is the view that reconciliation after mass violence will require difficult dialogue, a genuine confrontation with the sources of conflict, and parties' mutual dedication to rebuilding fractured relationships (Harlacher *et al.* 2007). The forms of engagement that community-based practices in Rwanda and Uganda facilitate distinguish them from other transitional justice institutions such as war crimes tribunals, which rarely allow open or meaningful interactions between victims and perpetrators and limit discourse to legal matters to the exclusion of more emotional concerns.

In contrast to this emphasis on engagement, one criticism of the ICTR expressed by some Rwandans is that, by undergoing trials hundreds of miles away in Arusha, high-level perpetrators avoid direct confrontation with the communities against whom they committed genocide crimes and therefore receive insufficient justice. Fidèle, a gacaca judge in Musanze district, said:

> In Arusha, the big fish are there. The victims travel there but in gacaca everyone is already here: survivors, perpetrators, judges. They are all here in the community. That is the difference. If we want prisoners to come, they come, they tell the truth, they apologise and ask for forgiveness. We can see if they are touched, if they are sincere. But in Arusha it isn't possible for survivors to experience this. They can't tell whether the accused are sincere. Those in Arusha haven't asked for forgiveness. Those in Arusha have committed many crimes here, they should face us, the Rwandan family, but they avoid us by being there.[3]

Similar sentiments were expressed during a case in 2009 concerning the Rwandan genocide suspect, François Bazaramba, who had fled to Finland. Members of the Finnish court where Bazaramba was on trial travelled to his former village in southern Rwanda. A Finnish journalist travelling with the court interviewed a local gacaca judge named Mamasani about the conducting of the trial overseas. The journalist reported,

> [Mamasani] feels that the final truth in [the trial] could be reached only if Bazaramba and the witnesses in the case would come before the local people. 'When he is not there, people can say anything they like.' Mamasani feels that a Gacaca court would be the right place to deal with the Bazaramba case.
>
> (*Helsingin Sanomat* 2009)

In such interpretations, justice delivered through the ICTR or foreign courts is perceived as less rigorous for genocide suspects because it entails no direct engagement with the general population, save the small number of everyday Rwandans called as witnesses in ICTR cases.

The ICTR – like many international justice institutions – has been criticised for appearing detached from day-to-day realities in Rwanda, as it is based in Arusha, Tanzania, and for failing to provide an adequate outreach and information programme for the population it purports to serve (Brittain 2003). These problems have undermined its legitimacy among many Rwandans. Indeed, many ICTR personnel view such detachment from domestic concerns as a virtue for an international institution trying to provide 'impartial' justice. Disengagement from local affairs is thus not merely a symptom of an international approach to justice but a deliberate policy. When asked whether he had travelled from Arusha to Rwanda to gauge the impact the ICTR

was having on the Rwandan population, especially in light of the Tribunal's stated objective of contributing to national reconciliation in Rwanda, one ICTR judge replied:

> I have never been to Rwanda and I have no desire to visit. Going there and seeing the effect we are having would only make my work more difficult. How can I do my job – judging these cases fairly – with pictures in my mind of what is happening over there? This task is already complicated enough.[4]

Such a view separates the act of punishing perpetrators from its likely political, legal, social and cultural consequences. It regards either retributive justice (giving perpetrators what they deserve) or deterrent justice (eradicating a culture of impunity by dissuading future criminals from offending) as the ICTR's ultimate objective. This perspective holds not only that considering the impact of justice is beyond the ICTR's remit but that substantive consideration of this might hamper the Tribunal's work, by jeopardising its perceived impartiality. Such views serve to further distance the ICTR from, and undermine its legitimacy in the eyes of, the Rwandan population. Consequently, the ICTR displays little inclination to affect the day-to-day relationships of previous antagonists in Rwanda and thus contributes little to the cause of national reconciliation, which, according to its Statute, it is designed to promote.

The problem of detachment in the name of impartiality affects international justice responses to mass conflict more generally and highlights their limitations in addressing the varied and nuanced effects of violence. In contrast, the emphasis of community-based transitional justice approaches on proximity and face-to-face engagement between participants is a core reason that many participants in these processes view them as vital means to truth, reconciliation and other complex social aims.

Neo-colonialism and challenges of foreign transitional justice interventions

A further widespread criticism of the ICC and international justice more broadly, especially in transitional justice debates in Africa, is that such approaches represent the neo-colonial imposition of external force on developing societies. Such critiques proliferated following the ICC's indictment of Sudanese president, Omar al-Bashir, in July 2008. Critics of the ICC – including the leadership of the African Union – viewed this as a violation of the principles of national sovereignty and sovereign immunity (Warham 2012). By this reckoning, as an attempt at regime change via international law, the Bashir indictment was rendered even more egregious by the fact that Sudan was not a signatory to the Rome Statute and therefore had not formally recognised the legitimacy of the Court.

The ICC, ICTR and other international justice institutions have not always responded effectively to accusations of neo-colonial interventions. Practitioners in these organisations have often displayed hubris and expressed a civilising mission toward African societies recovering from conflict or authoritarian rule (Branch 2011). Based in The Hague and Arusha, far from the immediate sites of conflict, such institutions have often treated Africa as a blank canvas for their judicial artistry, seemingly unaware of the continent's history of fraught engagement with myriad external powers and the impact of this on their own legitimacy. As discussed in more detail below, international courts and tribunals have also rarely sought to coordinate their operations with domestic transitional processes or expressed coherently how they contribute meaningfully to affected communities. These tendencies have fuelled claims of neo-colonial arrogance and political meddling. Concerns over criticisms of lofty detachment are a key reason for the recent trend in creating 'hybrid' tribunals such as the Special Court for Sierra Leone or

the Extraordinary Chambers in the Courts of Cambodia (ECCC), which are located inside conflict countries and employ both international and national personnel in an attempt to safeguard against accusations of international imposition (Romano *et al.* 2004; Kelsall 2009).

Depictions of all-powerful international institutions interfering with fragile domestic states and populations, however, are too stark. The ICC and ICTR have typically struggled to investigate and prosecute cases without the cooperation of African states, which in turn have proven highly effective at using international justice to their own ends (Peskin 2008; Clark 2011). When then-ICTR chief prosecutor Carla del Ponte threatened in 2002 to investigate post-genocide revenge attacks committed by the RPF, the Rwandan government responded by barring the travel of ICTR investigators to Rwanda and Rwandan witnesses to Arusha, effectively halting the Tribunal's operations.

In the case of the ICC, the Office of the Prosecutor entered into lengthy negotiations with the Ugandan and Congolese governments before those states agreed to refer their situations to the Court. Having 'chased' these state referrals, the ICC was forced to negotiate the terms of its investigations with those governments (Clark 2011). This largely explains why to date the ICC has not charged any Ugandan or Congolese government officials, despite the widely acknowledged complicity of state actors in atrocities. In Sudan, Bashir has stymied the ICC's operations by refusing to allow the Court's investigators on the ground. In the meantime, he has often succeeded in generating domestic sympathy in the face of the Court's 'Western intervention', thus bolstering his domestic legitimacy. These examples highlight the ability of African states to instrumentalise international justice for their own political gain. While international justice institutions should do more to address concerns over their interventions in Africa and elsewhere, the critical agency of African governments also requires greater emphasis in debates over neo-colonialism.

Hybridity, holism and complementarity: linking international, national and community-based approaches

Hybridity is an increasingly common theme in the study and practice of transitional justice. In recent years, a growing trend has emerged in institutional responses to complex conflict situations that advocates 'legal pluralism', or hybrid structures in which 'two or more legal systems coexist in the same social field' (Merry 1988: 870). Today, legal pluralism usually involves some type of international criminal justice process and a locally-directed truth commission, as in the cases of Sierra Leone, Kenya and Timor-Leste. The primary purpose of such hybridity is to facilitate holism. A holistic approach to transitional justice provides that multiple political, social and legal institutions, operating concurrently in a system maximising the capabilities of each, can contribute more effectively to the reconstruction of the entire society than a single institution. Holistic approaches cater to the various physical, psychological, and psychosocial needs of individuals and groups during as well as after conflict (Clark 2007).

The trend toward hybrid systems coincides with the greater legitimacy afforded to and more regular use of localised methods of accountability and conflict resolution, such as those in Rwanda and Uganda discussed above. Increasingly, in African states, international, national and community-level transitional justice processes coincide and frequently clash. Advocates of 'holism' often support this multi-level approach to transitional justice (Boraine 2006; Brubacher 2007; ICTJ n.d.). Such systems, however, are typically the product of accident rather than design, with different actors creating different levels of institutions at different times, with little coordination among them. The Great Lakes region in particular has become the focus of multi-tiered transitional justice: in the case of Rwanda, through the ICTR, the Rwandan national

courts and gacaca; and in the cases of Uganda and the Democratic Republic of Congo (DRC), through the ICC, the national military and civilian courts, and a range of community-level accountability and reconciliation mechanisms.

The ICTR and the ICC are founded, respectively, on the principles of 'stratified-concurrent jurisdiction' (Morris 1997) and 'complementarity' (Morris 2000; Brubacher 2007; Stahn and El Zeidy 2011), which assume close coordination with – and respect for – domestic transitional institutions. However, in practice, these international institutions have tended to compete with domestic processes for popular legitimacy and for jurisdiction over particular criminal cases. There has often been bad blood between the ICTR and Rwandan transitional institutions, as exemplified by the issue of RPF crimes discussed above. The concurrent operation of the ICTR, the Rwandan national courts and gacaca has also on several occasions led to clashes over whether international or domestic bodies have jurisdiction over particular suspects (Gourevitch 1996 1: A15; Mutagwera 1996: 17–36). Until 2011, the ICTR – under pressure from the UN to hasten completion of its caseload because of the Tribunal's enormous expense – nevertheless refused to transfer its residual cases to the Rwandan courts, claiming that the national jurisdictions do not meet international judicial standards and therefore genocide suspects would not receive a fair trial in Rwanda. These developments suggest an antagonistic rather than holistic relationship between international and domestic institutions (Palmer 2012).

Similarly, there has been little interaction between the ICC and domestic processes in countries such as Uganda and the DRC; where there has been interaction, it has tended to be competitive. The example of the DRC – where all of the ICC's operations have so far focused on Ituri Province – is salient in this regard. Ituri provided the ICC with a simpler judicial task than other provinces. Of the conflict-affected provinces of the DRC, Ituri has the best-functioning local judiciary, which has already proven adept at investigating serious crimes (Clark 2011). Since July 2003, the European Commission's (EC) Ituri-centred investment of more than US$40m towards reforming the Congolese judiciary has seen considerable progress in local capacity. The EC funded the purchase of new judicial offices and equipment and provided training and salaries for investigators and magistrates. Since 2003, the UN peacekeeping mission (known by the abbreviation, MONUC, and now MONUSCO) has provided around-the-clock protection to all judges in Bunia. These developments have contributed greatly to the increased efficiency of the Bunia judiciary.

In 2006, the military tribunal in Bunia prosecuted the case of Chef Mandro Panga Kahwa, a senior member of the *Union des Patriotes Congolais* (UPC) and later founder and president of the *Parti de l'Unité et la Sauvegarde de l'Intégrité du Congo* (PUSIC). Kahwa was found guilty of crimes against humanity, including the murder of villagers in Zumbe in 2002, and sentenced to 20 years in prison and ordered to compensate 14 of his victims up to US$75,000 each (Trial Watch). Among other serious cases before the Bunia courts, in 2008 the same military tribunal convicted a Congolese army lieutenant and sergeant for the use of rape and threats of violence against civilians in Fataki and Nioka (UN 2008: section 34).

That the Bunia courts have been able to investigate and prosecute such serious cases involving rebel leaders and senior Congolese military personnel highlights the substantial increase in domestic judicial capacity since the start of the EC reform programme. It is therefore unclear whether the ICC can adequately justify its involvement in Ituri, given the capacity of domestic institutions to investigate and prosecute major crimes. This has led some observers to question the validity of the ICC's strategy in Ituri, asking why a global court has focused its energies where the judicial task is more straightforward due to substantial local capacity, while mass atrocities continue in provinces where judicial resources are severely lacking. The domestic impact of the ICC's interventions in Ituri has been widespread disappointment among local

judicial actors that, despite the major legal reforms of the past nine years, they will not be able to prosecute major atrocity suspects in local courtrooms. This has important ramifications for the long-term legitimacy and efficacy of the domestic judiciary. It also leads some domestic judicial actors to believe they are receiving mixed messages from the international community, which has invested heavily in legal reform but maintains that such reforms are insufficient to warrant domestic trials of high profile suspects (Clark 2011).

The examples of the ICTR and ICC highlight that, while international transitional justice institutions employ the language of coordination, cooperation and complementarity, in practice, they tend to function unilaterally and often perceive domestic institutions as falling far short of global standards of justice. This underscores a key problem for attempts at holistic, multi-level approaches to transitional justice, which require trust among foreign and domestic actors and clear divisions but coordination of jurisdiction. Such issues are exacerbated by the problem of unclear objectives, discussed above, as effective coordination of different institutions first requires an articulation of the purposes of different types of processes. Thus, to date, multi-level transitional justice processes have tended to operate separately rather than systematically, undermining the work of international criminal justice institutions and the broader endeavours of transitional justice.

Future research directions

This section explores future directions for research into the role and practice of international criminal law in addressing mass atrocity. Its aim is to highlight research trends that are already developing as well as to propose new lines of inquiry. Specifically, this section focuses on four main themes: (1) measuring and assessing the impact of international justice processes; (2) effective ways to facilitate multi-level, complementary approaches to transitional justice; (3) the politics of international justice; and (4) victim participation in international trials and other victim-centred questions.

First, there is a substantial need for more systematic research into the impact of international criminal law institutions. As discussed above, 'faith-based' tendencies in transitional justice have led to significant – although often inconsistent – claims regarding the expected outcomes of international justice, particularly in terms of deterrence, stability and durable peace, but with little empirical evidence to support these statements. Sustained research is therefore required into the political, social, cultural and legal effects that international trials have on countries and regions affected by conflict. This research requires multi-disciplinary approaches, given that international legal processes are likely to affect various dimensions of these societies. It would also need to involve in-depth investigations over substantial periods to examine their long-term impact, as the effects of these institutions are highly dynamic and contingent. In doing so, these examinations would need to combine country-specific, qualitative and ethnographic approaches, which provide deep insights into the subtle dynamics within particular cases, with comparative methodologies that seek more generalised findings that cut across different country and regional examples.

At present, some initial quantitative research is taking place into the impact of a range of transitional justice processes, including international and domestic trials (Olsen *et al.* 2010; Transitional Justice Data Base Project). Most of these studies adopt a large-N quantitative methodology that attempts to identify global trends and to assess the impact of particular processes on key political outcomes, for example, democratisation. However, it is not clear that such studies can capture the necessary degree of analytical nuance and fine-grained understanding of key political and other dynamics within specific cases to make their ultimate findings truly

meaningful. The field of transitional justice – but particularly analyses of international criminal law – require a deeper understanding of the specific effects of certain processes on discrete societies. Comparative analyses of in-depth cases, with sufficient diversity of cases across regions and continents, can provide more global findings, without forfeiting the benefits of deep case studies, which is a key shortcoming of most quantitative studies in this area.

This question of empirically assessing the impact of transitional justice also needs to connect closely to the issue raised above regarding the need for clearer objectives of specific institutions (Palmer and Clark 2012). One aim of researching the effects of international justice processes should be to determine more systematically the feasible purposes of these processes, for example, to examine whether it is realistic to expect them to pursue broad goals such as stability, peace and reconciliation. If it is discovered that international trials have little identifiable impact in these realms, this may require either reforms to the structures and operations of international justice institutions to allow them to have greater effect in these realms, to the abandonment of the pursuit of certain unfeasible objectives or to the use of entirely different mechanisms which are deemed more effective than international justice. Overall, this research should clarify the specific aims of international criminal justice in wider processes of transition and help guide these institutions toward pursuing achievable goals. Part of this research agenda should be to determine whether in fact international criminal justice is a justifiable and effective response to mass atrocity or whether other processes – including domestic trials in transitional societies – are better suited in this regard.

Second, on a connected theme, more research is needed into the most effective ways of combining different transitional justice processes and institutions in the pursuit of 'holistic' responses to atrocity (Palmer 2012). As discussed earlier, the language of 'holism', 'hybridity' and 'complementarity' assumes that multiple processes are necessary to respond to the various needs of transitional societies. However, to date, there has been little sustained research into the compatibilities or otherwise of different types of institutions – for example, between war crimes tribunals and truth commissions or between national trials and community-level justice and reconciliation processes – and the conditions that enable or stymie effective cooperation. This research would inevitably involve the first area of investigation above, namely, determining empirically the impact and feasible objectives of discrete institutions. Greater clarity regarding individual processes, their capabilities and limitations would aid analysis of how different processes can reasonably be coordinated within the same societal contexts. The research should also explore the extent to which discrete institutions contain internal norms and structures and the necessary flexibility to enable cooperation with other transitional justice processes. This would also involve exploring internal barriers to such cooperation, for example, the tendency of some institutions to regard themselves as the predominant vehicle of transition to which all others should be subservient. These investigations should propose concrete reforms to overcome these barriers on the basis that cooperation or complementarity are not simply achieved through combining multiple transitional justice mechanisms but that, within discrete processes, substantial reform and a constant scope for evolution are required before they can function effectively with other processes.

Third, a current research trend that warrants broadening concerns the politics of international criminal justice (Peskin 2008; Clark 2008; Kelsall 2009; Nouwen and Werner 2010). Many scholars and practitioners of international justice view the field as apolitical, delivering neutral or impartial forms of accountability that are insulated from the vagaries of the domestic political fray (Akhavan 1996; Neier 1998). This perceived impartiality is often a key justification for international – rather than more localised – approaches to justice after atrocity. However, such perspectives overlook the critical political dimensions of international criminal justice which

profoundly affect the operations of international institutions as well as the conflict-affected societies where they investigate crimes. In particular, further research is required into the power dynamics that shape international criminal law, focusing on the policy motivations of states that support international justice in financial and other terms, how those motivations intersect with the objectives of the courts and tribunals themselves, the political relationships that these institutions develop with the governments of the countries in which they investigate, as well as their relations with human rights organisations, advocates and lobbyists. Given the profound influence that these political dimensions have on the daily functioning of international courts and tribunals, future research should focus on understanding the interplays among these actors and proposing ways for more ethical, transparent and effective navigation of complex political dynamics.

Furthermore, this research theme should include exploring the ways in which international criminal justice institutions can handle issues of power politics to ensure they build constructive relations with communities affected by violence, which often feel disenfranchised from the processes of international law. If international criminal law is perceived as too closely linked to the interests and objectives of powerful political actors, such as governments or international bodies, then it is likely to forfeit legitimacy among local populations and thus dull its effectiveness. Contrary to the insistence on the neutrality and impartiality of international criminal law, it is in the interests of international justice to admit these crucial political dimensions of its work and for researchers to dedicate greater time and energy to better understanding them.

A final key area of research into international criminal justice concerns the role of victims in judicial proceedings. Recent years have witnessed sustained claims for transitional justice, and international law in particular, to become more 'victim-centred' (Henham and Findlay 2011; Robins 2011; Sriram *et al.* 2012) – a theme that has been embraced by the ICC and the ECCC through their emphasis on victim participation at all stages of investigations and prosecutions and, in the case of the ICC, the establishment of the Trust Fund for Victims, which was recently tasked with delivering reparations to affected communities in the case of convicted Congolese warlord, Thomas Lubanga (ICC Trial Chamber I, 2012).

These victim-oriented developments necessitate two principal lines of inquiry. The first is philosophical, namely to what extent victims (as opposed to other key parties such as suspects and the transitional society at large) should be considered the central party in criminal trials and whose needs warrant particular prominence in legal and policy terms. Greater normative consideration of these issues is required, drawing on earlier inquiries on similar themes conducted by political and legal theorists and criminologists, to ascertain the justifiable importance of victims in the realm of international criminal justice. It is possible that an overly victim-oriented approach to justice skews processes away from other key parties, including suspects who deserve a fair trial, witnesses who may not necessarily be victims but nevertheless are critically invested in the justice enterprise, and societies generally that are affected by the outcomes of trials. Further analysis of the needs and claims of these different parties is required to lay a stronger normative foundation for the exercise of international justice.

In broader social and political terms – regardless of the primacy that victims should have in the practice of international criminal law – a current research trend that should be broadened and deepened concerns the most effective ways in which international law can address the needs and concerns of victims. This issue requires in-depth analysis of victims' stated needs – an issue that has been addressed in several qualitative and quantitative studies of discrete conflict cases (ICTJ 2005; OHCHR 2007) – followed by systematic discussion of the capacity of international law to meet those needs; a theme that connects to the issue above regarding the empirical impact of particular transitional justice processes. This research area should involve questions such as the role of reparations in addressing victims' needs, the extent to which

individual/communal and material/symbolic reparations are most appropriate given the nature of conflict in particular societies and prevailing resource constraints, as well as explorations of the role of trauma counselling, psychosocial healing and victim memorialisation in addressing atrocity.

International policy implications

This final section examines the policy implications of the problems with international criminal justice explored above, as well as the future research directions advocated for this field. Specifically, this section focuses on four main issues: (1) the challenge of determining the impact of transitional justice mechanisms such as international courts and tribunals; (2) to what extent policy-makers should continue funding international, rather than national, court processes; (3) the degree of assistance that other international bodies should afford international courts and tribunals during investigations and prosecutions; and (4) the role of international criminal law within peace negotiations and other forms of complex societal transitions.

A critical policy issue stemming from the issues examined above is the current lack of empirical evidence regarding the role and impact of international criminal justice institutions. At present, given the general dearth of in-depth analysis of these questions, most international political support for these institutions is largely ideological or aspirational – believing in the inherent worth of trial-based approaches to accountability for serious crimes – but with little tangible evidence of their long-term impact. For this reason, policy-makers require more convincing evidence of the benefits of international criminal justice. They also require a clearer understanding of the negative consequences that trial-based approaches can have for societies recovering from conflict. Not only do policy-makers require more evidence of the positive contributions courts can make, for example, in terms of deterrence and durable peace but also of their negative consequences, including the potential to dissuade combatants from engaging in peace talks for fear of prosecution, to entrench feelings of retribution and revenge by emphasising the need for punishment, and to cause major societal divisions through a lack of even-handed prosecutions. Deeper empirical analysis is required into both the likely positive and negative impact of international criminal justice to allow policy-makers to make more informed decisions about the appropriate redress for mass crimes.

The lack of clarity regarding the impact of international criminal law is also a serious matter for policy-makers because of the enormous financial cost of international courts. It is estimated that, over its 17 years of operation, the ICTR has cost the international community approximately US$1.5 billion and the first decade of the ICC has cost nearly US$1 billion (BBC 2012). If policy-makers cannot identify the tangible effects of international criminal justice in the societies concerned, such immense expenditure will be difficult to justify, particularly in the era of economic crisis and global belt-tightening.

This raises a second important policy consideration, namely whether global decision-makers should finance the reform of domestic judicial processes in transitional societies rather than continuing to support various international courts and tribunals (Kaye 2011). As the afore-mentioned case of the Ituri judiciary in north-eastern Congo highlights, carefully targeted international assistance to local courts – providing finance and some degree of technical expertise while maintaining the autonomy of domestic judicial actors – can help build robust and effective institutions. The Ituri example highlights that domestic reform is usually substantially cheaper than supporting international processes and can allow local institutions to handle cases of equal seniority and complexity to those within international jurisdiction. Domestic institutions also have the marked benefit of being located close to affected communities, which permits many

of the benefits of proximity and engagement discussed earlier. Furthermore, bolstering domestic institutions means contributing to permanent processes, as opposed to international institutions which eventually disband, as with the *ad hoc* or hybrid tribunals, or in the case of the ICC, move on to other parts of the globe. Certainly there are important problems to consider in supporting domestic judicial reform, principally to what extent local courts can be insulated from political interference and domestic security can be maintained to allow courts to function. However, the fact that international institutions have struggled to address these same issues suggests that policy-makers should start to shift their attention to supporting national judiciaries. It is not clear, from current evidence, that international judicial institutions have delivered a higher standard of justice than domestic institutions and whether they have had meaningful effects on societies recovering from atrocity. That these serious questions persist after two decades of sustained international justice interventions around the world suggests a change in strategy is necessary. A greater focus on domestic justice will meet substantial resistance from the community of scholars and practitioners who are deeply invested in the international criminal law enterprise, with its constant circulation of staff among the various courts and tribunals. But international policy-makers should resist pressure from this community to consider creative approaches to bolstering domestic justice, while also taking into account the inherent pitfalls of international meddling in domestic processes, as discussed above.

Third, a key policy question arising from the ICC's recent work is clarifying the role of other international bodies, including UN and unilateral peacekeeping missions and development agencies, in assisting international courts and tribunals during their investigations. From the outset, because of substantial financial and personnel limitations, the ICC has relied heavily on domestic governments and international actors for the security of Court staff in the field, identifying witnesses, gathering evidence and conducting outreach among local populations. The UN in particular has often been reluctant to link itself too closely to the ICC for fear of jeopardising its delicate relations with local actors who might perceive cooperation with the Court as a forfeit of UN neutrality. In the case of Ituri in north-eastern DRC, UN human rights and rule of law personnel were aggrieved by the ICC's assumption that it could gain immediate access to witnesses and evidence about grave violations which the UN had assiduously gathered over many years.[5] The UN – particularly through its peacekeeping mission in the DRC – eventually agreed to share some evidence with ICC investigators from the Office of the Prosecutor. However, this began a difficult relationship and resulted in the UN refusing to share certain pieces of evidence which were considered too sensitive and could risk the safety of UN staff and Congolese witnesses. This battle over evidence-sharing nearly resulted in the collapse of the ICC trial against the Congolese rebel leader, Thomas Lubanga, but the situation was resolved in time for the case to continue (Katzman 2009). This example highlighted, however, that the ICC's tacit expectation of assistance from the UN and other international bodies would not automatically be fulfilled, raising questions about how the ICC can conduct effective investigations and prosecutions if external actors are not always willing to cooperate.

This issue is arguably more fraught in cases such as Darfur, where the UN Security Council referred the situation to the ICC Prosecutor but without a clear undertaking by the UN peacekeeping missions in Sudan to assist the Court. Given that the ICC has not secured cooperation from the Sudanese government to allow its investigators on the ground in Darfur, the ICC has relied on the UN and other bodies to help with evidence-gathering – assistance that has not always been forthcoming. Nor has the UN shown any willingness to help arrest any of the high-level Sudanese government officials indicted by the ICC, including President Bashir or Ahmed Haroun, former Minister of State for Humanitarian Affairs and now governor

of South Kordofan Province. The two relevant peacekeeping missions – the joint UN-African Union mission in Darfur (UNAMID) and the UN mission in Sudan (UNMIS) – have refused to arrest senior Sudanese officials because neither mission is mandated to enforce ICC warrants, and both suffer severe personnel and logistical shortages and constant obstruction by Khartoum (Clark 2008). This lack of UN assistance drew criticism from the ICC Prosecutor (UN Security Council 2010) and highlighted the UN's bind in Darfur, namely needing to be seen to support the ICC, given that the Darfur referral emanated from the Security Council, but also needing to maintain the UN's stated neutrality in Sudan. These problems, underlined by the cases of Ituri and Darfur, necessitate clearer guidelines and strategies from UN and other international policy-makers regarding the degree of assistance that can be afforded international judicial institutions.

Finally, as exemplified by the Juba peace talks discussed above, international criminal law is now a central feature of most peace negotiations around the world, especially those involving UN mediation. The UN increasingly holds that there is a prohibition in international law against the use of amnesties for suspects of genocide, war crimes and crimes against humanity and therefore insists on prosecutions for such suspects within the framework of peace negotiations (Egeland 2012). This issue became a stumbling block in the Juba context because the LRA leadership insisted on the withdrawal of ICC arrest warrants against several of its commanders as a precondition for participating in the talks. Meanwhile, key actors in northern Ugandan civil society argued that the national Amnesty Act, passed in 2000, should take precedence over any calls for prosecutions. The UN stance in the Ugandan negotiations represented a general international trend toward opposing amnesties and supporting prosecutions, especially through international courts.

This position, however, raises two main problems – one legal and one policy-oriented – that warrant greater consideration by international decision-makers. In legal terms, as a range of commentators have pointed out, international criminal law does not establish as clear a prohibition against the use of amnesties for serious crimes as the UN and other advocates often suggest (Pensky 2008; Freeman and Pensky 2012; Mallinder 2012). While the Rome Statute governing the ICC states that domestic amnesties would not preclude ICC jurisdiction in a particular situation, other international criminal law statutes and conventions are less prescriptive or say very little about this issue. This suggests that the international legal basis for the trend against amnesties is substantially weaker than many advocates have proposed, which requires a different set of justifications employed by the UN and other international policy actors.

In broader policy terms, the questions above regarding the lack of evidence for the impact of trials should also affect international political prescriptions during peace processes. Given that some studies indicate that amnesties often contribute to durable peace and long-term stability (Snyder and Vinjamuri 2003/4) – although more empirical research is also required on this issue – policy-makers and negotiators should be less rigid in prescribing prosecutions for high-level suspects. At present, there is neither the firm international legal foundation nor substantial empirical evidence regarding the political and social benefits of trial-based accountability to warrant this strict international policy agenda. As shown during the Ugandan peace talks, the refusal by international actors to consider the possibility of amnesty for armed actors leads to narrow mediation frameworks, increases the intransigence of negotiating parties who are fearful of prosecution, and ultimately contributes to the collapse of negotiations. The danger therefore is that the current policy trend toward prohibiting amnesties will disincentivise armed groups from negotiating and thus entrench rather than halt conflict.

Conclusion

Recent decades have witnessed the rapid proliferation of international courts and tribunals as responses to mass atrocity around the world. International criminal justice has, in a short period, become a central feature of political transitions from mass conflict and authoritarian rule, peace-building and democratisation. These developments have gone far beyond the institutional and legal level to entrench a range of important global norms, including a deep belief in the need for international prosecutions for high-level suspects accused of serious crimes and a scepticism toward – even a stated prohibition against – the use of amnesty in these contexts.

While these developments have led to triumphalism from some legal and human rights advocates, it is clear that this entrenchment of international criminal justice within the framework of transitional justice has been highly problematic. International courts and tribunals have continually struggled with similar sets of challenges and have made similar mistakes, suggesting limited learning among these institutions and an unshakeable belief in their positive contributions. The problems with international criminal justice explored in this chapter centre on the over-arching issue of translating abstract legal norms and ideas into concrete realities on the ground in transitional societies. Uniting these various challenges is a sense that international law is often constructed in a political and social vacuum among legal and judicial scholars and practitioners, with insufficient attention paid to the complexities of societies recovering from atrocity, their particular historical, political, social and cultural features, their reluctance often to embrace external intervention in domestic affairs, and increasingly a range of problems stemming from the use of international law while conflict is ongoing. The emphasis on the supposed neutrality and impartiality of international criminal law – one of its widely perceived advantages over domestic justice – has tended to lead to a wilful detachment from the messy political and social realities of transitional societies. In doing so, international justice has often overlooked key aspects of those societies that greatly affect its own work and determine its long-term efficacy.

On this basis, international criminal justice requires a major rethink to make it relevant and meaningful in the twenty-first century. Scholars should pay more attention to analysing the tangible effects of international law within the societies in question, while lawyers and judges should consider more deeply the ways in which they can maximise the benefits of law for the affected communities in whose name they deliver justice. For international policy-makers, the overriding question is whether – given the perennial problems and often unsubstantiated benefits of international criminal law – they should shift their focus to supporting domestic judiciaries and other local processes, given their proximity to affected communities and a track record of dealing with modern forms of conflict. With the *ad hoc* and hybrid tribunals gradually closing their doors and the ICC soon to be the only remaining international criminal legal institution addressing mass crimes, this is an ideal time to consider whether a change toward reforming and bolstering domestic justice would ultimately be more beneficial for societies recovering from mass atrocity.

Discussion questions

1   What should we reasonably expect international criminal justice institutions to deliver for societies recovering from mass conflict and/or repressive rule?
2   As international criminal justice increasingly intervenes in cases of ongoing conflict, is it possible to insulate it from the pressures of insecurity and interference by domestic governments?

3   Is accountability for crimes such as genocide, war crimes and crimes against humanity better delivered by international or domestic courts or by entirely different types of mechanisms?
4   If international criminal justice operates alongside domestic transitional justice mechanisms, how can all of these processes be shaped to ensure that they effectively cooperate and complement one another?
5   Should amnesty be maintained as a possible response to mass atrocity, particularly during times of delicate peace negotiations?

Websites

Centre for International Politics of Conflict, Rights and Justice: http://www.soas.ac.uk/ccrj/.
International Center for Transitional Justice: http://ictj.org/.
Oxford Transitional Justice Research: http://www.csls.ox.ac.uk/otjr.php/.
Project on International Courts and Tribunals: http://www.pict-pcti.org/.
Transitional Justice Data Base Project: https://sites.google.com/site/transitionaljusticedatabase/.

Notes

1   Author's survivor interviews, Romain, Butare. 2003. [author's translation].
2   Author's interviews, Paul, Ruhengeri, Buhoma, 4 May 2003. [author's translation].
3   Interview with Gacaca Judge, Musanze District, Northern Province, Rwanda, 29 August 2008, notes on file with author. (Interview conducted jointly with Nicola Palmer.)
4   Author's interview, ICTR Judge, Arusha, 7 February 2003.
5   Author's interviews with UN personnel, Bunia, DRC, February 2006.

References

Akhavan, P. (1996) 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', *The American Journal of International Law*, 90(3): 501–510.
Amnesty International (2008a) 'Government Cannot Negotiate Away International Criminal Court Arrest Warrants for LRA', AI Index: PRE01/056/2008, 20 February 2008.
Amnesty International (2008b) 'Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short of a Comprehensive Plan to End Impunity', AI Index: AFR 59/001/2008, 1 March 2008.
Asmal, K. (2000) 'Truth, Reconciliation and Justice: The South African Experience in Perspective', *Modern Law Review*, 63(1): 1–24.
Boraine (2006) 'Transitional Justice: A Holistic Interpretation', *Journal of International Affairs*, 60(1): 17–27.
Branch, A. (2011) *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford: Oxford University Press.
British Broadcasting Corporation (2012) 'Ten Years, $900m, One Verdict: Does the ICC Cost Too Much?', 14 March, available at: http://www.bbc.co.uk/news/magazine-17351946.
Brittain, V. (2003) 'The Arusha Tribunal Costs Too Much for Very Few Results', *African Geopolitics*, 11, Summer, available at: http://www.african-geopolitics.org/show.aspx?ArticleId=3537.
Brubacher, M. (2007) 'The ICC, National Governments and Judiciaries', in N. Waddell and P. Clark (eds) *Peace, Justice and the ICC in Africa*, Meeting Series Report, London: Royal African Society, March, pp. 22–23.
Clark, P. (2007) 'Hybridity, Holism and "Traditional" Justice: The Case Of The Gacaca Courts In Post-Genocide Rwanda', *George Washington International Law Review*, 29(4): 765–838.
Clark, P. (2008) 'Ocampo's Darfur Strategy Depends on Congo', Oxford Transitional Justice Research Working Paper Series, 20 August, available at: http://www.csls.ox.ac.uk/documents/Clark_2.pdf.
Clark, P. (2010) *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers*, Cambridge: Cambridge University Press.
Clark, P. (2011) 'Chasing Cases: The ICC and the Politics of State Referral in Uganda and the Democratic Republic of Congo', in C. Stahn and M. El Zeidy (eds) *The International Criminal Court and Complementarity: Theory and Practice*, Cambridge: Cambridge University Press.

de Brouwer, A–M. and Chu, S. (2009) *The Men Who Killed Me: Rwandan Survivors of Sexual Violence*, Vancouver: Douglas and McIntyre.

Drumbl, M. (2000) 'Punishment Postgenocide: From Guilt to Shame to "Civis" in Rwanda', *New York University Law Review*, 75(5): 1221–1326.

Egeland, J. (2012) Debate on BBC World Service, 7 January, available at: http://www.bbc.co.uk/iplayer/console/p00mn5l0 (38:08).

Elster, J. (2004) *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge: Cambridge University Press.

Franke, K. (2006) 'Gendered Subjects of Transitional Justice', *Columbia Journal of Gender and Law*, 15(3): 813–828.

Freeman, M. and Pensky, M. (2012) 'The Amnesty Controversy in International Law' in F. Lessa and L. Payne (eds) *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, Cambridge: Cambridge University Press, pp. 42–66.

Fujii, L.A. (2009) *Killing Neighbors: Webs of Violence in Rwanda*, Ithaca, NY: Cornell University Press.

Gourevitch, P. (1996) 'Justice in Exile', *New York Times*, 24 June, A15.

Hamber, B. (2009) *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health*, New York: Springer.

Harlacher, T., Okot, F. X., Obonyo, C. A., Balthazard, M. and Atkinson, R. (2007) *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*, Kampala: Caritas Gulu Archdiocese.

Helsingin Sanomat (2009) 'Prosecutor in Genocide Case Takes Court on Tour of Rwanda Village', 17 September, available at: www.hs.fi/english/article/Prosecutor+in+genocide+case+takes+court+on+tour+of+Rwanda+village/ 1135249393557.

Henham R. and Findlay, M. (eds) (2011) *Exploring the Boundaries of International Criminal Justice*, Farnham: Ashgate Publishers.

Human Rights Watch (2008) *Benchmarks for Justice for Serious Crimes in Northern Uganda: Human Rights Watch Memoranda on Justice Standards and the Juba Peace Talks*, May 2007–February 2008.

International Center for Transitional Justice (2005) *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*, New York: ICTJ.

International Center for Transitional Justice (n.d.) 'What Is Transitional Justice?', available at: http://www.ictj.org/en/tj.

International Criminal Court (Trial Chamber I) (2012) 'Decision Establishing the Principles and Procedures to Be Applied to Reparations', *The Prosecutor vs. Thomas Lubanga Dyilo*, Situation of the Democratic Republic of Congo, ICC-01/04-01/06, 7 August 2012.

Kalyvas, S. N. (2006) *The Logic of Violence in Civil War*, Cambridge: Cambridge University Press.

Katzman, R. (2009) 'The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial', *The Northwestern University Journal of International Human Rights*, 8(1): 77–101.

Kaye, D. (2011) 'Justice Beyond The Hague: Supporting the Prosecution of International Crimes in National Courts', Council for Foreign Relations, June.

Kelsall, T. (2009) *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone*, Cambridge: Cambridge University Press.

Kritz, N. (ed.) (1995) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Country Studies*, vol. 2, Washington, DC: United States Institute of Peace Press.

Longman, T. (1995) 'Genocide and Socio-Political Change: Massacres in Two Rwandan Villages', *ISSUE: A Journal of Opinion*, 23(2): 18–21.

Mallinder, L. (2012) 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment', in F. Lessa and L. Payne (eds) *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, Cambridge: Cambridge University Press, pp. 69–96.

Merry, S. E. (1988) 'Legal Pluralism', *Law and Society Review*, 22(5): 869–901.

Minow, M. (1999) *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston: Beacon Press.

Morris, M. (1997) 'The Trials of Concurrent Jurisdiction: The Case of Rwanda', *Duke Journal of Comparative and International Law*, 7: 349–372.

Morris, M. (2000) 'Complementarity and Conflict: States, Victims, and the ICC', in S. Sewall and C. Kaysen (eds) *The United States and the International Criminal Court: National Security and International Law*, Lanham, MD: Rowman and Littlefield, pp. 195–210.

Mutagwera, F. (1996) 'Détentions et poursuites judiciaires au Rwanda', in J-F. Dupaquier (ed.) *La Justice Internationale face au Drame Rwandais*, Paris: Karthala, pp. 17–36.

Neier, A. (1998) *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice*, New York: Times Books.

Nino, C. S. (1991) 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina', *Yale Law Journal*, 100(8): 2619–2640.

Nouwen, S. and Werner, W. (2010) 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, 24(4): 941–965.

Olsen, T. D., Payne, L. A. and Reiter, A. G. (2010) *Transitional Justice in Balance: Comparing Processes, Weighing Efficiency*, Washington, DC: US Institute of Peace Press.

Orentlicher, D. F. (1991) 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Journal*, 100(8): 2537–2615.

Over, W. (1999) *Human Rights in the International Public Sphere*: *Civic Discourse for the Twenty First Century*, Stamford, CT: Ablex Publishing Corporation.

Oxford Transitional Justice Research (2010) *Debating International Justice in Africa: OTJR Collected Essays, 2008–2010*, Oxford, July, available at: www.fljs.org/uploads/documents/Justice_in_Africa.pdf

Palmer, N. (2012) 'Transfer or Transformation? A Review of the Rule 11 *bis* Decisions of the International Criminal Tribunal for Rwanda', *African Journal of International and Comparative Law*, 20(1): 1–21.

Palmer, N. and Clark, P. (2012) 'Challenging Transitional Justice', in N. Palmer, P. Clark and D. Granville (eds) *Critical Perspectives in Transitional Justice*, Cambridge: Intersentia Publishers, pp. 1–16.

Pensky, M. (2008) 'Amnesty on Trial: Impunity, Accountability and the Norms of International Law', *Ethics and Global Politics*, 1(1–2): 1–40.

Peskin, V. (2008) *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge: Cambridge University Press.

Porter, N. (2003) *The Elusive Quest: Reconciliation in Northern Ireland*, Belfast: The Blackstaff Press.

Robins, S. (2011) 'Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal', *International Journal of Transitional Justice*, 5(1): 75–98.

Romano, C., Nollkaemper, A. and Kleffner, J. (eds) (2004) *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford: Oxford University Press.

Snyder, J. and Vinjamuri, L. (2003/04) 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', *International Security*, 28(3): 5–44.

Sriram, C. L., Garcia-Godos, J., Herman, J. and Martin-Ortega, O. (eds) (2012) *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, London: Routledge.

Stahn, C. and El Zeidy, M. (eds) (2011) *The International Criminal Court and Complementarity: From Theory to Practice*, vols 1 and 2, Cambridge: Cambridge University Press.

Straus, S. (2006) *The Order of Genocide: Race, Power, and War in Rwanda*, Ithaca, NY: Cornell University Press.

Teitel, R. (1999) *Transitional Justice*, New York: Oxford University Press.

The Secretary-General (2004) *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 12, U.N. Doc. S/2004/616, 23 August.

Thoms, O., Ron, J. and Paris, R. (2008) 'The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners', Centre for International Policy Studies Working Paper, University of Ottawa, April, 5.

Transitional Justice Data Base Project, University of Wisconsin, available at: https://sites.google.com/site/transitionaljusticedatabase/.

Trial Watch, *Yves Mandro Kahwa Panga*, available at: http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/yves_mandro-kahwa-panga_576.html.

United Nations (1995) 'Statute of the International Criminal Tribunal for Rwanda', available at: www.un.org/ictr/ statute.html.

United Nations Mission in the Democratic Republic of Congo (2008) *Human Rights Monthly Assessment: March 2008*, 14 May, Section 34.

United Nations Office of the High Commissioner for Human Rights (2007) *Making Peace On Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda*, Gulu and Kampala: OHCHR.

United Nations Security Council (2010) 'Implementing International Criminal Court's Decisions on Darfur Ultimately up to Security Council, Chief Prosecutor Says in Briefing', SC 10107, 9 December, available at: http://www.un.org/News/Press/docs/2010/sc10107.doc.htm.

Waddell, N. and P. Clark (eds) (2008) *Courting Conflict? Justice, Peace and the ICC in Africa*, London: Royal African Society.

Waldorf, L. (2006) 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice', *Temple Law Review*, 1(55): 1–80.

Warham, O. (2012) 'Can the World Court Survive African Union's attack?', CNN Website, 15 June, available at: http://edition.cnn.com/2012/06/15/opinion/icc–sudan/index.html.

Wrange, P. and Onyango, J. F. (2011) *The International Criminal Court and the Juba Peace Process: Global Governance and Local Friction*, Kampala: Fountain Publishers.

8

Crimes against animality

Animal cruelty and criminal justice in a globalized world

Deborah Cao

Introduction

As has been rightly suggested, our treatment of non–human animals is a major unresolved problem of social justice in the world today (Nussbaum 2006).[1] Laws now exist in many countries in the world for the protection of animals against acts of cruelty with criminal sanctions. There is an emerging legal order regulating animal related matters in international and regional laws. Nevertheless, animal abuse seems to be on the increase and more widespread. As pointed out,

> In a strange way, mankind does seem to be growing more sentimental about animals and also more ruthless. No age has ever been more solicitous to animals, more curious and caring. Yet no age has ever inflicted upon animals such massive punishments with such complete disregard.
>
> (Scully 2002: x)

Justice for animals is still largely elusive.

This chapter focuses on animal cruelty as a crime and social harm and its socio–legal dimensions. It first outlines the anthropocentric culture and backdrop of victimization of animals in our society as seen in philosophical, legal, linguistic, religious, cultural and other human endeavours. This may help us gain historical, sociological, cultural and legal perspectives regarding our treatment of animals in the past and possible future directions. After all, law, including animal-related laws and legal regimes, reflects the underlying political, social, economic, cultural, and religious dimensions of our societies. Despite the mainstream human-centricity, there have been dissenting and minority voices expressed intermittently in history on behalf of the animal victims. These were translated into anti-cruelty law first in England and subsequently in other parts of the world. In our time, the 1970s onwards has seen animal liberation as a popular movement in most industrialized countries triggered by the works by Singer and other animal advocates. The chapter describes these legal advances in animal welfare law and the major types of offences against animals. The numerous prohibitions on the law books notwithstanding, many kinds of animal abuse and harm, especially large-scale institutionalized acts of cruelty, those sponsored or sanctioned by the state and perpetrated by public entities, corporations and

other institutions, often fall outside the reach of the law. The chapter highlights some of the legalized animal abuse. Finally, the chapter gives tentative definitions of 'crimes against animals' and 'international crimes against animals', together with some thoughts on the way forward in international law in protecting and enhancing animal rights and interests in our increasingly globalized world.

The basic premise is that acts of cruelty against animals are a moral issue and more importantly, acts of criminality and social harm, and that both domestic and international law need to be harnessed to reduce and redress such social harm and wrongs. Our anthropocentric thinking and attitude towards animals require a fundamental shift despite the progress made in the past few decades. This includes how we view the world and ourselves and our relationships with animals, how we regard animals as sentient beings and as partners and fellow inhabitants of the Earth. It also entails what we do and do not do in terms of law and justice on behalf of the most vulnerable and powerless groups who cannot speak. Animal abuse is social harm affecting humans and animals alike, and must be taken seriously and tackled more vigorously as a global and collective concern of humanity.

Anthropocentric culture

As has been proposed and now widely accepted, crime is a social construction that reflects societal power relations (Quinney 1970). Then what has been the relationship between humans and animals and between human society and animal world?

It is true that the relationship between humans and animals is 'a complex, ambiguous, challenging and frustrating affair' (Bekoff 2007: xxxv). Human–animal studies is a new and growing academic area drawing on philosophy, law, animal sciences, anthropology, veterinary medicine, biology, environmental studies, cultural studies, literary studies, sociology and criminology (for discussions of human–animal relationships, see Bekoff 2007). Our interaction with animals has been a constitutive part of human history (Fellenz 2007: 11). For discussions of human and animal relationships, see Caras (2002). Animals, big and small, dead and live, have contributed significantly to human evolution and development of human societies and civilization. We would not have been where we are today without the most vital contributions of animals in many different ways and throughout the ages.

However, human–animal relationships have been predominantly that of dominance, exploitation and killing for thousands of years, and there have been persistent efforts to stress the distance between humans and other animals. Relationship is usually bilateral, involving mutuality or interactions or even partnership. It may involve the acknowledgement of the existential awareness of the other party. Human treatment of animals in history has been overwhelmingly a one-sided affair, of total control, dominance and disposal, and of killing and destruction as food and other resources. Animals are not just in inferior or subordinate positions. They have no position or power versus humans either individually or as groups or species. Animals are found or brought into existence for eating, working, entertaining or otherwise exploitation in the material and physical world for exclusive human benefit. In the abstract, spiritual and metaphysical realm, the situation is similar if we look through different cultures and societies in language, law, religion, philosophy and other cultural creations.

To begin with, humans are animals, but we have made ourselves non-animals in order to feel superior and distinguish ourselves from other animals. Modern genetic science tells us that human genes are more than 98 per cent identical to those of chimpanzees and around 97 per cent the same as those of orangutans (see Ridley 2003). Despite the close kinship between humans and great apes, chimpanzees and humans are classified differently to belong to different branches

of the biological family tree. In taxonomy, humans are classified as Hominids in the animal kingdom under the categories of mammals and primates but orangutans, gorillas and chimpanzees are classified as Pongids (ibid.). Relevantly, more than a century ago, Charles Darwin, without the aid of genome mapping or DNA data, proposed then, to the shock of the scientific, religious and the rest of the world, that humans and the African apes are descended from a common ancestor. Our anthropocentric bias has always emphasized how very different humans are from all other forms of life. Such taxonomy mirrors the differentiation and bias in the mainstream thinking in philosophy, religion and legal classifications.[2]

Philosophers have pondered on the differences between humans and animals since the beginning of human civilization, but until recent times, few philosophers wrote much about the moral status of animals. Most classical philosophers who wrote about animals were primarily concerned with the differences between animals as compared to humans; they considered animals subordinate or inferior to humans and thus, denied animals any moral status – moral anthropocentrism, that is, human interests are located at the centre of the moral universe to the exclusion of other beings (see Steiner 2005; 2008). In other words, moral status is accorded to the species *Homo sapiens* to the exclusion of all other species (Steiner 2005). Such a philosophical position failed to give any moral standing to animals due to the belief that animals lack sentiency as advocated by Descartes or rationality as taught by Aristotle and Kant. Such an attitude and philosophy towards animals made up mainstream thought and orthodoxy over thousands of years until they were questioned in the second half of the twentieth century. It was not until the 1970s that this traditional belief was fundamentally shaken in both philosophical debates and popular thinking. Moral anthropocentrism has been seriously challenged in the past four decades in environmental philosophy and animal ethics. (For philosophical thoughts on animals, see Singer 1975/1995; 1985; 1993; 2007; Regan 1983; 2004. See Acampora (2007) discussing the major animal philosophy and ethics thinkers and writers in modern times.) Animal philosophy in our time has been characterized by ethical reflections and advocacy, 'from an early emphasis on anti-cruelty kindness, through a later insistence on rights or liberation, to a most recent resurgence of interest in caring sympathy' (Acampora 2007: 139). Most contemporary writings about animals question the traditional mainstream moral philosophy privileging humans over animals. (For a contemporary view against animal moral standing, see Carruthers 1992.) The opposition among ordinary people to animal cruelty especially in areas such as intensive farming and animal experimentation has also sharply increased in most Western countries, accompanying an interest in, and concern about, environmental issues.

As we know, people from different cultures and societies have significant differences in their way of thinking and way of life. However, one commonality across all cultures and societies is found in our treatment and attitude towards animals. It is a misconception that Eastern cultural and religious notions and practices are kinder and gentler towards animals or that Western culture somehow is particularly cruel towards animals. To illustrate, despite the distinct conception of nature and animals in Chinese traditional philosophy and thought regarding both humans and animals as integral parts of the cosmos, different from Western dualist philosophy with clear delineation between animals and humans, the instrumental view and use of animals nevertheless have always prevailed in Chinese culture and on the Chinese landscape (Cao 2011a). Animals' intrinsic value is acknowledged in traditional Chinese philosophy, but at the same time, animals are also assumed to have value and are worthy of interest relative to humans and others, and they are resources or serviceable for human needs and enterprises (Blakeley 2003: 139). The destruction of nature and of animal species has been going on for centuries in China (see Cao 2011a). In contemporary Chinese law, domestic animals are not afforded legal protection while wildlife is regarded as resources to be exploited as declared in the Chinese Constitution (Cao 2011b).

In language, the medium through which we communicate and relate to others and the world, animals are mostly associated with negative connotations. For instance, in modern Chinese, the term for 'animal' is *dongwu* which literally means 'moving things' and had come from Japanese. Language is more than just a symbol or means of communication but an attitude, a way of thinking and behaving towards animals in mainstream cultures. In Chinese, most of the idioms and expressions associated with animals carry negative meanings and most of the swear words are animal related. This is also true in English and many other languages. We speak as if humans were not animals and as if all other animals were stupid, violent and without feelings. In English, we have the expression 'as dumb as a pig', which is factually wrong as animal scientists now tell us, and 'there are many ways to skin a cat', a description of a past violent and bloody act, still being practised in some corners of the globe today, skinning cats live as part of the fur industry. Furthermore, as rightly pointed out, our language denies the harm that humans routinely inflict on other animals (Dunayer 2001). Language reveals and exposes as well as disguises and hides. At root, we instinctively assume that animals are necessarily the Other, among whose undesirable traits are uncleanliness, irrationality, untrustworthiness, lust and the potential for sudden violence (Beirne 2009: 62). It is true that the 'way we speak about animals is inseparable from the way we treat them, and those words legitimize abuse, discounting animal sentience, individuality and worth, sanctioning cruelty and murder' (Dunayer 2001: 9). Such language, unfortunately, is still part of the everyday language today and remains socially acceptable. Our linguistic power over animals and verbal abuse desensitize people to the physical abuse and injustice done to animals and encourage a callous and exploitive view of animals (ibid.: 10).

Religion has long been one of the most powerful forces shaping our beliefs about human–animal relationships (Waldau 2002: 581), and influences our understanding of such relationships in three principal ways: through our perceptions, our values and our practices (Linzey 2007: 586). Although the ancient religious traditions have sought to be respectful to animals, there are also powerful negative attitudes towards animals including human-centricity and human superiority. For instance, in Christianity, it is believed that humans are created superior to all other forms of life and humans alone deserve moral protection to the exclusion of animals. Furthermore, it has been taught that humans are given dominion over animals on Earth, and dominion has been interpreted over the centuries to endow ownership and possession. Despite the traditional teaching tradition and orthodoxy, some of the earliest animal advocates were Christian theologians.[3] It is also true that modern Christians generally take a much more benevolent view of animals, acknowledging that unnecessary mistreatment of animals is sinful and morally wrong, and that human dominion over animals means that humans have special moral obligations towards the weak and the oppressed including animals, analogous to that of parental obligation to children (see Linzey 2009).

The human-centric teachings are not exclusive to Christianity, as Paul Waldau (2002) demonstrated in his book *The Specter of Speciesism: Buddhist and Christian View of Animals*. His detailed and in-depth study and findings challenge the claims that the Buddhist tradition is ethically sensitive to other animals, including the claims that animals are treated with great sympathy and understanding and Buddhists never believed that humanity is superior to the rest of the natural world. His study proposed that what is said in the Buddhist scripture, what is done in Buddhist societies and the general tenor of the Buddhist depreciation of animals are inconsistent with these claims. Waldau concludes that speciesism is very much a part of Buddhist as well as Christian teaching and practice. We must also add that the other major world religions generally follow a similar tenor and direction. Religions are human creations after all, irrespective of origin and faith, bearing the hallmarks of human self-importance. (For religious perspectives on animals, see Linzey and Regan 1988; Waldau 2002; Linzey 2007; 2009; and Bekoff 2007: Vol. 2.[4])

As mentioned earlier, animals, for the most part in human legal history, have been treated differently from humans in law. Animals have been classified either as property or things. This has been the legacy of ancient Roman law, not just for Western laws but Eastern as well due to legal transplantation (see Cao 2010). In ancient Roman law, a person had rights while *res*, a thing, is the object of the rights of a person. All the beings that the Romans thought lacked free will – women, children, slaves, the insane and animals, were classified as things (Wise 2002: 32). This basic notion is attributed to Judaeo-Christian teaching, ancient Roman law and later to the most influential English jurist of the eighteenth century, William Blackstone (1732–1780). Blackstone describes the origin of people's property rights to animals this way:

> In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man 'dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth'. This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.
>
> (Morrison 2001: 2–3)

Similarly, according to John Locke (1632–1704), all earthly creatures belong to all mankind in common, as given by God, and man has dominion over them, holding them as property (Locke 2003: [27]).

These ideas and teachings are deeply entrenched in people's hearts and minds, in everyday lives and in the legal and social institutions in our societies. One major legacy is that as a general proposition, in English common law, domestic animals are said to belong to someone while wild animals are owned by no one. Domestic animals are the subject of absolute property of humans (see *Halsbury's Laws of England* 2008: [709]). Thus, domestic animals exist as the property of humans, whether they are companion animals, animals used in scientific research, in entertainment and sports, or farm animals (see Cao 2010). The common law's absolute rights of ownership of animals have been constrained over time by animal protection legislation, although the fundamental legal status of animals has remained unaltered (Radford 2001:101). As Radford points out, there was little regard for an animal's inherent needs as the protection against abuse that the common law provided originated in the importance the courts attached to safeguarding the inviolability of a person's possessions (ibid.: 101). The legal status of animals as property also affects standing. Generally speaking, as personal property and in the absence of any legislative prescription to the contrary, animals do not enjoy standing in their own right. This poses many, often insurmountable, difficulties and barriers for seeking legal redress for suffering animals. (For discussions of standing in the USA, see *Sierra Club v Morton* 405 US 727 (1972); 31 L Ed 2d 636; 92 S Ct 1361 per Douglas J. See also *Animal Welfare Institute v Kreps* 561 F 2d 1002 (1977); *Lujan v Defenders of Wildlife* 504 US 555; 112 S Ct 2130, 119 L Ed 2d 351 (1992); *ALDF v Glickman*, 154 F 3d 426 (1998), and also Sunstein 2004; Stone 1972; 1985; Mendelson 1996–1997; Favre 2008: 325–362.)

The property status of animals concerns not just civil matters. Some see it as going to the heart of our treatment of animals. As Radford (2001:100) notes, protective legislation regulates the treatment of animals against the backdrop of the common law's traditional principles; and wherever these are not superseded by legislation, they continue to apply. For example, because

legislation does not protect an animal's life, the owner retains complete discretion to decide whether the animal should live or die (ibid.: 100). In the absence of relevant protective legislation, it allows the owner of a domestic or captive animal complete autonomy to decide how the animal is to be treated, including whether or not it should be killed; and furthermore, in the absence of a conviction for cruelty, it imposes a barrier to empowering a third party to remove and dispose of animals which are being kept in situations which compromise their welfare (ibid.: 100). Human rights law regarding property rights also has the potential to detrimentally affect the protection of animals in some circumstances (ibid.: 102).

Relevantly, until recently, animals or animal abuse were largely absent in criminology, although animals have figured as criminals as in medieval Europe, as partners in crime with humans and as weapons or other objects of human agency (Beirne 1995). See Evans ([1906] 1998) for details of criminal prosecution and capital punishment of animals in medieval Europe. Above all, animals are always treated and described as property and objects in criminological discourse whose property identity has been stolen, poached, damaged, held as ransom, rustled, or otherwise misappropriated or spoiled (Beirne 2009: 3). Even when animal abuse is discussed in relation to human crimes, animals have little significance because it is often seen as a minor offence against property (ibid.: 3). Even in the more recent discussions of the links between animal abuse and human violence, it draws attention because of the human links. As acknowledged,

> [W]hen animals enter discourse in criminology, including family violence, their status is nearly always that of passive, insentient objects acted upon by humans. As such, they tend to enter discourse mainly because they reflect or are drawn into some aspect of the complex web of human relationships deemed problematic or undesirable. Investigators admit the discursive relevance of animal abuse but tend not to perceive the physical, psychological or emotional abuse of animals as an object of study in its own right . . . from the perspective of mainstream criminology, the study of animal abuse is seen to have little relevance to the pressing interhuman problems of 'real' crime.
>
> (South and Beirne 2006: xiv)

There have been calls for the abolition of the property status of animals in law. The basic underlying argument is that if you are property, you are, in law and in effect, a slave, wholly subject to the will of your owner. (For comparison between human slavery and non-human animals, see Wise 2002; 2006; Posner 2004.) It has been argued that, as long as animals are treated exclusively as a means to human ends, their interests must always be dissimilar to human interests, and will be therefore always subordinate and considered inferior to humans' interests (Francione 2000: 98). A practical consequence of the abolitionist position is that the abolitionists are opposed to all forms of human exploitation of animals and reject the regulation of such exploitation and animal welfare law reforms, advocating the complete abolition of insti-tutionalized animal industries and practices (see Francione 1996; 2000). Another practical solution is the possibility of creating legal rights for animals within the existing legal framework without the elimination of the property status of animals. It has been proposed that a new category of property should be created – Living Property – consisting of property that can possess defined legal rights of their own, based on the notion of living objects having self-ownership, that is, unless a human has affirmatively asserted lawful dominion and control, so as to obtain title to an animal, then an animal as a living entity will be considered to have self-ownership (Favre 2004: 245–250).[5]

To summarize the foregoing section, the long-standing and deep-rooted mentality and attitude towards animals and the use of animals in everyday life as tools, food and resources are the

concrete and living manifestation of speciesism, that is, 'discrimination against or exploitation of certain animal species by human beings based on an assumption of mankind's superiority' (*Oxford English Dictionary*, 2009). See also Dunayer 2004 on speciesism. This is parallel to sexism or racism, as Singer puts it:

> Our present treatment of animals is based on speciesism, that is, a bias or prejudice towards members of our own species, and against members of other species. Speciesism is an ethically indefensible form of discrimination against beings on the basis of their membership of a species other than our own. All sentient beings have interests, and we should give equal consideration to their interests, irrespective of whether they are members of our species or of another species.
>
> (2007: 29)

Worked, farmed and hunted, animals have always been used to provide human beings with various benefits, and animals are regarded as part of the human dominion in Western religious teaching; they are considered property in law and resources in economics (Fellenz 2007: 11). Animals have been used and regarded as having only instrumental value, that is, value as a means to some other end as opposed to their intrinsic value, being something which is good or desirable in itself. In most cases throughout human history, people have always believed that animals exist as means to human ends, serving human interest.

Needless to say, the consequences of speciesism have been far worse and much more violent for animals and animal species than the parallels in sexism or racism. This goes to the very heart of justice for animals. It is also the context and backdrop against which animals are abused and killed or otherwise exploited and destroyed. It is also the human world and broader environment in which laws are made in their name for their protection, and animal abuse is exempt, excused and defended in the name of justice.

Cruelty to animals as a crime

Despite the prevailing anthropocentricity throughout the ages, a few major thinkers in different times have challenged such thinking and way of life. One such prominent person was Jeremy Bentham (1748–1832), the first major legal thinker to call for the recognition of animals' rights and their proper treatment. Bentham proposed that the capacity for suffering is the vital characteristic that gives a being the right to legal consideration, and such beings include both human beings and non-human beings (Bentham [1789] 1996). Bentham's famous words are often cited today:

> The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. . . . It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason?* nor, Can they *talk?* but, Can they *suffer*?
>
> (ibid.: 282–283)

Bentham and the other early animal advocates in eighteenth- and nineteenth-century England helped the eventual enactment of law for animal protection, first in England and later in other parts of the world.

Early animal law

A little known fact is that imperial China had animal protection provisions in its imperial criminal code although today China does not have any law against animal cruelty (Cao 2011a). The Chinese Tang Code enforced during the Tang Dynasty (618–907 AD) had rules on the protection of animals used for various official purposes involving public stables and sacrificial animals, and these provisions were concerned with domesticated government animals used for working purposes in the fulfilment of official roles (Johnson 1997: 178; Cao 2011a).[6] Horses and cattle were considered important property and valuable economic resources, thus the well-being and health of such animals were an official concern. People in charge of the animals were punished for inadequate medical care for the animals and for overworking animals, leading to injury. The killing of government and private horses and cattle was also punishable by rather harsh criminal penalties (Johnson 1997: 186; Cao 2011a). It is necessary to recognize that the law was designed to protect valuable imperial government property, not out of an animal welfare concern (Cao 2011a).

In the West, it is believed that the first anti-cruelty legislation occurred when a law was passed in Ireland in 1635 prohibiting working horses by their tails and pulling wool from live sheep, the Thomas Wentworth's Act (see Beirne 2009). This is believed to be among the first formal criminalizing Acts for animals although it is unclear precisely what the Act intended in its usage of the term 'cruelty' (ibid.). On the other side of the Atlantic, the Massachusetts Body of Liberties of 1641 included two provisions protecting animals from cruel treatment (ibid.: 69–96; Leavitt 1968: 13–14), the first anti-cruelty legal provisions in what would become the United States. (For the prosecution of animal cruelty in Puritan Massachusetts from 1636 to 1683, see Beirne 2009: 69–96.)

The modern animal cruelty laws trace their origins to nineteenth-century England. The most important initial anti-cruelty law in the history of animal legislation is the *Act to Prevent the Cruel and Improper Treatment of Cattle* when it was passed by the British Parliament on 2 July 1822. It was to prevent the cruel and improper treatment of cattle, giving the court power to impose fines and imprisonment for acts of cruelty towards cattle, horses and sheep. This law laid the foundation for all anti-cruelty laws in different parts of the world in the years to come. As a result of the British pioneering law and the subsequent work by the RSPCA and many others, anti-cruelty law gradually became common in Western countries and spread to other parts of the world. (For historical developments of animal protection in England, see Manning and Serpell 1994; Ryder 2000. For discussions of the early English laws, see Radford 2001. For early animal law developments in the USA, see Leavitt 1968; Favre and Tsang 1993; Favre 2008.)

Current legal regimes for animal protection

Animals, anywhere in the world, can be victims of cruelty or neglect, whether they are companion animals, wildlife, farm animals, animals used in research or sports or entertainment. Despite the strident progress made in animal protection in recent decades, many problems still exist.

In terms of legal regimes, animal protection laws are found at domestic, regional and international levels. There is a distinction between wildlife conservation laws and anti-cruelty or animal welfare laws for domestic animals.

For domestic animals, the major sources of animal protection law are domestic anti-cruelty or animal welfare laws of the different countries where such laws are in place. Today, in all the major countries in the world, such laws exist, for instance, the USA, the UK and countries in the European Union (EU),[7] Israel, Australia, New Zealand, India, Brazil, South Africa and many others across all continents. (For a worldview of animal law in general and comparative anti-cruelty criminal law in particular, see Wagman and Liebman 2011.) One major exception is China. Despite the aggravating cruelty situation and widespread animal abuse, China does not have any anti-cruelty laws at the national or local levels, except in one jurisdiction, Hong Kong. Hong Kong has retained its laws, including the anti-cruelty law inherited from the previous British administration. China does have the Law for the Protection of Wildlife (1988) and it joined the CITES in 1981.[8] Given the vast size of China, its huge population and the large number of animals living, working and dying in China, the lack of legal protection for domestic animals is a serious concern, not just in China but for the international community as well. In recent years, there has been growing interest in animal legal protection in China, both at the official and community levels propelled by the grassroots animal rescue efforts and the emergence of animal NGOs, what I call a Chinese Animal Liberation Movement (see Wong 2011). In 2009–2011, a legislative proposal in the form of anti-cruelty law was drafted (of which I was one of the drafters) and submitted to the Chinese national legislature and central government, but so far there has been no official response despite persistent calls for such law from animal advocates and some legislators in recent years. (The full text in English translation of the Prevention of Cruelty to Animals Law of the PRC (Experts' Draft Proposal) is found at: http://aldf.org/downloads/ChinaCrueltytoAnimalsProposal3-10.pdf.)

At the international level, there are international treaties on the protection of wildlife, but there is no international agreement on domestic animal protection or for animal welfare. This is a gap in international animal welfare regulation to be filled.

The most important international treaty on animal protection is the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) (www.cites.org), an international wildlife regulatory instrument.[9] CITES currently has 175 signatory countries, and it is legally binding on the signatory countries, providing a framework to protect endangered animals (Bowman *et al.* 2010). The success and progress achieved under CITES need to be viewed against the backdrop of the prevailing human-centred approach to the treatment of animals in our societies. As pointed out, as in other realms of exploitation of animals, the supposed interests of humans overshadow the interests of animals in CITES as well as in other legal regulatory regimes (Kelch 2011).

A number of observations need to be made. First, CITES aims to ensure that international trade in specimens of wild animals and plants does not threaten their survival. It views wild fauna and flora as possessing value from aesthetic, scientific, cultural, recreational and economic points of view, and 'accepts the legitimacy of trade in animals, including those that are endangered, and this necessarily legitimizes the exploration of all these animals' (ibid.: 234). CITES is widely acknowledged as one of the most successful international environmental treaties, but it is not about humane treatment or animal welfare. Its focus is on endangered species that could disappear if human exploitation or use of their habitats is not controlled (Wagman and Liebman 2011: 279). It does not prohibit wildlife trade, including endangered species. Second, CITES enforcement is problematic. It depends on each individual state for implementation of its treaty obligations. Member states are required to impose a criminal penalty for trade in contravention of CITES. Accordingly, in different jurisdictions, trade in endangered species of animals may be criminal, attracting serious criminal sanctions. However, member countries do

not always penalize CITES violations (Jacobs 2010; Kelch 2011; Gettleman 2012). Third, for CITES and other international agreements on animal conservation, their main concerns are with human use of animals, not with protecting them for their own sake. Exploitation often trumps protection when there is a conflict or perceived tension between humans and animals. As pointed out, the views of humans, whether economic, cultural, political, religious, or social, and the long-term interests of humans, easily outweigh the interests of animals (Kelch 2011: 235). Despite the worldwide efforts to enforce laws to protect endangered animal species, 'CITES may be becoming nothing more than a brightly harnessed show pony in an international economic game of ecological exploitation' (ibid.: 231).

Another important area of international efforts for animals is the World Organization for Animal Health (OIE) (www.oie.int), an intergovernmental organization responsible for improving animal health worldwide. The need to fight animal diseases at global level led to the creation of the Office International des Epizooties (OIE) through the international Agreement signed in 1924 in Paris. In May 2003, it became the World Organization for Animal Health and currently has 178 member states.

As the original purpose of the OIE founding countries was to implement an international agreement to reduce and prevent the spread of animal diseases in agriculture, the objectives of sanitary and scientific information in the veterinary field are still among its priority missions. The motivation had little to do with concern for animal suffering (Bowman 1988–1989: 489). The most important aspect of OIE's work for animal welfare is in setting global animal welfare standards, based on science, that potentially can be universally adopted. In the OIE's Strategic Plan for 2001–2005, animal welfare was for the first time recognized as a priority, and subsequently, the Resolution on Animal Welfare was adopted (http://ec.europa.eu/food/animal/welfare/international/oie_resolution_en.pdf; see also Fitzgerald 2012). The OIE has devised detailed guidelines concerning the transport of animals by land, sea and air, the killing of animals for human consumption and disease control among others (Bowman *et al.* 2010: 699).

The most important regional legal regime concerning animal welfare today is that in the EU. The EU has adopted a large number of laws relating to animal welfare, and these laws and regulatory framework are now in place for the protection of animals in transport, farming and experimentation on pet animals. It has taken an active approach to the many different aspects of animal welfare matters (see Radford 2001; Kelch 2011; Wagman and Liebman 2011).[10]

Significantly, the Treaty of Lisbon (2009) contains a legally binding animal Protocol recognizing that animals are sentient beings which means the recognition that animals are capable of feeling pleasure and pain (http://ec.europa.eu/food/animal/welfare/policy/index_en.htm). Such a legal and formal recognition is a major step forward. Furthermore, it requires full regard to be paid to their welfare when policies relating to agriculture, transport, research and the internal market are formulated or implemented while 'respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage'. Thus, EU activities need to ensure that animals do not endure avoidable pain or suffering, and obliges the owner or keeper of animals to respect minimum welfare requirements. As the EU acknowledges, this puts animal welfare on an equal footing with other key principles, i.e., promoting gender equality, guaranteeing social protection, protecting human health, combating discrimination, and promoting sustainable development, among others.[11]

As we can see from the above, legal regimes and laws do exist today for the protection of different types of animals at national, regional and, to a lesser extent, international levels with different focus and emphasis.

Offences against animals

There are many different anti-cruelty or animal welfare laws in different jurisdictions with their own distinctiveness developed under the conditions of each country. However, these laws also share many commonalities. Anti-cruelty laws set a legal and moral standard for humans' interactions with animals with clear and universal similarities (Wagman and Liebman 2011: 142). (For a discussion of criminal law related to animals and global comparison, see ibid.: 139–183.) The broad objectives of such statutes are similar, that is, to prevent cruelty to animals, to encourage proper treatment of animals and to promote animal welfare. There is also the widely accepted or international concept of animal welfare today incorporating the Five Freedoms (see below). Furthermore, such laws criminalize acts of cruelty against animals and they define what constitutes acts of cruelty. All such statutes also prescribe punishments, ranging from fines, community service and bans on owning animals to imprisonment.

Types of offences against animals

We can distinguish different types of animal cruelty offences in the existing anti-cruelty statutes in different jurisdictions, but each statute specifies what constitutes animal cruelty in its own way. Generally speaking, there are two broad types of offences relating to animal cruelty and associated animal welfare offences: (1) acts of cruelty to animals; and (2) breach of duty of care to animals.

Originally, offences against animals were broadly in the area of abuse or violence against animals, the active acts of abuse. In more recent times, in some jurisdictions breach of duty of care to animals, that is, neglect, either intentional or unintentional, has been added, for instance, the UK Animal Welfare Act (2006), the Animal Welfare Act of New Zealand (1999), and some of the animal welfare statutes in Australia. (For discussions of duty of care to animals in the anti-cruelty laws in the USA, including case law, see Favre 2008: 256–285.)

For instance, in Australia today, for the offence of 'cruelty', the laws in all Australian States and Territories prohibit the infliction of unnecessary pain on an animal or the failure to take steps to alleviate pain experienced by an animal, subject to exceptions (see Cao 2010). The statutes in the States of Queensland and Tasmania explicitly include a duty of care for a person in charge of an animal. In other States, the duty of care is implied. The States of New South Wales, Tasmania and Victoria additionally have offences for aggravated cruelty, attracting heavier penalties, for acts of cruelty resulting in the death, deformity or serious disablement of an animal (see Prevention of Cruelty to Animals Act 1979 (NSW), s 6; Animal Welfare Act 1993 (Tas), s 9; Prevention of Cruelty to Animals Act 1986 (Vic), s 10). In addition to the general animal welfare offence provisions, some statutes in Australia also create specific welfare-related offences, including failing to provide adequate or appropriate exercise to an animal in confinement, tethering of an animal for an unreasonable length of time, exposing an animal to excessive heat or excessive cold, failing to provide adequate veterinary treatment, and neglecting an animal so as to cause it pain (see Cao 2010; see also Prevention of Cruelty to Animals Act 1979 (NSW), ss 9–10, Animal Welfare Act (NT), ss 6–8).

Another example is the Animal Welfare Act (2006) of the UK. It makes animal owners and keepers responsible for ensuring that the welfare needs of their animals are met. These include the need for a suitable environment, for a suitable diet, to exhibit normal behaviour patterns, to be housed with, or apart from, other animals, and to be protected from pain, injury, suffering and disease (s 9(2)). These are the contents of what is known as the Five Freedoms of Animal Welfare. Apart from the welfare duty of care, there are also the offences of cruelty, including causing unnecessary suffering to an animal (s 4), mutilation, docking of dogs' tails, administration

of poison and organizing animal fights (ss 5–8). As regards penalties, anyone who is convicted of committing cruelty to an animal, or not providing for its welfare needs, may be banned from owning animals, fined up to £20,000 and/or imprisoned (ss 32–34).

The New Zealand Animal Welfare Act (1999) (AWA (NZ)) provides a good illustration of different types of offences against animals. The AWA (NZ) enumerates more than 40 types of specific offences against animals. It also mandates a range of obligations owed by the owner or a person in charge of an animal. There are two broad types of offences: animal welfare offences and cruelty offences. There are other offences such as those related to surgical procedures, the prohibited use of certain traps and devices, among others.

By way of illustration, for animal welfare offences, Section 10 of the AWA (NZ) sets out a positive legal obligation of a person who owns or is in charge of an animal in relation to physical, health and behavioural needs of animals:

> The owner of an animal and every person in charge of an animal, must ensure that the physical, health and behavioural needs of the animal are met in a manner that is in accordance with both good practice; and scientific knowledge.
>
> (s 10)

Similarly, s 11(1) sets out a positive legal obligation of such a person to alleviate pain or distress of ill or injured animals:

> The owner of an animal that is ill or injured, and every person in charge of such an animal, must, where practicable, ensure that the animal receives treatment that alleviates any unreasonable or unnecessary pain or distress being suffered by the animal.

There are other animal welfare offences, including without reasonable excuse keeping the animal alive when it is in such a condition that it is suffering unreasonable or unnecessary pain or distress (s 14(1)(a)), or selling, attempting to sell, or offering for sale the animal when it is suffering unreasonable or unnecessary pain or distress (s 14(1)(b)), and deserting the animal without reasonable excuse in circumstances in which no provision is made to meet its physical, health and behavioural needs (s 14 (2)).

The other major category of offences against animals under the AWA (NZ) is that of cruelty offences. Under s 28(1):

> A person commits an offence who wilfully ill-treats an animal in such a way that –
> a   The animal is permanently disabled; or
> b   The animal dies; or
> c   The pain or distress caused to the animal is so great that it is necessary to destroy the animal in order to end its suffering.

The offence above is an indictable offence. The Act also defines 'ill-treating' in relation to an animal to mean causing the animal to suffer, by any act or omission, pain or distress that in its kind or degree, or in its object, or in the circumstances in which it is inflicted, is unreasonable or unnecessary (s 2).

> Under s 29, a person commits a cruelty offence who:
> a   Ill-treats an animal; or
> b   Pierces the tongue or tongue phrenum of an animal with a pig ring or similar thing or with any wire; or

c   Keeps or uses a place for the purpose of causing an animal to fight, or for the purpose of baiting or otherwise ill-treating an animal, or manages or assists in the management of, any such place; or

d   Is present, for the purpose of witnessing the fighting or baiting of an animal, at a place used or kept for the purpose; or

e   In any manner encourages, aids, or assists in the fighting or baiting of an animal; or

f   Brands any animal in such a manner that the animal suffers unreasonable or unnecessary pain or distress; or

g   Releases an animal, being an animal that has been kept in captivity, in circumstances in which the animal is likely to suffer unreasonable or unnecessary pain or distress; or

h   Counsels, procures, aids, or abets any other person to do an act or refrain from doing an act as a result of which an animal suffers unreasonable or unnecessary pain or distress.

Law appearing in the books does not mean that a law is enforced or enforced effectively. Enforcement of anti-cruelty animal law is particularly a problem in most jurisdictions, but this will not be further discussed here. Suffice to say that it is a known fact that the prosecution rates of animal cruelty complaints are very low and often prosecution is limited by budgetary constraints.

When a crime is not a crime

A crime or a criminal offence is an act or omission that violates the law in force. In the existing anti-cruelty laws, there is another common feature, i.e., a range of exemptions, defences and other qualifications regarding offences against animals. Then, what are the most common exemptions for acts of abuse that would otherwise be criminal?

Common exemptions

The most common categories of exemptions in anti-cruelty laws are for animals used in agriculture and in research. Other common exemptions include acts or practices against animals associated with cultural custom or tradition, slaughter of animals as part of religious faith, and in some instances, hunting, and some commercial uses of animals.[12] This is a legal mechanism to enable many acts that cause animal suffering to go unpunished. These exemptions are also said to be a weighing of animal versus human interests, the legislative intent and the power of industrial forces to influence the course of the law, and the dichotomy over which practices are acceptable and which are considered illegal and cruel (Wagman and Liebman 2011: 147).

Let us look at the exemption of farm animals in some statutes. Today, the largest scale of animal cruelty with the largest number of animals involved suffering from deliberate human-caused pain and suffering are animals in intensive farming factories. This practice spread and was introduced from developed countries to developing countries in the name of modern Western sophisticated and efficient farming techniques. It includes the raising of animals under abnormal and inhumane conditions and the transport and slaughter of such animals. However, in many animal welfare or anti-cruelty laws, acts of cruelty to farm animals in factory farming are exempt or otherwise deemed legal.

Take the USA, for example. The US federal animal welfare laws largely exclude farmed animals. The Animal Welfare Act (AWA, 7 USC 2131), the primary piece of federal legislation relating to animal protection in the USA, exempts all farm animals. (For discussions of the US Animal Welfare Act, see Favre 2008: 364–403. See also the background report of the Animal

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Welfare Act and related legislation prepared for the US Congress: http://nationalaglawcenter. org/assets/crs/RS22493.pdf and summaries of US federal animal protection statutes: http:// nationalaglawcenter.org/assets/crs/94-731.pdf.) No other US federal law applies to the raising of farm animals, and the US Department of Agriculture has no statutory authority to promulgate regulations relating to the welfare of animals on farms (Wolfson and Sullivan 2004: 207. See also Sullivan and Wolfson 2007).

The Humane Slaughter Act (P L 85-765) is the primary law affecting the slaughter of farmed animals, but it exempts poultry, the result of which is that over 95 per cent of all farmed animals in the USA have no federal legal protection from inhumane slaughter (Wolfson and Sullivan 2004: 208). A third related law, the Twenty-Eight Hour Law (49 USCS 80502), governs farmed animal transport. It provides that animals cannot be transported across state lines for more than 28 hours by a rail carrier, express carrier, or common carriers without being unloaded for at least five hours of rest, watering and feeding, but it does not apply to transport of farmed animals by trucks, the overwhelmingly preferred method today (Wolfson and Sullivan 2004: 206).

At the state level, the majority of the state anti-cruelty statutes include farmed animals for protection, but they exempt all 'accepted', 'common', 'customary' or 'normal' farming practices. This means that most of the intensive farming practices which are inherently and commonly acknowledged as cruel and inhumane are exempt from prosecution (ibid.: 206).[13] Roughly two-thirds of US states have express exemptions from the anti-cruelty laws for most conduct that occurs in modern animal agricultural practices, entertainment activities, sporting events using animals and scientific research, and these are the areas where the largest number of animals are used and killed on a daily basis (Wagman and Liebman 2011: 151).[14]

In this connection, there is a difference between the US and European animal welfare laws in terms of the applicability of cruelty to animals laws to farming practices. This was summarized by Justice T. Strasberg-Cohen in the Israeli foie gras case this way:

> One tendency, dominant in the US and Canada, is to exempt accepted farming practices from the applicability of cruelty to animal laws . . . Making regulations of this type in law suggests that if these regulations did not exist, those same 'acceptable' and 'reasonable' practices would be liable to be considered as abuse of animals. The difficulty with this approach is the fear that the law might provide immunity to cruelty practices that are not for any worthwhile end or such as cause disproportionate suffering without fear of sanctions. Another tendency, dominant in Europe and other countries, puts the stress on animal welfare. According to it, farming practices are not exempt from the applicability of animal protection laws unless specific legislative arrangements are made that include rules on how various farming practices should be implemented.
> (original citations omitted, as quoted in Wolfson and Sullivan 2004: 223)[15]

However, even with countries that take the second approach, for instance, Australia, farm animals are regulated differently. The animal welfare Acts in all States and Territories in Australia, as a general rule, govern the treatment of all types of animals, but the statutes authorize regulations of animals employed in agriculture and research using different rules or industry self-regulations, which have much lower thresholds and are not legally binding. The statutes include references to codes of practice that define what is regarded as acceptable for farm and research animals, and compliance with such codes can be used as a defence against a charge of cruelty (Cao 2010; White 2003).[16]

About a century ago, an English court once held that where unnecessary suffering of animals is caused by some act of an owner, it cannot be justified on the grounds of old custom or for

commercial benefit.[17] Significantly, the Israeli Supreme Court in 2003 annulled, on animal cruelty grounds, regulations regarding the force-feeding of geese for the production of foie gras and recognized animal interests in the face of economic concerns (HCJ 9232/01 *Noah v. Attorney General* [2002-2003] IsrSC 215, 215. See Sullivan and Wolfson 2007).

Other examples of state-sanctioned acts of cruelty

Despite all the laws on the books, the suffering of animals is on the increase all across the globe, as described here:

> When a quarter million birds are stuffed into a single shed, unable even to flap their wings, when more than a million pigs inhabit a single farm, never once stepping into the light of day, when every year tens of millions of creatures go to their death without knowing the least measure of human kindness, it is time to question old assumptions, to ask what we are doing and what spirit drives us on . . . Wildlife across the world live in a state of perpetual retreat from human development, until for many species there is nowhere to go, as we have seen for a generation in mankind's long good-bye to the elephants, grizzlies, gorillas, tigers, wolves, pandas, and other creatures who simply do not have room to live and flourish anymore. Even whales are still hunted, long after an international moratorium was declared . . . Employing weapons and methods ever more harsh and inescapable, the hunt goes on for many other animals . . . From Africa to the Western United States to the storied rain forest of the Amazon, it is the fate of many wild creatures either to be unwanted by man or wanted too much, despised as a menace to progress or desired as a means to progress – beloved and brutalized all at once, like the elephant and whale and dolphin.
>
> (Scully 2002: x–xi)

Apart from the legal exemptions and defences that shield large-scale animal abuse, there are other systemic or organized human activities around the world falling outside the law, which nevertheless inflict pain and suffering on both wild and domestic animals, or kill them in large numbers, often for commercial purposes. They are either not regulated or are sanctioned by different governments. Without going into details of the atrocities, a number of serious animal abuse cases need to be mentioned.

One of the controversial and always emotional matters concerning animal cruelty is laboratory vivisection and experimentation on animals. This is a global problem, and such acts of cruelty are carried out in the name of great human good. Nevertheless, animal testing involves violation to animals' bodily integrity, abuse, neglect, permanent confinement, painful and often pointless tests, and the animals are almost always killed when the tests end. Today, in most developed countries, there are regulations governing the use of animals in research and various procedures and processes pertaining research ethics are required for research establishments. As a result, some of the animal tests are now being transferred to developing countries where there is no or little regulation.

There are many large-scale organized animal abuse cases for commercial purposes from around the world. For instance, bear bile farming in China, South Korea and southeast Asia is one of those atrocities against otherwise protected wildlife for commercial gains. Some of the bear bile products are sold globally, despite the fact that it is illegal in many parts of the world. The bear bile farming industry now faces strong and growing opposition in China and elsewhere. Cat and dog meat and their trafficking as part of the meat trade in China with brutal and violent methods of transport and slaughter are another instance where there is growing opposition to

such dietary cruelty. In 2011, a major dog meat festival in China was cancelled due to popular condemnation and a boycott by Chinese netizens as reported in *The New York Times* (see Wong 2011). There are also organized atrocities such as the rounding up and brutal killing of stray dogs in China and other Asian countries, and in the Middle East and Eastern Europe, all sanctioned or organized by governments, and Japanese whaling, supported by both official and commercial interests, and the battles are being fought both at sea and in the courtrooms outside Japan in the international arena in recent years (see *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd (2008) 244 ALR 161* and *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2005] FCA 664 (27 May 2005);* see also Stephens and Rothwell 2007).

Fur farming is yet another global animal abuse case, involving many countries including the USA and China. Regarding dog and cat furs, in 2004, the Australian government amended its import regulations, banning the import and export of fur from domestic cat and dog species. This ban was largely due to popular petitions signed by more than 70,000 Australians, together with 9000 direct representations to the Minister for Justice and Customs. The USA and the EU have also banned such products. Similarly, regarding seal clubbing in Canada, the EU banned the import of all seal products into Europe in 2010, accelerating the shrinking of the market. These measures demonstrate the effectiveness and impact of international action against animal abuse.

Crimes against animality

For our purpose, the following tentative definitions may be useful:[18]

> *crime against animals* refers to acts or omissions that are against the law and subject to criminal prosecution and sanctions; and
> *international or transnational crime against animals* refers to acts or omissions that are a form of abuse and harm to animals regardless of legality, including those committed by individuals and those committed or facilitated by the state, corporations or other national or international entities.

In this regard, *animal abuse* (as defined by Agnew [1998] 2006: 85) refers to any act or omission that contributes to the pain or death of a sentient animal or that otherwise threatens the welfare of an animal. Such abuse may be physical or mental, may involve active maltreatment or passive neglect, may be direct or indirect, intentional or unintentional, socially approved or condemned, and/or necessary or unnecessary, and criminal or legal.

For thousands of years, humans, individually and collectively, have caused harm to animals. These include crimes against the animal kingdom, against individual animals, against animal species and against animal spirit. In the past two hundred years, people and society have begun to recognize the wrongdoing and injustice although only some abuse in some circumstances by some individuals is still sanctioned now in some jurisdictions. Crimes, after all, are human acts, and criminal law is a political, cultural and social and human phenomenon. To further reduce and end abuse and cruelty to animals requires not just legal sanctions but more importantly, a change of our attitude, way of thinking and way of living.

As with transnational environmental crimes, crimes against animals also require an international response. Today, a great deal of such abuse may originate in one country, but their impact is not limited to one nation, as the case of wildlife trafficking, Japanese whaling, the fur industry in China, seal slaughter in Canada, live animal export in Australia to the Middle East and other parts of Asia, and many others. Governments, international animal NGOs and

lawyers can play and are playing a major role in this area. Due to globalization and increased contact between peoples and trade, and above all, universal concerns for animal welfare, there is a need for more international efforts and collaboration to combat animal abuse in international law. A legal order is gradually emerging in international animal welfare protection supported and complemented by the more developed international wildlife law, with an emerging branch of international law in transnational animal welfare law (Bowman *et al*. 2010; Kelch 2011; Fitzgerald 2012).

In this regard, there is a major role for the UN that can be supported by international treaties and regional agreements. As said, we need to go beyond parochial and conventional criminological viewpoints and those perspectives that frame harm in terms of national or regional interest rather than the narrow concerns for humans or one or another nation (White 2011b: 156). As with broader international environmental crimes, crimes against animals are also global.

Closely related to the role of the UN, a potentially significant foundational document for animal welfare protection is the proposed Universal Declaration on Animal Welfare (UDAW).[19] The UDAW is a proposed inter-governmental document to recognize that animals are sentient and their welfare needs must be respected, and to prevent cruelty and reduce suffering. It has been gathering worldwide individual signatures and has won support from some governments. If this or a similar document were endorsed by the UN (as the Universal Declaration of Human Rights (UDHR) was), it could have a significant impact for animal welfare, as the UDHR did in the development of international human rights laws in the past five decades. Such a universal declaration sponsored by the UN would likely encourage and enable national governments to introduce and improve animal protection legislation and initiatives, and follow general standards of animal welfare, improving animal welfare and reducing cruelty nationally and internationally (see also Tulloch and White 2011).[20] It has the potential to have far-reaching and long-term impact worldwide, providing a blueprint for subsequent global action.[21] It may not be too far-fetched that one day, there may be international courts or tribunals prosecuting perpetrators of atrocities against animals and animal species.

Finally, humans and animals have been in contact and interaction for thousands of years. As noted, we have many types of relationships with members of other species, relationships involving responsiveness, sympathy, joy in excellence, concerned interaction as well as manipulation, indifference and cruelty and these relationships ought to be regulated by justice, instead of the war for survival and power (Nussbaum 2004: 326). The fact that humans act in ways that deny animals a dignified existence is an issue of justice, not just a matter of charity, compassion, or humanity – mistreating animals is not just morally wrong, but morally wrong in a special way, raising questions of justice (Nussbaum 2004: 326, 336). In 2000, the High Court of Kerala in India considered the plight of circus animals housed in cramped cages, subjected to fear, hunger, pain, and the undignified way of life they had to live (*Nair v Union of India*, Kerala High Court, no 155/1999, June 2000, cited in Nussbaum 2006: 324). The court asked rhetorically: If humans are entitled to fundamental rights, why not animals? The court found that those animals were 'beings entitled to dignified existence and humane treatment sans cruelty and torture' within the meanings of the Indian Constitution. As noted, dignified existence for animals is an issue of justice and an urgent one and there is no obvious reason why notions of basic justice, entitlement and law cannot be extended across the species barrier (Nussbaum 2004: 325–326).

Discussion questions

1   Do you think cruelty to animal is a justice issue, and why or why not?
2   What is the situation of domestic animals and wildlife in a country you are familiar with?

3   What legal protection is there in a country you are familiar with, and what reform do you think is necessary for effective enforcement?
4   What further legal measures do you think can be taken to combat animal abuse nationally and internationally?

Websites

Animal law: http://animallaw.info/.
CITES: http://www.cites.org/.
EU animal welfare index: http://ec.europa.eu/food/animal/welfare/index_en.htm.

Notes

1   Nussbaum (2006) regards our treatment of animals, of people with severe disabilities and people who are not fellow citizens as the three unsolved problems of social justice in the world today.
2   In 2008, the Austrian Supreme Court ruled that Matthew Hiasl Pan, a chimpanzee, cannot be declared a person: http://www.msnbc.msn.com/id/22670956/ns/technology_and_science-science/t/its-official-austria-chimp-not-person/#.UFvmVKDvbnU. See also http://www.greatapeproject.org/.
3   For example, Humphry Primatt (1725–1780), an English clergyman, published in 1776, *A Dissertation on the Duty of Mercy and the Sin of Cruelty to Brute Animals*, the first systematic theology of the status of animals and the need for justice. Primatt's work was an inspiration to Broome who, together with Martin, Wilberforce and others, helped to found the society that was to become the RSPCA and the passing of the first English anti-cruelty law. Primatt's work was cited by Henry Salt (1851–1939), an animal right advocate, an inspiration for Peter Singer.
4   For a discussion of animal sufferings in India, see Fox (2003). For a discussion of the animal law in India and religious influence over the law, see Wagman and Liebman (2011: 152–156). It is noted that in Judaism, one of the basic teachings since ancient times is not harming animals and caring for animals (Kalechofsky 2002).
5   In countries where there is no anti-cruelty law like China, the property status of animals affords companion animals and their owners the only legal protection. According to a press report, in 2012, a court in Liaoning Province, China, convicted a man of killing the six dogs of his neighbour on the basis of private property damage and economic losses with a penalty of one year imprisonment and a fine.
6   The Tang Code of Imperial China is a comprehensive penal code incorporating civil law elements. It was first created in 624 AD during the Tang Dynasty, and it became the basis for all the legal codes of the succeeding dynasties in China up to the fall of the last dynasty, the Qing. It was also the model for other East Asian countries.
7   In Germany, apart from its animal welfare law, the Constitution as amended in 2002 declares: 'the State . . . protects the natural basis of life and the animals, within the framework of constitutional laws and through lawmaking and in accordance with ordinances and through judicial decisions', elevating animal protection to a *Grundrechte*, i.e., a basic right of the Constitution, although it is unclear what it translates to into everyday reality. See Nattrass (2004), and Wagman and Liebman (2011: 266–269). Similarly, the Indian Constitution imposes upon all its citizens a fundamental duty to protect and improve the natural environment and to have compassion for living creatures, see Wagman and Liebman (2011: 262–266).
8   China has severe punishments for killing or smuggling some endangered species, for instance, a man convicted of hunting and killing a panda was given the death penalty in 1992, as noted in Wagman and Liebman (2001: 173), although such a penalty is no longer available.
9   There are other international treaties related to wildlife, e.g., the *Convention for the Conservation of Migratory Species of Wild Animals*, the *Convention on Biological Diversity*, the *International Convention for the Regulation of Whaling*.
10   The EU has treaties governing the protection of animals in different areas including: the *European Convention for the Protection of Animals During International Transport*; the *European Convention for the Protection of Animals Kept for Farming Purposes*; the *European Convention for the Protection of Animals for Slaughter*; the *European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific*

Purposes. The EU has also many directives and other laws concerning animals, binding on EU member states. Further information can be found at: http://ec.europa.eu/food/animal/welfare/index_en.htm.

11 See http://ec.europa.eu/food/animal/welfare/policy/index_en.htm. Regarding the animal Protocol in the Treaty of Lisbon which was included in the earlier Treaty of Amsterdam (1997), the court found with reference to the latter in *Jippes v Minister van Landbouw* (Case C-189/01 [2001]ECR I-5689) that animal protection is not an EC objective, and that ensuring animal welfare is not a general principle of EC law. For a discussion of EU animal-related laws, see Radford (2001), Ausems (2006) and Fitzgerald (2012).

12 Significant and unique among the Australian animal welfare statutes is s 79(2) of the Northern Territory statute which states that it is *not a defence* to a prosecution for an offence under this Act that the act or omission constituting the offence or an element of the offence was in accordance with cultural, religious or traditional practices.

13 A relevant case is the McLibel case: *McDonald's Corporation and McDonald's Restaurants Ltd. v Helen Steel and David Morris* [1997] EWHC QB 366, where the British court found that some intensive farming practices were cruel.

14 As Wagman and Liebman (2011:151) point out, only rarely did the court find that standard exemptions do not apply to the most egregious acts of cruelty, e.g., *Commonwealth v Barnes* 629 A. 2d 123 (Pa. 1993).

15 HCJ 9232/01 *Noah v. Attorney General* [2002–2003] IsrSC 215, 215. The English translation can be found on the High Court website: http://elyon1.court.gov.il/eng/home/index.html.

16 Compliance with the relevant codes constitutes a defence: *Animal Welfare Act 1992* (ACT), s 20; *Animal Welfare Act* (NT), s 79; *Animal Care and Protection Act 2001* (Qld), ss 38, 40; *Animal Welfare Act 1985* (SA), s 43; *Prevention of Cruelty to Animals Act 1986* (Vic), s 6; and *Animal Welfare Act 2002* (WA), s 25.

17 *Waters v Braithwaite* (1914) 78 JP 124 where the court held that a traditional practice will not justify conduct that would otherwise be considered causing unnecessary suffering. See also the leading English case, *Ford v Wiley* (1889) 23 QBD 123. Both cases are discussed in Radford (2001).

18 I took my inspiration from White's (2011) definitions for transnational environmental crime.

19 The idea of an international animal welfare agreement is not new. The RSPCA first proposed it in the aftermath of World War I (Bowman 1988–1989: 487).

20 The draft declaration is found at: http://www.animalsmatter.org/en/campaign_resources. It calls for recognition that animals are sentient beings, and that humans and other species and other forms of life co-exist within an interdependent ecosystem, and also the recognition of the Five Freedoms for animal welfare and the Three Rs (reduction in numbers of animals, refinement of experimental methods, and replacement of animals with non-animal techniques).

21 For the history of attempts to create an international instrument on animal welfare, see Bowman (1988–1989). See Cavalieri (2001) who advocates rights for animals as part of the expanded theory of human rights. She bases her argument on the notion of animals as 'intentional beings', i.e., beings with goals and desires, who are entitled to rights as part of our moral community, not instruments for humans to use. To her, the institutional denial of fundamental rights to beings that are entitled to them is a direct attack on those fundamental rights, subverting the very idea of justice.

References

Acampora, Ralph R. (2007) 'Animal Philosophy: Bioethics and Zoonthology', in R. Malamud (ed.) *A Cultural History of Animals*: *In the Modern Age*, vol. 6. Oxford: Berg, pp. 139–162.

Agnew, R. (1998/2006) 'The Causes of Animal Abuse: A Social-Psychological Analysis', *Theoretical Criminology*, 2: 177–209, reprinted in South, N. and Beirne, P. (eds) (2006) *Green Criminology*, Aldershot: Ashgate, pp. 83–115.

Ausems, E. (2006) 'The Council of Europe and Animal Welfare,' in Council of Europe Publishing (ed.) *Animal Welfare*, Belgium: Council of Europe, pp. 233–253.

Beirne, P. (1995) 'The Use and Abuse of Animals in Criminology: A Brief History and Current Review', *Social Justice*, 22(1): 5–31.

Beirne, P. (2009) *Confronting Animal Abuse: Law, Criminology, and Human-Animal Relationships*, Lanham, MD: Rowman & Littlefield.

Beirne, P. and South, N. (eds) (2007) *Issues in Green Criminology*, Cullompton: Willan Publishing.

Linzey, A. and Regan, T. (eds) (1988) *Animals and Christianity: A Book of Readings*, London: SPCK, and New York: Crossroad.

Locke, J. (2003) *Two Treatises on Government and A Letter Concerning Toleration*, ed. and with an Introduction by I. Shapiro, Second Treatise, New Haven, CT: Yale University Press.

Manning, A. and Serpell, J. (eds) (1994) *Animals and Human Society*: *Changing Perspectives*, London: Routledge.

Mendelson, J. (1996–1997) 'Should Animals Have Standing? A Review of Standing under the Animal Welfare Act', *Environmental Affairs Law Review*, 24: 795.

Morrison, W. (ed.) (2001) *Blackstone's Commentaries on the Laws of England Book II*, London: Cavendish.

Nattrass, K. M. (2004) '". . . und die Tiere": Constitutional Protection for Germany's Animals', *Animal Law*, 10: 283–312.

Nussbaum, M. C. (2004) *Frontiers of Justice: Disability, Nationality, Species Membership*, Cambridge, MA: Harvard University Press.

Oxford English Dictionary (2009) Oxford: Oxford University Press.

Posner, R. A. (2004) 'Animal Rights: Legal, Philosophical, and Pragmatic Perspectives', in C. R. Sunstein and M. C. Nussbaum (eds) *Animal Rights: Current Debates and New Directions*, Oxford: Oxford University Press, pp. 51–78.

Quinney, R. (1970) *The Problem of Crime*, New York: Dodd Mead.

Radford, M. (2001) *Animal Welfare in Britain*, Oxford: Oxford University Press.

Regan, T. (1983) *The Case for Animal Rights*, Berkeley, CA: University of California Press.

Regan, T. (2004) *Empty Cages: Facing the Challenge of Animal Rights*, Lanham, MD; Rowman & Littlefield.

Ridley, M. (2003) *Nature via Nurture: Genes, Experience, and What Makes Us Human*, London: Fourth Estate.

Ryder, R. D. (2000) *Animal Revolution: Changing Attitudes towards Speciesism*, Oxford: Berg.

Scully, M. (2002) *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy*, New York: St Martin's Press.

Singer, P. ([1975] 1995) *Animal Liberation*, New York: Random House/New York Review Books.

Singer, P. (ed.) (1985) *In Defence of Animals*, New York: Blackwell.

Singer, P. (ed.) (1993) *Practical Ethics*, Cambridge: Cambridge University Press.

Singer, P. (2007) 'Ethics, Animals and Nature', in H-L, Li and A. Yeung (eds) *New Essays in Applied Ethics: Animal Rights, Personhood and the Ethics of Killing*, New York: Palgrave Macmillan, pp. 29–41.

Steiner, G. (2005) *Anthropocentrism and its Discontents: The Moral Status of Animals in Western Philosophy*, Pittsburgh, PA: University of Pittsburgh Press.

Steiner, G. (2008) *Animals and the Moral Community: Mental Life, Moral Status, and Kinship*, New York: Columbia University Press.

Stephens, T. and Rothwell, D. (2007) 'Japanese Whaling in Antarctica: Humane Society International Inc v Kyodo Senpaku Kaisha Ltd', *Review of European Community and International Environmental Law*, 16(2): 243.

Stone, C. D. (1972) 'Should Trees Have Standing?: Toward Legal Rights for Natural Objects', *Southern California Law Review*, 45: 450–487.

Stone, C. D. (1985) 'Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective', *Southern California Law Review*, 59: 1–154.

South, N. and Beirne, P. (eds) (2006) *Green Criminology*, Aldershot: Ashgate.

Sullivan, M. and Wolfson, D. J. (2007) 'What's Good for the Goose . . . the Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States', *Law and Contemporary Problems*, 70: 139–173.

Sunstein, C. R. (2004) 'Can Animals Sue?' in C. R. Sunstein and M. C. Nussbaum (eds) *Animal Rights, Current Debates and New Directions*, Oxford: Oxford University Press, pp. 251–262.

Sunstein, C. R. and Nussbaum, M. C. (eds) (2004) *Animal Rights, Current Debates and New Directions*, Oxford: Oxford University Press.

Tulloch, G. and White, S. (2011) 'A Global Justice Approach to Animal Law and Ethics', *Australian Animal Protection Law Journal*, 6: 29–52.

Wagman, B. A. and Liebman, M. (2011) *A Worldview of Animal Law*, Durham, NC: Carolina Academic Press.

Waldau, P. (2002) *The Specter of Speciesism: Buddhist and Christian Views of Animals*, Oxford: Oxford University Press.

Wise, S. M. (2002) *Drawing the Line: Science and the Case for Animal Rights*, Cambridge, MA: Perseus.

White, R. (2008) *Crimes Against Nature*, Cullompton: Willan Publishing.

White, R. (ed.) (2011a) *Global Environmental Harm*, Cullompton: Willan Publishing.

White, R. (2011b) *Transnational Environmental Crimes*, London: Routledge.

White, S. (2003) 'Legislating for Animal Welfare: Making the Interests of Animals Count', *Alternative Law Journal*, 28: 277–281.

Wolfson, D. J. and Sullivan, M. (2004) 'Foxes in the Hen House – Animals, Agribusiness and the Law: A Modern American Fable', in C. R. Sunstein and M. C. Nussbaum (eds) *Animal Rights: Current Debates and New Directions*, New York: Oxford University Press, pp. 205–233.

Wong, E. (2011) 'After Online Campaign, Chinese Dog Meat Festival Is Canceled', *The New York Times*, September 29.

Understanding the intersection between international human rights and mental disability law

The role of dignity

Michael L. Perlin

Introduction

"Traditionally, disability has not been regarded as a human rights issue" (Lawson 2006: 462; see also Lord 2004). As recently as twenty years ago, it was not so broadly acknowledged (Rosenthal and Rubenstein 1993). Although there had been multiple prior cases decided in the United States and in Europe that, retrospectively, had been litigated from a human rights perspective (see Perlin 2011a, discussing, in this context, *Wyatt v. Stickney*, 1972), the characterization of "disability rights" (especially the rights of persons with *mental* disabilities) as a social issue was not discussed in a global public, political or legal debate until the early 1990s. Instead, disability was seen only as a medical problem of the individual requiring a treatment or cure in order to make the disabled individual an "equal" in society. By viewing disability as a human rights issue, however, we are required to focus on the inherent equality of all people, regardless of abilities, disabilities, or differences, and this obligates society to remove the attitudinal and physical barriers to equality and inclusion of people with disabilities (see Perlin *et al.* 2006; see also Hendricks and Degener 1994; Jones and Marks 1999; Lawson 2006). The ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) forces us to restructure our views of the rights of this population, and requires us to come to grips with a history of mistreatment, stigmatization and marginalization.

In this context, it is necessary to focus on the important issue of dignity. As ratified, the Convention calls for "respect for inherent dignity" (Article 3(a)). The Preamble characterizes "discrimination against any person on the basis of disability [as] a violation of the inherent dignity and worth of the human person" (ibid.: para. h.). And these provisions are consistent with the entire Convention's "rights-based approach focusing on individual dignity" (Dhir 2005: 195), placing the responsibility on the state "to tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons" (Quinn and Degener 2002: 14). Professor Michael Stein recognizes the important role of dignity, writing: "[A] dignitary perspective compels societies to acknowledge that persons with disabilities are valuable because of their inherent

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human worth" (Stein 2007: 106). In Professor Cees Maris's summary: "The Convention's object is to ensure disabled persons enjoy all human rights with dignity" (2010: 1156).

The test of whether the CRPD will have authentic meaning or will be little more than a "paper victory" (Perlin 2009a: 490) will be whether, as a result of the ratification of the Convention, persons with mental disabilities – especially *institutionalized* persons with mental disabilities (both those institutionalized civilly and those in forensic facilities) – are, in fact, treated with the level of dignity that they are owed as a key requirement of international human rights law. It is far too early to come to any conclusions on this point, but this question is one that will be before us for the indefinite future (see Perlin 2011b).

In this chapter, I will first consider the growth of disability rights as a civil liberties issue over the past two decades. Next, I will look at the concept of "dignity" both in a criminal justice and disability context. I will then examine the UN Convention and evaluate it as a means of insuring dignity for the population in question. Following this, I will examine the concepts of *sanism* and *pretextuality* in an effort to better explain why the current state of affairs has developed as it has in the context of the universal factors that permeate the practice of mental disability law worldwide (Perlin 2007b). After that, I will evaluate these issues through the prism of therapeutic jurisprudence (TJ) (ibid.; Wexler and Winick 1996). I will conclude by discussing the interplay between the forensic mental health system, international human rights and mental disability law from a TJ perspective.

Disability rights as a civil liberties issue

Remarkably, the issue of the human rights of people with disabilities, particularly people with mental disabilities, had been ignored for decades by the international agencies vested with the protection of human rights on a global scale. Early developments in global international human rights law following World War II – and the various forms of human rights advocacy that emerged in the decades that followed – failed to focus on mental disability rights (see Perlin and Szeli 2012). As Dr. Theresa Degener, a noted disability scholar and activist, has observed:

[D]rafters of the International Bill of Human Rights did not include disabled persons as a distinct group vulnerable to human rights violations. None of the equality clauses of any of the three instruments of this Bill, the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966), mention disability as a protected category.

(Degener 2000: 187)

Historically, mainstream human rights protection systems and advocacy organizations rarely acknowledged mental disability rights as part of their mandates, and often simply ignored the existence of such rights (Perlin and Szeli 2012). The human rights issues encountered by persons with mental disabilities may have been perceived as too complex or esoteric. This challenge was sometimes articulated in rather unfortunate ways, such as "We work in human rights, not mental disability rights." While the oblique suggestion that people with mental disabilities were not "human" was generally unintended, it may well have reflected deep-seated beliefs that they were somehow less human than the broader population whose human rights merited unquestioned protection.[1] But while human rights are – by definition – universally possessed by *all* humans, the formal recognition of the applicability of these rights in contexts specific to vulnerable populations is critical for their enforcement.

To some extent, this new interest in human rights protections for people with disabilities echoes a larger international movement to protect human rights (Ramcharan 1991),[2] and appears to more precisely follow C. Raj Kumar's observation that "the judicial protection of human rights and constitutionalization of human rights may be two important objectives by which the rule of law can be preserved and which may govern future human rights work" (Kumar 2003: 282).

To be sure, some of the results to date have been modest. Few will quarrel with Douglass Cassel's observation that "[t]he direct impact of international human rights law on practice in most of the world remains weak and inconsistent" (Cassel 2001: 135). But, as Cassel perceptively noted further:

> Both this incipient body of law, and to a lesser degree its direct and even more its indirect influence on conduct, have grown rapidly in historical terms, and appear to be spreading in ways that cannot be explained by a worldview based solely on state power and rational calculations of self-interest. To appreciate its effectiveness and potential, international human rights law must be understood as part of a broader set of interrelated, mutually reinforcing processes and institutions – interwoven strands in a rope – that together pull human rights forward, and to which international law makes distinctive contributions.
>
> (ibid.)

Thus understood, international law, Cassel concluded, "can be seen as a useful tool for the protection of human rights, and one which promises to be more useful in the future" (ibid.).

Within the legal literature, the first time disability rights was directly conceptualized as a human rights issue may have been as recently as 1993. In their groundbreaking article, Eric Rosenthal and Leonard Rubenstein applied international human rights principles to the institutionalization of people with mental disabilities. In the political context, disability as a human rights issue first appears to have been raised in remarks made the next year by former United States Senator Bob Dole: "As a nation that has been a pioneer in promoting the dignity of its own citizens with disabilities, we have a special obligation to assume leadership in establishing the international human rights of people with disabilities" (Dole 1994: 931). More recently, in 2004, Senator Tom Harkin introduced the concept of human rights protections for people with disabilities when he successfully won US Congressional approval for an amendment to the Foreign Assistance Act requiring accessibility of government-funded construction overseas (http://harkin.senate.gov/int-affairs/index).

Meanwhile, regional human rights courts across the globe had already begun to exhibit an increasing willingness to address mental disability rights issues over a decade earlier. In 1979, well before the publication of Rosenthal and Rubenstein's article, the European Court of Human Rights had already heard its first mental disability rights case, *Winterwerp v. Netherlands* (Perlin 2012). Over the following decades, the European Court heard dozens of mental disability rights cases, defining and refining the contours of human rights as applied in mental health contexts under the European Convention (Gostin 2000; Lewis 2002). In the Americas, the Inter-American Commission on Human Rights heard its first mental disability rights case, *In the Matter of Congo*, under the American Convention on Human Rights in 1999, breaking new ground in formalizing the use of the MI Principles as a guide for interpreting and applying binding human rights standards (Perlin 2007a; 2012). And subsequently, in 2003, the African Commission on Human and Peoples' Rights decided its first mental disability rights case, *Purohit and Moore v. The Gambia*, under the African Charter (Perlin 2012). All of this case law has served to validate the connection between mental health and human rights, providing regional fora for recognizing

and enforcing the human rights of individuals labeled with mental disabilities (see generally, Perlin 2012).[3]

However, during the late twentieth century, a great deal of important mental disability rights advocacy occurred outside of formal legal settings. Local, regional, and international non-governmental organizations conducted investigations, wrote reports, and brought media attention to egregious human rights abuses suffered by people labeled with mental disabilities. Most significantly, the emergence of a "consumer movement" supported the natural advocacy capacities of stakeholders. The focal point of the mental disability rights movement must be individuals who are identified as having mental disabilities. Yet, historically, their voices have often been ignored, while others deemed to speak for those who purportedly could not speak for themselves. Referring to themselves as *consumers*, *users*, *ex-users*, *ex-patients*, or *survivors* of mental health services, individuals who had been labeled with mental disabilities began to organize not only locally, but also regionally and globally. Such self-advocacy groups have since become instrumental in identifying violations of their human rights, and in advocating reform in the policies and systems that directly affect their lives (see e.g., Gombos *et al.* 2002).

Dignity

The meaning of dignity

Professor Carol Sanger suggests that dignity (see Perlin 2013a; 2013b) means that people "possess an intrinsic worth that should be recognized and respected," and that they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth (Sanger 2009: 415). Treating people with dignity and respect makes them more likely to view procedures as fair and the motives behind law enforcement's actions as well-meaning (Birckhead 2009). What individuals want most "is a process that allows them to participate, seeks to merit their trust, and treats them with dignity and respect" (Munford 2007: 393).

The legal process upholds human dignity by allowing the litigant – including the criminal defendant – to tell his or her own story (Kruse 2008: 1353). A notion of individual dignity,

> generally articulated through concepts of autonomy, respect, equality, and freedom from undue government interference, was at the heart of a jurisprudential and moral outlook that resulted in the reform, not only of criminal procedure, but of the various institutions more or less directly linked with the criminal justice system, including juvenile courts, prisons, and mental institutions.
>
> (Miller 2004: 1569 n. 473)

Fair process norms such as the right to counsel "operate as substantive and procedural restraints on state power to ensure that the individual suspect is treated with dignity and respect" (Arenella 1983: 200).

Dignity in the criminal justice process

Dignity concepts are expansive; a Canadian Supreme Court case has declared that disenfranchisement of incarcerated persons violated their dignity interests (*Sauve v. Canada* 2002, as discussed in Pinard 2010). In the context of the trials of persons with mental disabilities, "the moral dignity of the criminal process would be frustrated if grossly incompetent defendants were permitted to plead guilty" (Winick 1995: 593; for a transnational consideration of this issue,

see Miller 2003). Perhaps counter-intuitively to much of the lay public, dignity may trump "truth" as a core value of the criminal justice system (Luna and Cassell 2010).

The right to dignity is memorialized in many state constitutions (see Castiglione 2008), in multiple international human rights documents (Birgden and Perlin 2009; Perlin and Dlugacz 2009; Perlin 2011b: 37–41), in judicial opinions (see Rao 2008; Daly 2011), and in the constitutions of other nations (Chaskalson 2011). It is of special significance in the criminal justice process, both at the individual level and at the institutional level. "At the individual level, the legal process upholds human dignity by allowing the criminal defendant to tell his own story " (Kruse 2008: 1353, discussing Luban 2007: 68–72):

> at the institutional level, the legal process upholds a criminal defendant's human dignity by allowing him to remain silent – to put the state to its proof of guilt beyond a reasonable doubt – and to argue any inferences that are consistent with innocence, even if the defendant (and his lawyer) know that these inferences are in fact false.
>
> (Kruse 2008: 1353–1354, discussing Luban 2007: 72–73)

Dignity requires that all individuals be given an opportunity to participate in a political and social community supported by the state (Rao 2008: 219–220).

In his exhaustive evaluation of dignity in the specific context of international human rights law, Professor Christopher McCrudden has reviewed cases from the International Court of Justice, the European Court of Human Rights, the European Court of Justice and the constitutional courts of many nations, and finds multiple categories of cases in which "dignity" is relied on as a basis for a court's judgment:

- cases involving prohibition of inhuman treatment, humiliation, or degradation by one person over another;
- cases involving individual choice and the conditions for self-fulfillment, autonomy, and self-realization;
- cases involving protection of group identity and culture, and
- cases involving the creation of necessary conditions for individuals to have essential needs satisfied (McCrudden, 2008: 686–694; on the multiple meanings of dignity in the context of court opinions, see Glensy 2011).

The connection between these principles and the topics under discussion in this chapter should be clear. If a state intends to meet international human rights standards, it should guarantee, among other fundamental rights, the right to dignity in all aspects of the criminal trial process (Ludwikowski 1995). And one of the critical functions of counsel is to "protect the dignity and autonomy of a person on trial" (*Jones v. Barnes*, 1983: 759, Brennan, J., dissenting).

The CRPD

Disability rights have taken center stage at the United Nations in the most significant historical development in the recognition of the human rights of persons with mental disabilities, due to the drafting and adoption of a binding international disability rights convention (Heyns and Viljoen 2001; Megret 2008a; 2008b; Perlin and Szeli 2010; 2012). In late 2001, the United Nations General Assembly established an Ad Hoc Committee "to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities" (G.A. Res. 56/168 (2001)). The Ad Hoc Committee drafted a

document over the course of five years and eight sessions, and the new CRPD (see Perlin 2009a; 2011a; 2012; 2013c) was adopted in December 2006 and opened for signature in March 2007 (G.A. Res. A/61/611 (2006a); G.A. Res. A/61/106 (2006b)). It entered into force – thus becoming legally binding on States Parties – on May 3 2008, thirty days after the 20th ratification. One of the hallmarks of the process that led to the publication of the UN Convention was the participation of persons with disabilities and the clarion cry, "Nothing about us, without us" (Kayess and French 2008: 4). This has led commentators to conclude that the Convention "is regarded as having finally empowered the 'world's largest minority' to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection" (ibid.).

This Convention is the most revolutionary international human rights document ever created that applies to persons with disabilities (Perlin 2012). The Disability Convention furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most every aspect of life (Dhir 2005). It firmly endorses a social model of disability – a clear and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law (Perlin 2011b). "The Convention responds to traditional models and situates disability within a social model framework" (Kaiser 2009:139; Lord *et al.* 2010: 56) and sketches the full range of human rights "that apply to all human beings, all with a particular application to the lives of persons with disabilities" (Lord and Stein 2009: 256; see also McCallum 2010). It provides a framework for insuring that mental health laws "fully recognize the rights of those with mental illness" (McSherry 2008: 8).

The CRPD categorically affirms the social model of disability by describing it as a condition arising from "interaction with various barriers [that] may hinder . . . full and effective participation in society [of those with mental illness] on an equal basis with others" instead of inherent limitations (CRPD, Article 1 and Preamble, para. e.,), reconceptualizes mental health rights as disability rights (Fennell 2008), and extends existing human rights to take into account what persons with disabilities have actually experienced (Megret 2008a). To this end, it calls for "respect for inherent dignity" (CRPD, Article 3(a)) and "non-discrimination" (CRPD, Article 3(b)). Subsequent articles declare "freedom from torture or cruel, inhuman or degrading treatment or punishment" (CRPD, Article 15), "freedom from exploitation, violence and abuse" (CRPD, Article 16), and a right to protection of the "integrity of the person" (CRPD, Article 17).

The CRPD is unique because it is the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities. It not only clarifies that states should not discriminate against persons with disabilities, but also sets out explicitly the many steps that states must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society (Hoffman and Könczei 2010; Lee 2011; DeMarco 2012). One of the most critical issues in seeking to bring life to international human rights law in a mental disability law context is the right to adequate and dedicated counsel. The CRPD mandates that "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity" (CRPD, Article 12). Elsewhere, the Convention commands:

> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

> (CRPD, Article 13)

It is important to note that "[t]he extent to which this Article is honored in signatory nations will have a major impact on the extent to which this entire Convention affects persons with mental disabilities" (Perlin 2008b: 253). If and only if there is a mechanism for the appointment of dedicated counsel (Stein *et al.* 2010) can this dream become a reality (Perlin 2011b; 2012).

The ratification of the CRPD marks the most important development ever seen in institutional human rights law for persons with mental disabilities (see Perlin 1998–2002, for a full discussion of institutional mental disability law). The CRPD is detailed, comprehensive, integrated and the result of a careful drafting process. It seeks to reverse the results of centuries of oppressive behavior and attitudes that have stigmatized persons with disabilities. Its goal is clear: to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms of all persons with disabilities, and to promote respect for their inherent dignity (CRPD, Article 1). Whether this will actually *happen* is still far from a settled matter.

It is critical, in the context of this inquiry, to take a close look at the Convention's mentions of "dignity," and the commentary about those mentions. As noted above, as ratified, the Convention calls for "respect for inherent dignity" (CRPD, Article 3(a)). The Preamble characterizes "discrimination against any person on the basis of disability [as] a violation of the inherent dignity and worth of the human person" (CRPD, Preamble). These provisions are consistent with the entire Convention's "rights-based approach focusing on individual dignity" (Dhir 2005: 195), placing the responsibility on the state "to tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons" (Quinn and Degener 2002: 14; see also Vischer 2012). As noted in the introductory section, Professor Michael Stein summarizes this nicely: "[A] dignitary perspective compels societies to acknowledge that persons with disabilities are valuable because of their inherent human worth" (Stein 2007: 106; see also Shultziner and Rabinovici 2012). Again as per Professor Cees Maris: "The Convention's object is to ensure disabled persons enjoy all human rights with dignity" (Maris 2010: 1156).

Sanism, pretextuality and the universal factors

An examination of comparative mental disability law reveals that there are at least five dominant, universal, core factors that must be considered carefully in any evaluation of whether international human rights standards have been violated. Each of these five factors is a reflection of the shame that the worldwide state of mental disability law brings to all of us who work in this field. Each is tainted by the pervasive corruption of sanism that permeates all of mental disability law. Each reflects a blinding pretextuality that contaminates legal practice in this area (Perlin 2011b: 81). And finally, each of these factors are constant, no matter where we observe the practice of mental disability law and wherever we observe the treatment of persons institutionalized because of mental disability (Perlin 2009a: 488).

First, what do I mean by "sanism"? Sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry (Perlin 1992: 374–375). It permeates all aspects of mental disability law and affects all participants in the mental disability law system: litigants, fact finders, counsel, expert and lay witnesses. Its corrosive effects have warped mental disability law jurisprudence in involuntary civil commitment law, institutional law, tort law, and all aspects of the criminal process (pretrial, trial and sentencing) (Perlin 2003b: 684).

And what do I mean by "pretextuality"? Pretextuality defines the ways in which courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired

ends. This pretextuality is poisonous. It infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying (Perlin 2003a: 25).

All aspects of mental disability law are pervaded by sanism and pretextuality, whether the specific presenting topic is involuntary civil commitment law, right to refuse treatment law, the sexual rights of persons with mental disabilities, or any aspect of the criminal trial process, and whether we are talking about domestic or international law (ibid.). Together, I believe they help explain the contamination of scholarly discourse and of lawyering practices alike (Perlin 2009a: 488). Unless and until we come to grips with these concepts – and their stranglehold on mental disability law development – any efforts at truly understanding this area of the law are doomed to failure (Perlin 1999: 26).

These are the universal factors one must consider in determining if international human rights standards have been violated:

1   Core factor #1: Lack of comprehensive legislation to govern the commitment and treatment of persons with mental disabilities, and failure to adhere to legislative mandates.
2   Core factor #2: Lack of independent counsel and lack of consistent judicial review mechanisms made available to persons facing commitment and those institutionalized.
3   Core factor #3: Failure to provide humane care to institutionalized persons.
4   Core factor #4: Lack of coherent and integrated community programs as an alternative to institutional care, and
5   Core factor #5: Failure to provide humane services to forensic patients (see Perlin 2007b; 2009a; 2011).

Consider these factors discussed previously and the impact that the Convention might have on each of them.

I noted in Core Factor 1 that there was often no mental health law *at all* in other nations. The new CRPD obligates all State Parties to "adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention" (CRPD, Article 4.1(a)). The extent to which this obligation is honored will reveal much about the Convention's ultimate "real-world" impact.

I noted in Core Factor 2 that often no counsel was provided to persons facing institutionalization. The CRPD mandates that "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity" (CRPD, Article 12.3). Elsewhere, as previously noted, the Convention commands that:

> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
>
> (CRPD, Article 13.1)

The extent to which this article is honored in signatory nations will have a major impact on the extent to which this entire convention "matters" to persons with mental disabilities. Globally, counsel is often unavailable to persons facing civil commitment because of mental disability, see Perlin (2008b).

I noted in Core Factor 3 that conditions in psychiatric institutions around the world "shock the conscience" and violate the "decencies of civilized conduct" (cf. *Rochin v. California* 1952: 172–173).[4] Consider Article 22 of the CRPD, which states, "No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy." What impact will this Article have on future cases in ameliorating conditions such as those described here?

I noted in Core Factor 4 that, internationally, virtually all nations were deficient in providing community services. Consider the potential application of Article 19:

> States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
>
> (a) Persons with disabilities have the opportunity to choose their place [*sic*] of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.

Violations of this Article are ongoing in nearly every nation in the world (see Perlin *et al.* 2006).

Finally, I noted in Core Factor 5 that conditions in forensic facilities were even more abysmal than in civil facilities. For example, in Hungary, until very recently, convicted prisoners from Budapest Prison were used to "keep an eye on" patients in that nation's only high security forensic psychiatric institution "with high suicide risk" (Perlin 2007b: 354, citing Press Release 2005). In Albania, persons with mental disabilities who have been charged with a criminal offense reside in a prison unit and must comply with prison rules while institutionalized; these inmates were regularly institutionalized for *five* years before a re-evaluation of their condition (Perlin 2007b: 354, citing Weinstein *et al.* 2001). These conditions are stupefying and amount to wholesale violations *per se* of the UN Convention.

It is clear that the CRPD opens up for reconsideration the full panoply of issues discussed in this Article as they relate to persons with mental disabilities. If, by way of example, rules of evidence and procedure create an environment that perpetuates the sort of sanism and pretextuality that has had such a negative impact on the lives of persons with mental disabilities, a strong argument could be made that these rules must be recrafted in the context of the Convention. Certainly, this question *must* be "on the table" for lawyers and for advocates in the coming years (Perlin 2009a: 493–494).

Therapeutic jurisprudence

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ) (e.g., Wexler 1990; Wexler and Winick 1996; Winick 2005) (see also, in this context, Perlin, 2012b; 2013a; 2013b). Initially employed in cases involving individuals with mental disabilities, but subsequently expanded far beyond that relatively narrow area, therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have either therapeutic or anti-therapeutic consequences (Perlin 2008a; 2008b; for a transnational perspective, see Diesfeld and Freckelton 2006).

The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not

subordinating due process principles (Perlin 2003a; 2005; 2008b; 2009b). There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: "the law's use of mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns" (1993: 21). As I have stated elsewhere: "An inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties" (Perlin 2000: 412; see also Perlin 1998: 782).

Therapeutic jurisprudence "asks us to look at law as it actually impacts people's lives" (Winick 2009: 535), and focuses on the law's influence on emotional life and psychological well-being (Wexler 2000). It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness" (Winick 2003: 26). TJ understands that, "when attorneys fail to acknowledge their clients' negative emotional reactions to the judicial process, the clients are inclined to regard the lawyer as indifferent and a part of a criminal system bent on punishment" (Cruz 2010: 59). By way of example, therapeutic jurisprudence "aims to offer social science evidence that limits the use of the incompetency label by narrowly defining its use and minimizing its psychological and social disadvantage" (Steinberger 2003: 65). TJ is a tool for "gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications" (Freckelton 2008: 582). In its aim to use the law to empower individuals, enhance rights, and promote well-being, therapeutic jurisprudence has been described as "a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism" (Brookbanks 2001: 329–330). That is, therapeutic jurisprudence supports an ethic of care (Winick and Wexler 2006: 605–607).

One of the central principles of therapeutic jurisprudence is a commitment to dignity (Winick 2005: 161). Ronner (2008: 627) describes the "three Vs": voice, validation and voluntariness, arguing:

> What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.
>
> (Ronner 2002: 94–95)

The question posed is this: does the criminal trial process promote a vision that is consonant with the principles that Professor Ronner sketches out for us in this extract? Taking as a given the accuracy and importance of Professor Ronner's "three V's," it follows that a litigant must feel that the tribunal has genuinely listened to, heard, and taken seriously his story. To what extent has the criminal trial process *apparat* absorbed TJ values and incorporated them into the daily business of the criminal court system, especially in cases involving litigants with mental disabilities?

The interplay between the forensic mental health system, international human rights and mental disability law

The professional literature is "strangely silent" on whether forensic psychology practice meets human rights standards (Perlin 2010), a silence that is both shameful and baffling (Perlin 2006).[5] Significantly, there are three times as many individuals incarcerated in prison as institutionalized in mental hospitals and it is estimated that, in the United States, 16 percent of adults in prisons and jails have a mental illness, a rate of two to four times that of the general population (Fellner 2006). The rate of prisoners with mental illness is also increasing (Canales 2012). Prisoners with mental illness are more likely to violate prison rules leading to disciplinary hearings, inappropriate sanctions, and segregation (Fellner 2006). In this section, I will consider the relationship of TJ to the application of international human rights principles to prisoners and detainees with a mental illness (see generally, Birgden and Perlin 2008; Birgden and Perlin 2009).

Might therapeutic jurisprudence assist forensic psychologists and other mental health professionals to actively address human rights? Therapeutic jurisprudence, human rights, and forensic psychology can intersect in terms of therapeutic jurisprudence and human rights (Ward and Birgden 2007), therapeutic jurisprudence and forensic psychology (Birgden and Ward 2003), and human rights and forensic psychology (Perlin 2006; Perlin 2010). In common, therapeutic jurisprudence, human rights, and forensic psychology rights are normative, humanistic (with a concern for well-being), and inter-disciplinary. A normative approach conceptualizes problems, seeks solutions, and specifies values that are foundational for a particular profession (Madden and Wayne 2002). Therapeutic jurisprudence provides a useful interdisciplinary discourse – combining political theory and science, sociology, law, philosophy, biology, cultural studies, anthropology, and psychology – on human rights (Ward and Birgden 2007). Both therapeutic jurisprudence and human rights can guide forensic psychologists in a normative approach (e.g., under what circumstances involuntary psychological treatment may be acceptable), a humanistic approach (forging a therapeutic alliance based on an ethic of care), and an inter-disciplinary approach (a collaborative approach with other disciplines).

In relation to prisons, Zinger (2006) states that the best approach to ensure that the rule of law is upheld is to view corrections as being in the human rights business:

> The best argument for observing human rights standards is not merely that they are required by international or domestic law but that they actually work better than any known alternative – for offenders, for correctional staff, and for society at large. Compliance with human rights obligations increases, though it does not guarantee, the odds of releasing a more responsible citizen. In essence, a prison environment respectful of human rights is conducive to positive change, whereas an environment of abuse, disrespect, and discrimination has the opposite effect: Treating prisoners with humanity actually enhances public safety. Moreover, through respecting the human rights of prisoners, society conveys a strong message that everyone, regardless of their circumstance, race, social status, gender, religion, and so on, is to be treated with inherent respect and dignity.
>
> (ibid.:127)

A human rights model

Virtually no attention has been paid by forensic psychologists to the violation of human rights in institutions. Ward and Birgden (2007) have proposed a human rights model to be applied by forensic psychologists in offender rehabilitation (see also Birgden 2004). The proposed model

is the only known one based on human rights principles (see also Birgden 2009: 43): "Therapeutic jurisprudence should describe itself as a philosophy and therefore take a normative stance, based on a human rights perspective." Based on the work of Gewirth and consequential and deontological justifications, Ward and Birgden argue that the individual has the right to core values of freedom and well-being in order to function as an autonomous and dignified agent (Ward and Birgden 2007; on the "good lives" model from which these concepts are derived, see Birgden 2002). The core value of freedom entails non-coerced situations and internal capabilities (e.g., the capacity to formulate intentions, to imagine possible actions, and to form and implement valued plans). Freedom is made up of personal freedom and social recognition. The core value of well-being entails meeting physical, social, and psychological needs. Well-being is made up of personal security, material subsistence, and elemental equality.

The role of forensic psychologists

As discussed, ethical forensic practice must be understood in the context of international human rights law and international ethical codes of practice. In addition, a TJ approach requires forensic psychologists to understand the law and attempt to apply it to therapeutic effect. What does *therapeutic* mean in the context of corrections? To date, TJ has not clearly defined the concept (see Kress 1999) and it is unclear whether social scientists, legal actors, legislators (or, indeed, defendants/offenders) ought to define the concept (Slobogin 1999; Roderick and Krumholz 2006). Despite this problem, Birgden (2008) has argued that a TJ approach in corrections requires a balance between community rights and offender rights in order to manage offender risk *for the community* and meet offender needs *for the offender*, weighing justice principles and therapeutic principles to enhance community protection. In this way, the offender can be managed as both a rights–violator and a rights–holder (Ward and Birgden 2007).

Psychologists are to demonstrate respect for individuals by acknowledging their legal rights and moral rights, their dignity, and right to participate in decisions affecting their lives (see Australian Psychological Society Code of Ethics 2007). However, very little literature has considered the intersection between forensic psychology and human rights (see Perlin 2006; 2010; Ward and Birgden 2007; Day and Casey 2009; Perlin and Dlugacz 2009). Despite the rapid development of forensic psychology, Ward and Birgden (2007) have noted that there is a lack of theoretical and research attention paid to moral, social, and legal rights in prisoners (but see Ward and Salmon 2009). Such concerns are particularly applicable to prisoners with a mental illness.

The United Nations *Standard Minimum Rules for the Treatment of Prisoners* (1957) require prison staff to display integrity, humanity, competence, and personal suitability for the work. Forensic psychologists are also required to adhere to codes of professional conduct. Codes are a public commitment by a professional group to a particular set of standards and rules and the highest standards of ethical practice (Glaser 2003). For example, the American Psychological Association's ethical code demands that psychologists must recognize "fairness and justice" and the Speciality Guidelines for Forensic Psychologists also cover a range of professional behaviors (Perlin 2010), and the Australian Psychological Society Code of Ethics (2007) addresses three general principles: respect, propriety, and integrity. In terms of legal consequences for breaching codes, it is rare for forensic psychologists to be censured.

By way of example, there have apparently been only two cases in the United States in which forensic psychologists had been brought before state licensing boards for poor professional conduct and one criminal case in which professional standards were scrutinized (Perlin 2010). In Australia, only two states provide publicly accessible information regarding professional practice over a period of time. In South Australia, there were 24 cases between 1991 and 2007 but none

involved forensic psychologists (South Australian Psychological Board 2007). In Victoria, there were 34 cases between 1999 and 2007 and two of these were forensic psychologists (Psychologists Registration Board of Victoria 2007). One psychologist was reprimanded for professional misconduct, later de-registered for separate criminal charges, and in 2003 was re-registered with conditions. The other psychologist was de-registered for professional misconduct. An additional problem with existing codes is that such standards and rules are not based on a theory linking them to human rights. Ward and Birgden (2007) suggest that forensic psychologists as therapeutic agents (in therapeutic jurisprudence terms) should use the concept of human rights to structure and guide the assessment, treatment, and management of offenders (see Ward *et al.* 2007 as an example applied to sex offenders) and ground ethical principles for psychological practice (see Ward *et al.* 2009, regarding the American Psychological Association).

If forensic psychologists do not recognize that the business of corrections is to promote and monitor respect for human rights and prevent, detect, and remedy human rights violations, then systemic abuses of power will be inevitable (Zinger 2006). Article 15 of the United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (1988) clearly states that no individual should be subjected to torture, to cruel, inhuman or degrading treatment, or punishment. However, in recent years, there has been a dramatic increase in the attention paid to the issue of the standards of behavior that govern the practice of forensic psychologists (and forensic psychiatrists). This new attention flows mostly from revelations of the sanction of torture at prison camps in Guantánamo Bay and Abu Ghirab (see Pope and Gutheil 2009). These human rights violations have led to the question of whether this ongoing (and fierce) debate will be limited to the extraordinarily important (but clearly, relatively narrow) question of the relationship between forensic psychology and torture as a function of international human rights law, or whether it will be expanded to a broader inquiry that considers the relationship between international human rights law and all professional practice in which forensic psychologists engage (Perlin and Dlugacz 2008). I believe that the latter should occur, particularly in relation to freedom and well-being.

In an earlier work, Professor Astrid Birgden and I sought to articulate a constellation of principles that, when combined, would link therapeutic jurisprudence, ethical forensic practice, and international human rights law (see Birgden and Perlin 2009: 59–88, listing principles of respect for dignity, competent caring for individuals' well-being, integrity of mental health professionals participating in forensic systems, and demonstrating professional and scientific responsibilities to the larger community). In my earlier discussion of the universal factors of mental disability law, I concluded that: "Depressingly, persons in the forensic system receive – if this even seems possible – less humane services than do civil patients" (Perlin 2007b: 354). I believe that a turn towards the TJ-focused principles suggested in these articles that I co-authored with Professor Birgden (as well as her own and those that she has co-authored with Tony Ward) would offer some measure of relief from these onerous conditions.

Conclusion

"International human rights reality still routinely lags behind human rights aspirations" (Stacy 2009: 6). In their thorough and thoughtful analysis of the treatment of mental disability issues under the European Convention on Human Rights, Peter Bartlett and his colleagues lay down the gauntlet: the challenge of the next 25 years will be "to breathe life into Convention provisions as they apply to [persons with mental disabilities] and to press for full implementation of the standards that are won through litigation and political advances" (Bartlett *et al.* 2007: 28). They continue by stressing that the issues are one of "basic human dignity" (ibid.).

In arguing why the United States should ratify the new UN Convention, Tara Melish focuses on the "deeply entrenched attitudes and stereotypes about disability that have rendered many of the most flagrant abuses of the rights of persons with disabilities 'invisible' from the mainstream human rights lens" (Melish 2007: 44).[6] These stereotypes are the essence of sanism; US ratification of the Convention would be the "greatest blow" against institutionalized sanism for which we could hope (Perlin 2009a: 497). And its eradication is a goal to which all of us who take this area of law and society seriously should aspire (Perlin, 2007b: 357).

Acknowledgments

Discussion questions

1   Why is the Convention on the Rights of Persons with Disabilities (CRPD) a unique international human rights law document?
2   Why has organized forensic psychology paid so little attention to violations of international human rights in psychiatric and correctional institutions?
3   How can the application of therapeutic jurisprudence principles best inform developments in international human rights law?
4   What impact might the CRPD have on the ways that sanism and pretextuality pervade mental disability law?
5   What is the role and importance of dignity in the intersection between international human rights law, mental disability law, and therapeutic jurisprudence?

Websites

http://www.humiliationstudies.org/.
http://www.therapeuticjurisprudence.org/.
www.ap-ls.org/.
www.ialmh.org.

Notes

1   See Perlin (2008c: 9):

> When I have shared with others our vision of [doing mental disability law advocacy work and teaching on-line mental disability law courses] in sub-Saharan East Africa, those others have often scoffed, suggesting that the problems faced in that part of the world are so profound that it is almost frivolous to create the programs we are seeking to launch. As you might expect, I disagree, profoundly.

2   Ramcharan is the former Deputy UN High Commissioner for Human Rights.
3   According to Perlin and Szeli:

> We cannot fall into the trap of assuming that, simply because a court issued a decision, that conditions in institutions immediately changed or that procedural safeguards were immediately instituted in response to such decisions. The history of mental disability law is all too often the history of "paper victories," and even the most rights-protective court decisions may be slow to produce significant real-life changes.

(2012: 84 n. 26)

4 Although the Court was referring to a particularly objectionable and unconstitutional invasion of the privacy of a criminal defendant, this language applies equally to conditions in some psychiatric institutions. See Perlin (2008b).
5 But see Pope and Gutheil (2009) (the American Psychological Association ethics code runs counter to the Nuremberg Ethic).
6 President Obama signed the CRPD three years ago (Diament 2012), but the Senate failed to ratify it on December 4, 2012 for lack of a "super majority" of votes. The Democratic leadership has promised to bring the Convention up again for ratification in 2013. See: http://usicd.org/index.cfm/crpdupdates.

References

Arenella (1983) "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies," *Georgetown Law Journal*, 86: 185–248.

Australian Psychological Society Code of Ethics (2007) "Code of Ethics," available at: http://www.psychology.org.au/about/ethics/.

Bartlett, P., Lewis, O. and Thorold, O. (2007) *Mental Disability and the European Convention on Human Rights*, Leiden: Martinus Nijhoff Publishers.

Birckhead, T. (2009) "Toward a Theory of Procedural Justice for Juveniles," *Buffalo Law Review*, 57: 1447–1513.

Birgden, A. (2002) "Therapeutic Jurisprudence and 'Good Lives': A Rehabilitation Framework for Corrections," *Australian Psychologist*, 37: 180–186.

Birgden, A. (2004) "Therapeutic Jurisprudence and Responsivity: Finding the Will and the Way in Offender Rehabilitation," *Crime, Psychology, and Law*, 10: 283–295.

Birgden, A. (2008) "Offender Rehabilitation: A Normative Framework for Forensic Psychologists," *Psychiatry, Psychology and Law,* 15: 1–19.

Birgden, A. (2009) "Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required," *University of Puerto Rico Revista Juridica*, 78: 43–60.

Birgden, A. and Perlin, M. L. (2008) "'Tolling for the Luckless, the Abandoned and Forsaken': Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists," *Legal and Criminological Psychology*, 13: 231–243.

Birgden, A. and Perlin, M. L. (2009) "'Where the Home in the Valley Meets the Damp Dirty Prison': A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings," *Aggression and Violent Behavior*, 14: 256–263.

Birgden, A. and Ward, T. (2003) "Pragmatic Psychology Through a Therapeutic Jurisprudence Lens: Psycholegal Soft Spots in the Criminal Justice System," *Public Policy, Psychology, and the Law*, 9: 334–360.

Brookbanks, W. (2001) "Therapeutic Jurisprudence: Conceiving an Ethical Framework," *Journal of Law and Medicine*, 8: 328–341.

Canales, C. (2012) "Prisons: The New Mental Health System," *Connecticut Law Review*, 44: 1725–1764.

Cassel, D. (2001) "Does International Human Rights Law Make a Difference?" *Chicago Journal of International Law*, 2: 121–135.

Castiglione, J. D. (2008) "Human Dignity under the Fourth Amendment," *Wisconsin Law Review*, 655: 101–156.

Chaskalson, A. (2011) "Dignity as a Constitutional Value: A South African Perspective," *American University International Law Review*, 26: 1377–1407.

Cruz, E. H. (2010) "Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements," *Harvard Latino Law Review*, 13: 47–65.

Daly, E. (2011) "Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right," *Ohio Northern University Law Review*, 37: 381–427.

Day, A. and Casey, S. (2009) "Values in Forensic and Correctional Psychology," *Aggression and Violent Behavior*, 14: 231–238.

Degener, T. (2000) "International Disability Law; A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13–17, 1999," *Berkeley Journal of International Law*, 18: 180–195.

DeMarco, K.D. (2012) "Disabled By Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on the Use of Supermax Solitary Confinement," *University of Miami Law Review*, 66: 523–565.

Dhir, A. A. (2005) "Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities," *Stanford Journal of International Law*, 41: 181–216.

Diament, M. (2012) "Obama Urges Senate to Ratify Disability Treaty," available at http://www.disability scoop.Com/2012/05/18/Obama-Urges-Senate-Treaty/15654/(accessed May 18 2012).

Diesfeld, K. and Freckelton, I. (2006) "Mental Health Law and Therapeutic Jurisprudence," in I. Freckelton and K. Peterson (eds.) *Disputes and Dilemmas in Health Law*, Sydney: The Federation Press.

Dole, B. (1994) "Promises to People with Disabilities?: Commentary on Blanck," *Iowa Law Review*, 79: 925–934.

Fellner, J. (2006) "A Corrections Quandary: Mental Illness and Prison Rules," *Harvard Civil Rights-Civil Liberties Law Review*, 41: 391–412.

Fennell, P. (2008) "Human Rights, Bioethics, and Mental Disorder," *Medicine and Law*, 27: 95–107.

Freckelton, I. (2008) "Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence," *Thomas Jefferson Law Review*, 30: 575–591.

Glaser, B. (2003) "Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs," *Western Criminology Review*, 4: 143–154.

Glensy, R. D. (2011) "The Right to Dignity," *Columbia Human Rights Review*, 43: 65–142.

Gombos, G. *et al.* (2002) "Hungary: The Social Care Home Report," *New York Law School Journal of International and Comparative Law*, 21: 361–386.

Gostin, L. (2000) "Human Rights of Persons with Mental Disabilities: The European Convention of Human Rights," *International Journal of Law and Psychiatry*, 23: 125–159.

Hendricks, A. and Degener, T. (1994) "The Evolution of a European Perspective on Disability Legislation," *European Journal of Health Law*, 1: 343–365.

Heyns, C. H. and Viljoen, F. (2001) "The Impact of the United Nations Human Rights Treaties on the Domestic Level," *Human Rights Quarterly*, 23: 483–535.

Hoffman, I. and Kónczei, G. (2010) "Legal Regulations Related to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code," *Loyola of Los Angeles International and Comparative Law Review*, 33: 143–172.

Jones, M. and Marks, L.A.B. (1999) "Law and the Social Construction of Disability," in *Disability*, *Diverse Ability and Legal Change*, The Hague: Martinus Nijhoff.

Kaiser, H.A. (2009) "Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State," *Health Law Journal*, 17: 139–194.

Kayess, R. and French, P. (2008) "Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities," *Human Rights Law Review*, 8: 1–34.

Kress, K. (1999) "Therapeutic Jurisprudence and the Resolution of Value Conflicts: What We Can Realistically Expect, in Practice, from Theory," *Behavioral Sciences and the Law*, 17: 555–588.

Kruse, K. (2008) "The Human Dignity of Clients," *Cornell Law Review*, 93: 1343–1364.

Kumar, C. R. (2003) "Moving Beyond Constitutionalisation and Judicial Protection of Human Rights: Building on the Hong Kong Experience of Civil Society Empowerment," *Loyola of Los Angeles International and Comparative Law Review*, 26: 281–314.

Lawson, A. (2006) "Disability, Degradation, and Dignity: The Role of Article 3 of the European Convention on Human Rights," *Northern Ireland Legal Quarterly*, 56: 462–491.

Lee, B. Y. (2011) "The U.N. Convention on the Rights of Persons with Disabilities and its Impact upon Involuntary Civil Commitment of Individuals with Developmental Disabilities," *Columbia Journal of Law and Social Problems*, 44: 393–445.

Lewis, O. (2002) "Protecting the Rights of People with Mental Disabilities: the European Convention on Human Rights," *European Journal of Health Law*, 9: 293–320.

Lord, J. (2004) "NGO Participation in Human Rights Law and Process: Latest Developments in the Effort to Develop an International Treaty on the Rights of Persons with Disabilities," *ILSA Journal of International and Comparative Law*, 10: 311–318.

Lord, J. E. and Stein, M. A. (2009) "Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play," *Boston University International Law Journal*, 27: 249–281.

Lord, J. E., Suozzi, D. and Taylor, A. L. (2010) "Lessons from the Experience of U.N. Convention on the Rights of Persons with Mental Disabilities: Addressing the Democratic Deficit in Global Health Governance," *Journal of Law, Medicine and Ethics*, 38: 564–576.

Luban, D. (2007) "Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)," in D. Luban (ed.) *Legal Ethics and Human Dignity*, Cambridge: Cambridge University Press.

Ludwikowski, R. (1995) "Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe," *Cardozo Journal of International and Comparative Law*, 3: 73–162.

Luna, E. and Cassell, P. (2010) "Mandatory Minimalism," *Cardozo Law Review*, 32: 1–83.

Madden, R. G. and Wayne, R. H. (2002) "Constructing a Normative Framework for Therapeutic Jurisprudence Using Social Work Principles as a Model," *Touro Law Review*, 18: 487–502.

Maris, C. (2010) "A ≠ A: Or, Freaky Justice," *Cardozo Law Review*, 31: 1133–1169.

McCallum, R. (2010) "The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections," available at: http://ssrn.com/abstract=1563883.

McCrudden, C. (2008) "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law*, 19: 655–723.

McSherry, B. (2008) "International Trends in Mental Health Laws: Introduction," in B. McSherry (ed.) *International Trends in Mental Health Laws*, Annandale, NSW: The Federation Press.

Megret, F. (2008a) "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?," *Human Rights Quarterly*, 30: 494–516.

Megret, F. (2008b) "The Disabilities Convention: Toward a Holistic Concept of Rights," *International Journal of Human Rights*, 12: 261–278.

Melish, T. (2007) "The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify," *Human Rights Brief*, 14: 37–46.

Miller, E. (2004) "Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism," *Ohio State Law Journal*, 65: 1479–1576.

Miller, R. (2003) "The Shared Transatlantic Jurisprudence of Dignity," *German Law Journal*, 4: 925–934.

Munford, L. T. (2007) "The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare," *Harvard Negotiation Law Review*, 12: 377–414.

Perlin, M. L. (1992) "On Sanism," *Southern Methodist University Law Review*, 46: 373–407.

Perlin, M. L. (1998) "'Where the Winds Hit Heavy on the Borderline': Mental Disability Law, Theory And Practice, Us and Them," *Loyola of Los Angeles Law Review*, 31: 775–793.

Perlin, M. L. (1998–2002) *Mental Disability Law: Civil and Criminal*, 2nd edn, vols. 1–5. Newark, NJ: Lexis–Nexis.

Perlin, M. L. (1999) "'Half-Wracked Prejudice Leaped Forth': Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did," *Journal of Contemporary Legal Issues*, 10: 3–36.

Perlin, M. L. (2000) "A Law of Healing," *University of Cincinnati Law Review*, 68: 407–434.

Perlin, M. L. (2003a) "'She Breaks Just Like a Little Girl': Neonaticide, The Insanity Defense, and the Irrelevance of 'Ordinary Common Sense,'" *William and Mary Journal of Women and the Law*, 10: 1–31.

Perlin, M. L. (2003b) "'You Have Discussed Lepers and Crooks': Sanism in Clinical Teaching," *Clinical Law Review*, 9: 683–729.

Perlin, M. L. (2005) "'And My Best Friend, My Doctor/ Won't Even Say What It Is I've Got': The Role and Significance of Counsel in Right to Refuse Treatment Cases," *San Diego Law Review*, 42: 735–755.

Perlin, M. L. (2006) "'Your Old Road Is/ Rapidly Agin'": International Human Rights Standards and Their New Impact on Forensic Psychologists and Psychiatrists," paper presented as the keynote address at the 26th Australian and New Zealand Association of Psychiatry, Psychology and Law, Lorne, Australia.

Perlin, M. L. (2007a) "An Internet-Based Mental Disability Law Program: Implications for Social Change in Nations with Developing Economies," *Fordham International Law Journal*, 40: 435–454.

Perlin, M. L. (2007b) "International Human Rights Law and Comparative Mental Disability Law: The Universal Factors," *Syracuse Journal of International Law and Commerce*, 34: 333–358.

Perlin, M. L. (2008a) "'Everybody Is Making Love/Or Else Expecting Rain': Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia," *University of Washington Law Review*, 83: 481–508.

Perlin, M. L. (2008b) "'I Might Need a Good Lawyer, Could Be Your Funeral, My Trial': Global Clinical Legal Education and the Right to Counsel in Civil Commitment Cases," *Washington University Journal of Law and Policy*, 28: 241–264.

Perlin, M. L. (2008c) "'When the Winds of Changes Shift': International Teaching for Social Change, Or, Why Doing What We Do Keeps Us 'Forever Young,'", paper presented at Society of American Law Teachers Conference, University of California Berkeley Law School, March 15.

Perlin, M. L. (2009a) "'A Change Is Gonna Come': The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law," *Northern Illinois University Law Review*, 29: 483–498.

Perlin, M. L. (2009b) "'His Brain Has Been Mismanaged with Great Skill': How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?," *Akron Law Review*, 42: 885–916.

Perlin, M. L. (2010) "'With Faces Hidden While the Walls Were Tightening': Applying International Human Rights Standards to Forensic Psychology," *U.S.-China Law Review*, 7: 1–13.

Perlin, M. L. (2011a) "'Abandoned Love': The Impact of *Wyatt V. Stickney* on the Intersection Between International Human Rights and Domestic Mental Disability Law," *Law and Psychology Review*, 35: 121–142.

Perlin, M. L. (2011b) *International Human Rights and Mental Disability Law: When the Silenced Are Heard*, Oxford: Oxford University Press.

Perlin, M. L. (2012) "Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the UN Convention on the Rights of Persons with Disabilities," *George Washington International Law Review*, 44: 1–37.

Perlin, M. L. (2013a) *A Prescription for Dignity: Rethinking Criminal Justice and Mental Disability*, London: Ashgate (in press).

Perlin, M. L. (2013b) *Mental Disability and the Death Penalty: The Shame of the States*, Lanham, MD: Rowman and Littlefield (in press).

Perlin, M. L. (2013c) "'There Are No Trials Inside the Gates of Eden': Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence," in B. McSherry and I. Freckelton (eds.) *Coercive Care: Law and Policy* (in press). London: Routledge.

Perlin, M. L. and Dlugacz, H.A. (2008) *Mental Health Issues in Jails and Prisons: Cases and Materials*, Durham, NC: Carolina Academic Press.

Perlin, M. L. and Dlugacz, H.A. (2009) "'It's Doom Alone That Counts': Can International Human Rights Law Be an Effective Source of Rights in Correctional Conditions Litigation?" *Behavioral Sciences and Law*, 27: 675–694.

Perlin, M. L. and Szeli, E. (2010) "Mental Health Law and Human Rights: Evolution, Challenges and the Promise of the New Convention," in J. Kumpuvuori and M. Scheninen (eds.) *United Nations Convention on the Rights of Persons with Disabilities: Multidisciplinary Perspectives*, Helsinki, Finland: The Center for Human Rights of Persons with Disabilities in Finland (VIKE).

Perlin, M. L. and Szeli, E. (2012) "Mental Health Law and Human Rights: Evolution and Contemporary Challenges," in M. Dudley, D. Silove and F. Gales (eds.) *Mental Health and Human Rights: Vision, Praxis, and Courage*, Oxford: Oxford University Press.

Perlin, M. L., *et al.* (2006) *International Human Rights and Comparative Mental Disability Law: Cases and Materials*, Durham, NC: Carolina Academic Press.

Pinard, M. (2010) "Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity," *New York University Law Review*, 85: 457–534.

Pope, K. and Gutheil, T. (2009) "Psychologists Abandon The Nuremberg Ethic: Concerns For Detainee Interrogations," *International Journal of Law and Psychiatry*, 32: 161–166.

Press Release (2005) Mental Disability Advocacy Center (MDAC), "Prisoners or Patient?," June, available at: http://www.mdac.info/documents/PR_IMEI_20050627_eng.pdf.

Psychologists Registration Board of Victoria (2007) *Complaints*, available at: http://www.psychreg.vic.gov.au/store/page.pl?id=3185.

Quinn, G. and Degener, T. (2002) *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, Blue Ridge Summit, PA: United Nations Publication.

Ramcharan, B. G. (1991) "Strategies for the International Protection of Human Rights in the 1990s," *Human Rights Quarterly*, 13: 155–169.

Rao, N. (2008) "On the Use and Abuse of Dignity in Constitutional Law," *Columbia Journal of European Law*, 14: 201–255.

Roderick, D. and Krumholz, S.T. (2006) "Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence," *Southern New England Roundtable Symposium Law Journal*, 1: 201–223.

Ronner, A. (2002) "Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles," *University of Cincinnati Law Review*, 71: 89–120.

Ronner, A. (2008) "The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome," *Touro Law Review*, 13: 601–696.

Rosenthal, E. and Rubenstein, L.S. (1993) "International Human Rights Advocacy under the 'Principles for the Protection of Persons with Mental Illness'," *International Journal of Law and Psychiatry*, 16: 257–300.

Sanger, C. (2009) "Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law," *Columbia Journal of Gender and the Law*, 18: 409–499.

Shultziner, D. and Rabinovici, I. (2012) "Human Dignity, Self-Worth, and Humiliation: A Comparative Legal-Psychological Approach," *Psychology, Public Policy and Law*, 18: 105–143.

Slobogin, C. (1999) "Therapeutic Jurisprudence: Five Dilemmas to Ponder," *Psychology, Public Policy and Law*, 1: 193–219.

South Australian Psychological Board (2007) *Complaints*, available at: http://www.sapb.saboards.com.au/publication.htm.

Stacy, H. M. (2009) *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture*, Stanford, CA: Stanford University Press.

Stein, M. A. (2007) "Disability Human Rights," *California Law Review*, 95: 75–121.

Stein, M. A., Waterstone, M. E. and Wilkins, D. B. (2010) "Cause Lawyering for People with Disabilities," *Harvard Law Review*, 123: 1658–1703.

Steinberger, C. B. (2003) "Persistence and Change in the Life of the Law: Can Therapeutic Jurisprudence Make a Difference?," *Law and Psychology Review*, 27: 55–72.

United Nations (1957) "Standard Minimum Rules for the Treatment of Prisoners," available at: www.unhchr.ch/html/menu3/b/h_comp34.htm.

United Nations (1988) "Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment," available at: http://www.un.org/documents/ga/res/43/a43r173.htm.

United Nations (2001) G.A. Res. 56/168.

United Nations (2006a) G.A. Res. A/61/106.

United Nations (2006b) G.A. Res. A/61/611.

Vischer, R. (2012) "How Do Lawyers Serve Human Dignity?," *St. Thomas Law Review* (in press).

Ward, T. and Birgden, A. (2007) "Human Rights and Clinical Correctional Practice," *Aggression and Violent Behavior*, 12: 628–643.

Ward, T. and Salmon, K. (2009) "The Ethics of Punishment: Correctional Practice Implications," *Aggression and Violent Behavior*, 14: 239–247.

Ward, T., Gannon, T. E., and Birgden, A. (2007) "Human Rights and the Treatment of Sex Offenders," *Sexual Abuse: A Journal of Research and Treatment*, 19: 195–216.

Ward, T., Gannon, T. E. and Vess, J. (2009) "Human Rights, Ethical Principles, and Standards in Forensic Psychology," *International Journal of Offender Therapy and Comparative Criminology*, 53: 126–144.

Weinstein, H. *et al.* (2001) "Protecting the Mentally Disabled," available at: http:// www.cceia.org/resources/publications/dialogue/2_06/online_exclusive/654.html.

Wexler, D. B. (ed.) (1990) *Therapeutic Jurisprudence: The Law as a Therapeutic Agent*, Durham, NC: Carolina Academic Press.

Wexler, D. B. (1993) "Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship," *Behavioral Science and Law*, 11: 17–30.

Wexler, D. B. (2000) "Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies," in D. P. Stolle, D. B. Wexler and B. J. Winick (eds.) *Practicing Therapeutic Jurisprudence: Law as a Helping Profession*, Durham, NC: Carolina Academic Press.

Wexler, D. B. and Winick, B. J. (eds.) (1996) *Law in a Therapeutic Key: Recent Developments in Therapeutic Jurisprudence*, Durham, NC: Carolina Academic Press.

Winick, B. J. (1995) "Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie," *Journal of Criminal Law and Criminology*, 85: 571–624.

Winick, B. J. (2003) "A Therapeutic Jurisprudence Model for Civil Commitment," in K. Diesfeld and I. Freckelton (eds.) *Involuntary Detention and Therapeutic Jurisprudence: International Perspective on Civil Commitment*, Farnham: Ashgate.

Winick, B. J. (2005) *Civil Commitment: A Therapeutic Jurisprudence Model*, Durham, NC: Carolina Academic Press.

Winick, B. J. (2009) "Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime," *Nova Law Review*, 33: 535–543.

Winick, B. J. and Wexler, D. B. (2006) "The Use of Therapeutic Jurisprudence in Law School Clinical Education: The Criminal Law Clinic," *Clinical Law Review*, 13: 605–632.

Zinger, I. (2006) "Human Rights Compliance and the Role of External Prison Oversight," *Canadian Journal of Criminology and Criminal Justice*, 48: 127–140.

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Cases cited

In the Matter of Victor Rosario Congo, Report No. 63/99 Case 11.427 (13 April, 1999).

Jones v. Barnes, 463 U.S. 745 (1983).

Purohit and Moore v. The Gambia, Comm. No. 241/2001, 16th activity report of the AFR.C.H.P.R. (2002–2003).

Sauvé v. Canada [2002] 3 S.C.R. 519.

Winterwerp v. The Netherlands, 33 Eur. Ct. H.R. (ser. A) (1979).

The industries of crime and justice

Systems of corrections and punishment

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Isolated confinement

Effective method for behavior change or punishment for punishment's sake?

Terry A. Kupers

A historic wrong turn

In the 1970s, I began testifying in class action lawsuits as a psychiatric expert witness regarding jail and prison conditions and the adequacy of correctional mental health services. The issues usually included jail and prison crowding, which constituted harsh conditions and violated the Eighth Amendment prohibition against cruel and unusual punishment. The War on Drugs, increasingly harsh prison sentences, and other factors were causing the prison population to multiply geometrically. Meanwhile, with the "de-institutionalization" of state psychiatric hospitals and subsequent budget cuts in community mental health programs, a large number of individuals suffering from serious mental illness were finding their way into the prisons. In fact, while the prison population was multiplying geometrically in recent decades, the proportion of prisoners suffering from serious mental illness was also climbing. With crowding there were insufficient cells, so gymnasiums became impromptu dormitories, while four or six prisoners were crammed into cells built for one or two. Classes and rehabilitation programs did not expand to fill the need. It was known, from a robust literature on crowding, that massive crowding, especially with relative idleness, caused increased rates of violence, psychiatric breakdown and suicide in the facilities (Thornberry and Call 1983; Paulus *et al*. 1978). Meanwhile, there was a concerted effort on the part of conservative politicians to dismantle prison rehabilitation programs in the prisons. The cry was to "stop coddling criminals." So there were a lot of idle prisoners, many suffering from serious mental illness, shoe-horned into small spaces, and the result was mayhem.

The prison-building binge that gathered momentum in the 1980s was accompanied by a love affair with supermaxes. Supermaximum security units are also known as SHUs or Security Housing Units, the California acronym that has become synonymous with supermax confinement around the country. A supermaximum security unit or SHU is a cellblock or an entire prison made up entirely of isolation or segregation cells, where the prisoners are confined nearly 24 hours per day and eat meals alone (or with a cellmate) in their cells (Rhodes 2004; Shalev 2009). The isolation and idleness are extreme. Few, if any, rehabilitation or education programs exist in supermaxes. Most states and the federal government built them, and an unprecedented proportion of maximum security prisoners wound up in some form of long-term segregation.

This development constituted a historic wrong turn in American correctional policies. Severe crowding and downsizing of rehabilitation programs and the enlarged diversion of individuals suffering from serious mental illness into correctional facilities had exacerbated violence and mental illness in the prisons. Instead of remedying the crowding, providing adequate mental health treatment and reinstating rehabilitation programs, correctional authorities blamed "the worst of the worst" for the violence and madness and proceeded to lock a growing proportion of prisoners in punitive segregation, including supermaximum security units. That wrong turn has caused immense pain and suffering and resulted in a large number of very damaged prisoners and ex-prisoners.

The damaging effects of supermax isolated confinement

Long-term confinement (greater than three months) in an isolated confinement unit such as a supermaximum facility is well known to cause severe psychiatric morbidity, disability, suffering and mortality (Grassian and Friedman 1986; Scharff-Smith 2006). It has been known for as long as solitary confinement has been practiced that human beings suffer a great deal of pain and mental deterioration when they remain in solitary confinement for a significant length of time. Thus, in 1890, the U.S. Supreme Court found that in isolation units:

> [A] considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.
>
> (*In re Medley* 1890)

A significant amount of research echoes the Court's findings. Hans Toch provided early narrative reports from prisoners at the highest levels of security and isolation (Toch 1975). Craig Haney has researched the detrimental effects of long-term isolation (Haney *et al.* 1973; Haney 2003, 2006). More than four out of five of the prisoners he evaluated suffered from feelings of anxiety and nervousness, headaches, troubled sleep, and lethargy or chronic tiredness, and over half complained of nightmares, heart palpitations, and fear of impending nervous breakdowns. Equally high numbers reported obsessive ruminations, confused thought processes, an oversensitivity to stimuli, irrational anger, and social withdrawal. Well over half reported violent fantasies, emotional flatness, mood swings, chronic depression, and feelings of overall deterioration, while nearly half suffered from hallucinations and perceptual distortions, and a quarter experienced suicidal ideation.

Stuart Grassian has conducted similar research (Grassian 1983; Grassian and Friedman 1986). He describes a particular psychiatric syndrome resulting from the deprivation of social, perceptual, and occupational stimulation in solitary confinement. This syndrome has basically the features of a delirium, and among the more vulnerable population, can result in an acute agitated psychosis, and random violence – often directed towards the self, and at times resulting in suicide. He has also demonstrated in numerous cases that the prisoners who end up in solitary confinement are generally not, as claimed, "the worst of the worst"; they are, instead, the sickest, most emotionally labile, impulse-ridden and psychiatrically vulnerable among the prison population.

Two-thirds of the prisoners Dr. Grassian initially studied had become hypersensitive to external stimuli (noises, smells, etc.) and about the same number experienced "massive free floating anxiety." About half of the prisoners suffered from perceptual disturbances that for some included

hallucinations and perceptual illusions, and another half complained of cognitive difficulties such as confusional states, difficulty concentrating, and memory lapses. About a third also described thought disturbances such as paranoia, aggressive fantasies, and impulse control problems. Three out of the 15 had cut themselves in suicide attempts while in isolation. In almost all instances the prisoners had not previously experienced any of these psychiatric reactions. For all prisoners, long-term solitary confinement has the effect, on average, of making post-release adjustment very problematic and worsening recidivism rates (Lovell *et al.* 2007).

An alarmingly large proportion of prisoners consigned to supermaximum security isolation in recent decades suffer from serious mental illness. Sheilagh Hudgins and Gilles Cote performed a research evaluation of penitentiary inmates in a Supermaximum Security Housing Unit and discovered that 29 percent suffered from severe mental disorders, notably schizophrenia (Hudgins and Cote 1991). David Lovell has described typical disturbed behavior (Lovell 2008). I have reported my own findings from litigation-related investigations (Kupers 1999). It is stunningly clear that for prisoners prone to serious mental illness, time served in isolation and idleness exacerbates their mental illness and too often results in suicide. This is the main reason that federal courts have ruled that prisoners with serious mental illness must not be subjected to long-term isolation (*Madrid v. Gomez 1995*; *Jones 'El v. Berge 2001*; *Presley v. Epps 2005, 2007*).

Recently I have been asked by attorneys to investigate the effects of very long-term solitary confinement (over a decade) upon prisoners who do not exhibit an obvious serious mental illness. These are individuals who do not participate in mental health treatment, who have refused to inform on other prisoners as a condition of release from supermaximum confinement, and many of them have long ago become eligible for parole but parole boards have told them that because they remain in isolated confinement, they cannot be paroled. The referral question I am asked is whether their continuing isolated confinement causes additional psychiatric harm. My preliminary answer (my investigation is ongoing) is that very long-term isolation and idleness have produced in these prisoners, on average, disabling symptoms beyond those reported by Haney, Grassian, me and others (whose studies mostly involved prisoners who had been in solitary confinement for a matter of months or a few years). Those disturbing symptoms continued and worsened over ensuing decades of solitary confinement, but additionally, these prisoners have become severely cut off from their own feelings and have turned inward so they hardly engage in any social activity at all, even considering their very limited options within the isolation unit. The damage is cumulative and severe.

Then, too often, a certain number of prisoners are released straight out of solitary confinement to the community at the end of their prison sentence (this is called "maxing out of the SHU"). This creates huge problems for them in adjusting to community life, and, needless to say, the recidivism and parole violation rates for the group who "max out of the SHU," as well as for those who spent considerable time in isolation, are extremely dire (Lovell *et al.* 2007). Whether or not prisoners are permitted to "max out of the SHU" (the alternative in several states is to require six months of re-socialization in a general population unit prior to prisoners reaching their release date), the period of isolation and idleness has very negative effects on their chances of succeeding at "going straight" after being released.

It is predictable that prisoners' mental state deteriorates in isolation. Human beings require at least some social interaction and productive activities to establish and sustain a sense of identity and to maintain a grasp on reality. In the absence of social interactions, unrealistic ruminations and beliefs cannot be tested in conversation with others, so they build up inside and are transformed into unfocused and irrational thoughts. Disorganized behaviors emerge. Internal impulses linked with anger, fear and other strong emotions grow to overwhelming proportions. Sensory deprivation is not total in supermax units; there is the intermittent slamming of steel

doors and there is yelling (one has to yell in order to be heard by anyone from within one's cell), but this kind of noise does not constitute meaningful human communication. Prisoners in this kind of segregation do what they can to cope. Many pace relentlessly, as if this non-productive action will relieve the emotional tension. Those who can read books and write letters do so.

The tendency to suffer psychiatric breakdown and become suicidal is made even worse by sleep deprivation, which is a frequent occurrence among prisoners in isolated confinement. There are noises at night as other prisoners, for example, those suffering from serious mental illness, cry out. Then, besides the slamming of doors, officers yell out orders on the cellblock or pod. Then, the lights are usually on all night. Prisoners from around the country tell me that for these and other reasons, it is very difficult to sleep in supermax units. Loss of sleep intensifies psychiatric symptoms by interfering with the normal diurnal rhythm (the steady alternation of day and night that provides human beings with orientation as to time), and the resulting sleep loss creates fatigue and magnifies cognitive problems, memory deficits, confusion, anxiety, and sluggishness.

It is under these extreme conditions that psychiatric symptoms begin to emerge in previously healthy prisoners. Of course, in less healthy ones there is psychosis, mania or compulsive acts of self-abuse or suicide. We know that the social isolation and idleness, as well as the near absolute lack of control over most aspects of daily life, very often lead to serious psychiatric symptoms and breakdown. It has been known for decades that suicide is approximately twice as prevalent in prison than it is in the community, and recent research confirms that, of all successful suicides that occur in a correctional system, approximately 50 percent involve the 3–8 percent of prisoners who are in some form of isolated confinement at any given time (Way *et al.* 2005; Mears and Watson 2006; Patterson and Hughes 2008).

Inadequate treatment for prisoners suffering from serious mental illness is only one of many serious problems with supermaxes. Relationships between staff and prisoners break down and too often there is widespread and well-documented abuse and sadism on the part of some of the keepers toward the people they keep under total control. In this type of very high security unit there evolves a "vicious cycle" of worsening hostility and misunderstanding between staff and prisoners. This is not to downplay the reality that rule violations do occur in such units, and an appropriate and fair disciplinary system must be maintained. But when human beings are subjected to extremes of isolation and idleness, and deprived of every vestige of control over their environment, and in addition are denied social contact and all means to express themselves in a constructive manner, then it is entirely predictable that they (or almost any human being) will resort to increasingly desperate acts to achieve some degree of control of their situation and to restore some modicum of self-respect. The prisoners are driven to small acts of resistance, which in turn are likely to be perceived by officers as disrespectful or rule-breaking; the officers, in turn, become increasingly insensitive, punitive or even abusive toward the identified troublemakers.

A culture of punishment

Psychologists have been guided for a long time by the evidence-based axiom that positive rewards are much more effective than negative punishments in changing behaviors and helping people grow. This axiom gets to the heart of today's prison crisis. But in American prisons, the negative punishments have gained ascendancy to such a great extent in recent decades that there is little room for rehabilitation-minded staff to design a series of positive rewards for pro-social and acceptable behaviors, the strategy that once, prior to the 1970s, constituted the core of rehabilitation programs in the prisons.

Prisons serve several purposes. They quarantine individuals deemed dangerous in the community. They serve as punishment for crimes committed. And they are a place for rehabilitation. In different historical epochs, one or another of these purposes was emphasized over the others. As Garland points out, the punishment purpose has gained ascendancy in the USA since the 1970s, and the rehabilitation purpose, which was a major priority during the century leading up to the 1970s, has had to take a back seat (Garland 2001). In supermax isolation units, punishment becomes severe and unremitting, rehabilitation and positive rewards practically non-existent. In effect, the prisoner is pushed by the severity of punishment at every turn to act in more extreme and dysfunctional ways to express dissatisfaction with the way he or she is being treated. With each desperate and inappropriate act on the part of the prisoner, the staff react more punitively. There arises a culture wherein further punishment becomes the staff's reaction to everything they judge to be misbehavior on the part of prisoners.

We have a precedent for this kind of vicious cycle, but unfortunately its lessons have been mostly lost on contemporary correctional authorities. In the era of mental asylums, when individuals suffering from serious mental illness were confined in large public psychiatric hospitals, Erving Goffman, Thomas Scheff and other "sociologists of deviance" hypothesized that institutional dynamics play a big part in driving patients to regress into impotent and bizarre aggressive behaviors while clinicians are side-tracked into disbelieving patients' emotional pains and reporting of events (Goffman 1962; Scheff 1966). For example, a young man is brought against his will to the locked psychiatric hospital, he protests loudly that he is not crazy and in fact it is his parents or the police who want him locked up who are actually distorting the reality. The admitting psychiatrist interprets his increasingly loud protests as signs of the very mental illness being ascribed to him and he is involuntarily admitted to the inpatient unit. As he realizes he is being deprived of his freedom, his protests become louder and more desperate. The staff take his emotional protests as further evidence confirming the diagnosis of psychosis. He is placed on a locked ward and deprived of most familiar means of expressing himself. He does something irrational such as throwing a chair through a window in order to express his outrage over being deprived of his freedom. The staff are even more convinced of his "madness" and lock him in an isolation room with no clothes and no pens or writing materials. Being even more incensed and more desperate to express himself he smears feces on the wall of the isolation room and begins to write messages with his finger in the smears on the wall. Of course, Goffman and Scheff were very concerned about the self-fulfilling-prophecy involved in the staff's diagnostic process, and they warned poignantly that incremental denial of freedom to individuals within "total institutions," whether they actually suffer from a bona fide mental illness or not, leads inexorably to their increasingly irrational and desperate attempts to maintain their dignity and express themselves.

In effect, we see the same tragic drama being played out in the prisons today. The supermax isolation unit is where the most extreme version of the drama is enacted on a daily basis, including the smearing or throwing of bodily wastes. For the confined individual, the most maddening part of the story is likely the way the staff discount everything the patient/prisoner has to say. Staff in a facility where the focus is almost entirely punitive, where there is little or no room for treatment and rehabilitation, tend to discount the confined individuals' accounts of events, and tend to become insensitive to their complaints about emotional pain and psychological symptoms. The area where this unfortunate dynamic is most obvious is the diagnosing of psychiatric disorders in prisoners consigned to long-term solitary confinement. In the course of my tours of supermax units around the USA, I have found many prisoners who are clearly suffering from a serious mental illness, very often a psychotic condition such as schizophrenia. When I review these prisoners' clinical charts and discuss them with correctional mental health

staff, I am informed that the individual is "merely manipulating," or that he is "malingering," or that he has no "Axis I diagnosis." (Axis I is the place in a formal diagnostic assessment where serious mental illnesses are recorded, in contrast to Axis II, where personality disorders are recorded.) In other words, in the eyes of the mental health staff, the prisoners I find to be psychotic or schizophrenic actually have no real mental disorder, but are more accurately diagnosed as fakers or "antisocial personalities."

It is possible that I am wrong, diagnostically speaking, on one occasion or another, and it is also possible that I am occasionally fooled by a prisoner who is malingering (exaggerating symptoms in order to gain something such as the waiving of punishment for rule-breaking) or faking psychiatric problems. But I am a Board-certified psychiatrist and I have worked and taught for many years in a variety of treatment settings. It is extremely unlikely that I am fooled the large number of times when I discover prisoners in solitary confinement who clearly appear psychotic and have past histories of mental illness that support my diagnostic impressions. Thus, for example, my disagreement with correctional mental health staff over diagnosis frequently involves prisoners who, prior to incarceration, had been admitted to psychiatric hospitals several times, had made serious suicide attempts, had responded with improved behavior to anti-psychotic medications, and had been granted Social Security Disability for their psychiatric disorder. Now, when I discover them hallucinating and exhibiting psychotic thought processes in a solitary confinement cell, I am supposed to believe they are suddenly free of serious mental illness and merely "malingering"? This is certainly much less likely than the alternative explanation, i.e. that the correctional staff have become somewhat inured to prisoners' bizarre symptoms and, like the asylum clinicians Goffman and Scheff described, have adopted an entirely punitive and unsympathetic attitude toward their pleas for help and their inappropriate behaviors. Then, when the prisoner in question acts more bizarrely, the staff (custody as well as mental health staff) respond with increasingly severe punishments. Of course, the more appropriate and humane response would be to intensify the mental health treatment interventions, including but not limited to increased medication dosages, when the patient acts more disturbed. And in most cases this would require removing the prisoner from the harsh isolative conditions that exacerbate symptoms.

In the short term, this cyclic dynamic leads to commotion and physical altercations inside the supermax units. But in the long run it leads to damaged prisoners who become chronically dysfunctional. The axiom remains valid and applicable: if improved behavior on the part of the prisoners were the aim, it would be much more effective for staff to reward the prisoners' positive behaviors at every turn than to mete increasingly petty or harsh punishments for every misstep on the prisoner's part. In fact, when enlightened correctional managers devise programs in their prisons' supermax units whereby prisoners can earn incrementally greater amenities and freedoms by exhibiting acceptable behavior, and the increments are short enough and the required behaviors reasonable and attainable, most prisoners in isolation are willing to cooperate and earn their way out of "the hole." On the other hand, the more a generalized culture of punishment leads the staff to distrust and disrespect the prisoners, the more the prisoners are driven to dysfunctional acts of defiance.

The advent of "Therapeutic Cubicles" is symptomatic of the vicious cycle I am describing. Therapeutic cubicles or "programming modules" are small holding cells, approximately the shape of a phone booth, made of steel and lexsan (indestructible plexiglass). Four or five of these cubicles are bolted to the floor in a room where group treatment is conducted. Typically in supermax units, each prisoner is brought into the room in shackles and placed in a cubicle. Then the therapist or teacher enters and begins the session. Prisoners call these cubicles "cages," and many tell me they feel like they are being treated like animals (Kupers 2012).

Meanwhile, the widespread utilization of programming cubicles tends to exacerbate the vicious cycle I am describing.

Placing prisoners in these cubicles for every contact with mental health staff has the effect of further increasing the distance and alienation between prisoners and staff in contemporary corrections. Over several decades in the USA, there has been a diminution of everyday interactions between prisoners and staff. At every level of security, compared to just a few decades ago, prisoners spend less time interacting with staff out of their cells and in public spaces within the facilities. For example, in the 1970s, even in a maximum security prison, general population prisoners would exit their cells in the morning, spend most of their day at work or on the yard or in a dayroom, and would need to return to their cells only for evening count and to sleep. Today, many maximum security general population cellblocks permit only four or five hours per day of non-work, out-of-cell time. At the same time, "lockdowns" have become commonplace, where cellblocks or entire prisons are locked down for months at a time. Typically there is a violent incident involving a few prisoners, the staff do not know who perpetrated the violence, and all prisoners in the cellblock, or all prisoners of the race of an alleged assailant, are locked in their cells 24 hours per day and cell-fed. This type of mass lockdown actually constitutes another form of isolation, but is rarely counted in the figures given for the proportion of prisoners in a system who are in solitary confinement. Then there are the supermax units and other varieties of long-term solitary confinement. In isolated confinement, contact between prisoners and officers is relatively limited, often consisting only of officers passing out food trays and ushering prisoners in restraints to and from activities, perhaps placing the prisoner in a therapeutic cubicle. In many settings, officers have essentially forgotten (or never learned or practiced) how to interact with prisoners informally, and in too many cases they are actually frightened of interacting with prisoners. Is it any wonder that staff who once "walked the line" and chatted with their wards are now afraid to be in a room with prisoners who are not in total restraints? Unfortunately, when programming cells become a routine, across-the-board requirement, they serve to further distance staff from prisoners and worsen the growing problem of alienation. Staff who are inclined to focus almost exclusively on punishment for prisoners become even less inclined to get to know the prisoners and talk with them in a friendly, non-punitive context. Many prisoners tell me that their contact with officers is limited to the officers silently passing their food tray through the slot in their isolation cell door, or yelling orders at them and swearing they will punish them for one misstep or another.

Once the staff limit their repertoire in this way, further punishments become the only option they can think about for every new situation. And once punishment becomes the almost automatic response to every misbehavior or inappropriate behavior, there is a series of unfortunate consequences. Staff tend to disbelieve the prisoners' complaints of emotional pain and disbelieve the obvious negative repercussions of extreme prison conditions such as solitary confinement. With prisoners suffering from Serious Mental Illness, this too often means that staff disbelieve the reported symptoms and instead insist that the prisoners are malingering or manipulating to avoid punishment for their willful misbehavior.

Then, since the prisoners are already in solitary confinement and have no amenities, even harsher punishments are devised for their subsequent misbehavior. The "cell extraction" is just such a further punishment. In supermax units around the country, a significant proportion of the isolated prisoners are "extracted" when they "resist" officers' orders, in many cases this involves something as minor as refusing to return a food tray. The prisoner tells the officer he will not return his food tray because there were insects in his food and he wants to keep the tray as evidence of the unhygienic meal. The officer signals a special team of four or five officers who come to the prisoner's cell to "extract" him and seize the food tray. The officers in this special

team wear padding all over their bodies, including a helmet with a visor. Usually they first spray immobilizing gas (mace or pepper spray) through the food port. Then, if the prisoner still refuses to put his hands through the food port and "cuff up," they unlock the cell door and bolt into the cell all together, the first officer pushing the prisoner against a wall with a special shield, and each other officer being assigned to grab an arm or a leg and "take down" the recalcitrant prisoner. Of course, injuries are frequent, and can be quite severe. I have toured supermax units where one feels the immobilizing gas stinging one's nostrils as soon as the outer door is opened.

A few years ago I testified as a psychiatric expert in federal court about the supermax unit at Mississippi State Penitentiary (*Presley v. Epps 2005, 2007*). Just prior to my testimony I had toured a supermax pod where prisoners reported to me that one particular officer on the evening shift would spitefully spray immobilizing gas through the food ports of the prisoners who had angered him. After spraying the prisoner, the officer would keep on walking down the tier, leaving the prisoner coughing and choking from the toxic gas. The Department of Corrections policy mandated that whenever officers resorted to immobilizing gas, an incident report had to be written, the prisoner had to be checked by medical staff and treated, and the cell had to be decontaminated. This officer often did not write reports, did not notify the medical staff, and did not make provisions for decontaminating the prisoners' cells. In this case, the Commissioner and Deputy Commissioner of the Mississippi DOC were in the courtroom, and they quickly disciplined the errant officer and ordered all officers to follow policy regarding the use of immobilizing gas. But this unfortunate incident illustrates the extent of the culture of punishment that so often gets out of control in solitary confinement and supermax units. The point is that, once the staff buy into a culture of punishment with too little concern about prisoners' rehabilitation, abuses become common and tend to worsen over time.

Some of the abuses, such as an officer spraying prisoners he dislikes with immobilizing gas, constitute a violation of policy, and an urgent indication that better staff training and supervision are needed. At other times, the policy itself is abusive. For example, in some states there are Behavior Management Plans (BMPs) for prisoners already in solitary confinement who are deemed recalcitrant. At Montana State Prison, according to official policy, a BMP is ordered when a prisoner misbehaves in the supermax unit. The prisoner's clothing, bedclothes and all other amenities are removed from his cell, and he is fed "nutra-loaf" (a mixture of foods pressed into a bar that the prisoners report is essentially inedible) for a 48-hour period. Then, if the prisoner is angered by this treatment, and for example cusses at the officers imposing this severe punishment upon him, then that prisoner is "written up," i.e. given another disciplinary infraction report, and his time on this first phase of the BMP is extended further. Thus, the initial step of the BMP where the prisoner's clothing is removed and he is fed "nutra-loaf" is theoretically imposed for a 48-hour period, but by the end of the 48 hours the prisoner can be punished for unacceptable behavior with an additional 48-hour stint, and then there may easily be another. Prisoners who have been punished with BMPs tell me they feel like they will be naked, without bedding and eating loaf for a very long time, even though their original sentence to that phase of the BMP was only for 48 hours.

In 2009, I was asked to evaluate a young man, Mr. R. K., at Montana State Prison who had been tried as an adult and, at age 15, sent to adult prison. Soon after he arrived at Montana State Prison, an older man grabbed his testicles, and having been warned he had to show how tough he was if he wanted to avoid being someone's sex slave, he hit him. He was sent to the supermax unit for "fighting." In the supermax, he soon became disoriented, lost control of his anger, talked back to officers and disobeyed some orders, the result being further disciplinary write-ups and a much longer stint in supermax isolation. He became acutely depressed and made repeated suicide attempts, on a couple of occasions attempting to bite through the veins

of his arm. Each time he tried to take his own life, he was put in an observation cell for a few days and then sent back to his isolation cell. In fact, most of the suicides that occur among the population in isolation take place in an isolation cell after the prisoner has been returned from observation. Eventually he made such a serious suicide attempt he nearly died, requiring blood transfusions in an intensive care unit to survive. He told me that every time he is placed in solitary he "goes crazy" and cannot control his self-destructive impulses. On several occasions, the mental health staff opined that his suicide attempts were "manipulations," his aim being to have himself removed from supermax isolation. Eventually this young man, because of legal intervention on the part of the American Civil Liberties Union, came before a judge who ordered the state to transfer him to a psychiatric hospital where his suicide could be prevented and he could receive needed treatment (*Katka v. Montana Department of Corrections 2009*).

Once a culture of punishment takes hold and the staff feel they need to respond to each new unacceptable behavior on the part of prisoners with further punishments, the punishments become more severe and the effect too many times is more emotional harm to the prisoners, in many cases, including suicide. But to the extent it is the conditions of confinement, the almost total idleness and isolation in the supermax unit, that drive much of the prisoners' unacceptable or symptomatic behavior, the successive punishments serve merely to exacerbate the problem.

The international picture

The USA incarcerates a higher proportion of its citizenry by far than any other developed country, and also consigns a greater proportion of prisoners to solitary confinement. I was in Moscow in April, 2012, for an exchange between American and Russian prison experts arranged by the American Bar Association ROLI (Rule of Law Initiative). We met with NGO (non-governmental organizations, comparable to non-profit organizations in the USA) prison reform activists and talked about combating human rights violations. When I discussed the emotional harm of supermaximum security prisons, Russian colleagues told me that of course there is some prison segregation and solitary confinement in Russia, but nothing like the number of prisoners affected and the many months and years they spend in solitary in American prisons. Russia, like other countries outside the USA, tends to utilize isolation infrequently, and only with political prisoners or crime figures they deem especially dangerous.

Other industrialized countries tend to prioritize rehabilitation, many attempt to avoid crowding by not consigning low-level offenders to prison, and most provide substantial substance abuse treatment in the community. On average, they try to keep the prison census reasonable, and they rely much less than the USA on solitary confinement. Less affluent countries often confine prisoners, including pre-trial detainees, in dormitories, where crowding, violence and disease can be huge problems, but they do not utilize wholesale isolation the way the USA does. There are notable exceptions. For example, the Italian prison system uses isolation resembling supermaximum security for terrorists and high profile organized crime (Mafia) figures. A federal law, Article 41-bis of the Prison Administration Act, mandates isolation for dangerous individuals (Ministry of Justice, Italy 2000). Italian penological practices have been successfully challenged at the European Court of Human Rights, where the issues were a lack of adequate due process and inadequate contact with loved ones. Brazil also utilizes isolation units for prisoners they consider especially dangerous. But no other industrialized country utilizes isolation in supermaximum security units on the large scale seen in the USA. It remains an open question whether the love affair with supermax prison units in evidence in recent decades in the USA will become more of a model for other countries, or will they see the harm and

ineffectiveness of mass isolation for what it is and continue to pursue a course more friendly to rehabilitation?

Of course, there is a long history of some form of solitary confinement in various countries that predates the relatively recent popularity of supermaxes in the USA. Prisoners of war and political prisoners have long been placed in solitary confinement, where they suffer enormously and great harm is done to their emotional stability. Often the isolation is combined with torture, for example, during the process of "enhanced interrogation" (McCoy 2007) and at black sites (Mayer 2007). The dark underside of American practices in these regards surfaced embarrassingly in the release of photos from Abu Ghraib depicting American soldiers stripping Arab captives, forcing them into very close contact with each other, and sexually humiliating them (Danner 2004). It was known, or should have been known, that humiliations like these condemn a Muslim man to a lifetime of haunting painful images and self-rebukes. What happened at Abu Ghraib was torture. Torture often includes solitary confinement, possibly in a dark, cold and wet dungeon. But the actual physical torture conducted in these places overshadows the fact of the tortured prisoner being housed in solitary confinement. It would seem obvious that the return of a prisoner from a torture session, possibly including "water-boarding," to an isolation cell would make the pain and suffering that much greater. The isolation and idleness between torture sessions make a very negative contribution to the tortured prisoner's emotional health. But I will not discuss further the prisoners worldwide who are housed in solitary confinement while being actively and brutally tortured, except to mention that they, too, suffer from the harmful effects of solitary confinement.

There are international treaties and reports of investigations where torture is defined and prohibited. Courts have been established to mandate the end of torture wherever it is proven to exist. For example, at the United Nations there is a Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. Juan E. Méndez is the current Special Rapporteur, and in a recent report to the General Assembly of the UN, he included a section on solitary confinement (Méndez 2011).

Special Rapporteur Méndez reported he undertook his study because he found

> the practice of solitary confinement to be global in nature and subject to widespread abuse. In particular, the social isolation and sensory deprivation that is imposed by some States does, in some circumstances, amount to cruel, inhuman and degrading treatment and even torture.
>
> (ibid.: 7)

He cited the Istanbul Statement on the Use and Effects of Solitary Confinement, which concludes: "[T]he use of solitary confinement should be kept to a minimum, used in very exceptional cases, for as short a time as possible, and only as a last resort" (Istanbul Statement on the Use and Effects of Solitary Confinement 2007). Special Rapporteur Méndez continues:

> States around the world continue to use solitary confinement extensively. In some countries, the use of Super Maximum Security Prisons to impose solitary confinement as a normal, rather than an "exceptional," practice for inmates is considered problematic. In the United States, for example, it is estimated that between 20,000 and 25,000 individuals are being held in isolation. Another example is the extensive use of solitary confinement in relation to pretrial detention, which for many years has been an integral part of the Scandinavian prison practice. Some form of isolation from the general prison population is used almost everywhere as punishment for breaches of prison discipline. Many States now use solitary confinement more routinely and for longer durations.

Special Rapporteur Méndez proceeded to identify other countries where basic minimum standards are violated by prison isolation practices, especially with vulnerable populations and youth. He deems the utilization of solitary confinement for pre-trial detainees an unacceptable practice, and he concludes:

> The Special Rapporteur stresses that solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions. He finds solitary confinement to be contrary to one of the essential aims of the penitentiary system, which is to rehabilitate offenders and facilitate their reintegration into society. The Special Rapporteur defines prolonged solitary confinement as any period of solitary confinement in excess of 15 days . . . In this context, the Special Rapporteur reiterates that States should refer to the Istanbul Statement on the Use and Effects of Solitary Confinement as a useful tool in efforts to promote the respect and protection of the rights of detainees.

In the Report of the Special Rapporteur and in the proceedings of international human rights courts, the term "torture" bears a striking resemblance to "cruel and unusual punishment" as that phrase is applied in the American legal system. American courts tend to limit their rulings to Constitutional violations, for example, violations of the Eighth Amendment prohibition against "cruel and unusual punishment." But at least one court has used the word "torture" to name the treatment of at least one prisoner with mental illness consigned to prolonged solitary confinement as well as numerous lengthy Behavior Modification Plans (BMPs). In the case of Mark Edward Walker, the Montana Supreme Court used the word "torture" in discussing the long-term isolation, inadequate mental health care, and application of BMPs (*Walker v. Montana 2003*). Mr. Walker had been diagnosed with Bipolar Disorder and had benefited from mood-stabilizing medications prior to incarceration at Montana State Prison (MSP). But at MSP, he was taken off his medications, his diagnosis was changed to something less serious, he was consigned to long-term punitive segregation in a supermax unit, and he was given BMPs. According to the Montana Supreme Court, reviewing his case:

> Our Constitution forbids correctional practices which permit prisons in the name of behavior modification to disregard the innate dignity of human beings, especially in the context where those persons suffer from serious mental illness. We cannot sanction correctional practices that ignore and exacerbate the plight of mentally ill inmates like Walker, especially when that inmate is forced to rely on the prison for his care and protection. The plain meaning of the dignity clause commands that the intrinsic worth and the basic humanity of persons may not be violated. Moreover, if the particular conditions of confinement cause serious mental illness to be greatly exacerbated or if it deprives inmates of their sanity, then prison officials have deprived inmates of the basic necessity for human existence and have crossed into the realm of psychological torture.
>
> (*Walker v. Montana 2003*: 82)

The courts have developed definitions and standards to help them determine if a constitutional violation has been proved in the current case. One of the standards involves "deliberate indifference." In other words, it is not sufficient for the Plaintiff (the prisoners as a group or class) to prove that the Department of Corrections has perpetrated activities that are cruel and unusual. Rather, Plaintiff must prove that the named defendants (a warden, perhaps a Commissioner, perhaps a Governor) knew of the damage the activities or conditions are likely

to cause, and they took no heed, i.e., they were deliberately indifferent. When I testify I mention torture. Attorneys tell me it is not an important consideration for American courts, they are more interested in violations of the Constitution. But, in my opinion, torture on one hand, and cruel and unusual punishment on the other, are mostly overlapping categories. The international courts and the US courts are talking about the same abuses. They are looking for acts of torture that occur in the prisons, for example, the rape of women prisoners by male officers, or the use of excessive force that causes great harm to prisoners, or conditions of confinement such as crowding or prolonged solitary confinement, that can be shown to predictably cause great harm. Torture and an Eighth Amendment violation are essentially synonymous.

Sarah Shourd was one of three American hikers arrested in Iran in 2009 and imprisoned. She writes about her experience in a solitary confinement cell:

> After two months with next to no human contact, my mind began to slip. Some days, I heard phantom footsteps coming down the hall. I spent large portions of my days crouched down on all fours by a small slit in the door, listening. In the periphery of my vision, I began to see flashing lights, only to jerk my head around to find that nothing was there. More than once, I beat at the walls until my knuckles bled and cried myself into a state of exhaustion. At one point, I heard someone screaming, and it wasn't until I felt the hands of one of the friendlier guards on my face, trying to revive me, that I realized the screams were my own.
>
> Of the 14 and a half months, or 9,840 hours, I was held as a political hostage at Evin prison in Tehran, I spent 9,495 of them in solitary confinement.
>
> (Shourd 2011)

Sarah Shourd is very articulate, and very able to make sense of the bizarre turn of events where she and her two friends were captured and thrown into an Iranian prison. Most prisoners are not as articulate, do not have a large audience of family and the broader public following their every twist of fate, and many are consigned to solitary in a supermax prison for years or even decades. There are unfortunate souls in many countries who – because of their ethnicity, or their beliefs, or their choice of a side to fight on – languish in solitary confinement for many years, often with a certain portion of overt torture in the mix. But again, other countries do not employ solitary confinement on the massive scale it is employed in the USA.

Further research

Much more research is needed regarding the effects of long-term solitary confinement. But we also need to study broader questions, such as why the recidivism rate has been climbing, and what forms of rehabilitative programming are effective in reducing recidivism and keeping our communities safe. The problem with research inside correctional facilities is that Departments of Correction are generally very averse to researchers having access to prisoners. I am afraid that is at least in part because the prison system wants to protect itself from outside interference in its operations, and again there is the need to keep the unacceptable occurrences, such as excessive force on the part of custody staff or preventable deaths, from the public's awareness. Thus the research that is conducted inside the prisons tends to be only the kind that has the seal of approval from the relevant Department of Corrections. The Colorado Department of Corrections has released a report of their research on the psychiatric effects of supermax confinement, concluding that long-term isolation in a supermax unit has no more harmful effects than maximum security imprisonment for the same period of time (O'Keefe *et al.* 2010). Stuart

Grassian and I have responded to that report, pointing out that the methodology is very flawed, the researchers did not even bother to talk to the prisoners about their mental health issues, and the actual data derived during the study should, if properly interpreted, lead to the opposite conclusion from that propounded by the researchers, i.e., even this study supports the fact that long-term supermax confinement causes much emotional harm and exacerbates mental illness (Grassian and Kupers 2011). Of course, a huge volume of very good research on the harm of supermax solitary confinement appears in the reports and testimony of mental health experts investigating supermax facilities in preparation for testimony in class action litigation. When I investigate a correctional system, I interview hundreds of prisoners, many in supermax units, and I report to the court the harm done by their long-term solitary confinement. Drs. Haney and Grassian, among others, do the same. More than additional research, we need wider public presentations of the shocking findings I am summarizing in this chapter.

Some social implications of supermaximum security prisons

In recent decades in the USA, wealth has become more concentrated in fewer hands, the gap between rich and poor has grown, and there has been a turn away from social welfare programs that would ordinarily support disadvantaged people. Meanwhile, disadvantaged people, for example, low-income individuals with serious mental illness, on average, receive less than adequate treatment and support in the community, and tragically, in all too many cases, find their way into the criminal justice system. In other words, poor and disenfranchised people are "disappeared" by the increasingly inequitable society that refuses to adequately fund services they need to stay afloat. While this trend is rarely discussed in these terms, I firmly believe disadvantaged people are being disappeared from public view into the jails and prisons because the public is too little interested in helping them, cannot bear to witness their suffering in the community, and all too conveniently, there is the politically popular ideology of "lock 'em up and throw away the key." Criminal defenses built on some version of "incompetence to stand trial" or "not guilty by reason of insanity" become more difficult to win. Sentences are made longer, more mandatory and harsher. And meanwhile, in the jails and prisons, there is crowding and inadequate mental health services, and diminishing opportunities to participate in meaningful educational and rehabilitative programming.

Individuals with serious mental illness spend ever longer periods behind bars, they are less prepared for success at "going straight" once they are released, and their parole violation rates and recidivism rates rise precipitously. While the population of prisoners with serious mental illness might appear a "special case," in fact a comparable fate awaits prisoners who do not suffer from significant mental illness. While the prison population has multiplied many times over in recent decades, educational and rehabilitation services, like mental health treatment services, have not grown apace. Prisoners face longer sentences, a greater likelihood they will spend a significant amount of time in isolation including supermax confinement, and a rapidly rising recidivism rate after they are released.

David Garland provides a social historical analysis of these developments, differentiating between the age of reform or the welfare state era that lasted for approximately 100 years and came to an end in the early 1970s, and the "culture of control" that has succeeded the welfare state era and prevails today in criminal justice:

> The criminologies of the welfare state era tended to assume the perfectability of man, to see crime as a sign of an under-achieving socialization process, and to look to the state to assist those who had been deprived of the economic, social and psychological provision

necessary for proper social adjustment and law-abiding conduct. Control theories begin from a much darker vision of the human condition. They assume that individuals will be strongly attracted to self-serving, anti-social, and criminal conduct unless inhibited from doing so by robust and effective controls . . . Where the older criminology demanded more in the way of welfare and assistance, the new one insists upon tightening controls and enforcing discipline.

(Garland 2001: 15)

Of course, the supermaximum security prison is the epitome, and a natural culmination of control theories. Another name for the supermaximum security unit is "Control Unit." And it is no accident that little in the way of education or rehabilitation is available to the denizens of supermaximum "control units." Rehabilitation is not in the government's plans for them. I have focused on prisoners with serious mental illness who land in long-term solitary confinement. Their condition, their disabilities, and their prognosis become much worse on account of the idleness and isolation. Of course, when prisoners are kept idle and isolated, there is little or no mental health treatment, nor rehabilitation. This explains why prisoners with serious mental illness are so severely and irreversibly damaged by their experience in isolation. But the conditions that cause psychiatric deterioration in prisoners with serious mental illness are obviously going to cause pain and emotional harm to prisoners who appear, upon casual inspection, to be emotionally stable. Thus, following a rigorous review of the extant research literature on supermax confinement, a group of widely recognized experts on solitary confinement concluded: "No study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects" (Amicus Brief to the Supreme Court 2005).

I explained in the previous section why the prognosis for individuals suffering from serious mental illness becomes more dire after they spend time in a prison solitary confinement unit. The prisoners with serious mental illness whom I meet in supermax units are, on average, and very obviously, more disturbed, more chronically disabled and their condition is much less likely to improve in the future, compared to patients I have encountered in the community who suffer from comparable serious mental illnesses but undergo adequate treatment in a non-correctional setting. This is an important point, and to make it more clear, I will compare the fate of an individual suffering from a serious mental illness who is fortunate enough to enjoy a friendly and growth-inducing environment with the fate of one who is tormented and abused. On one hand, individuals suffering from mental illness who receive adequate treatment and spend their time in friendly circumstances (for example, a loving home or a halfway house where they are encouraged to study, form healthy relationships, and accomplish the steps they need to traverse if they are ever to enjoy meaningful employment and quality relationships) are quite likely to keep their illness under control, be as productive as they can be given their illness, and live a relatively quality life. On the other hand, the equivalent individual (i.e., someone who suffers from the same mental illness) who is repeatedly traumatized, maybe raped, has no stable residence nor gainful pursuits, and is shuffled from one relatively uncaring service provider to another will suffer a worsening mental disability and will have a much bleaker future (likely including incarceration). In other words, the neglected and traumatized individual with serious mental illness has a much more dire prognosis than the individual who enjoys a supportive environment and adequate treatment.

It is in this sense that the harsh conditions of solitary confinement cause great and permanent damage. Prisoners suffering from serious mental illness are disproportionately consigned to solitary confinement for much of their term in prison, there they are unlikely to receive adequate

treatment, they are not going to participate very much in rehabilitation programs, and after they have spent a number of years in prison their psychiatric disorder is likely to be more severe, more chronic, less amenable to treatment, and they are more likely to leave prison (if they have a determinate sentence, and over 90 percent of prisoners are eventually released) broken and incapable of adjusting to life in the community. Destroying a prisoner's ability to cope in the free world is one of the worst things prison does. I have described this as "the decimation of life skills," a form of torture (Kupers 2008b). Crowding, a lack of rehabilitation opportunities, excessive reliance on isolation as punishment, restriction of visits and contacts with the outside world, pervasive sexual abuse, disrespect at every turn, the failure of pre-release planning – all these things add up to throwing the prisoner who completes a prison term out into the world broken, with no skills, and a very high risk of recidivism. This is the plight of prisoners with serious mental illness, and it is also the plight of the other prisoners consigned to long-term supermax settings.

I do not believe the public would stand for this outrageous callousness – if the public were aware it is going on in our midst. But the public is almost entirely ignorant about all of this. After all, there is little media attention to the plight of prisoners with serious mental illness, nor to the plight of prisoners with or without mental illness who spend inordinate lengths of time in solitary confinement and are then returned to the community. In some states, including California, there are "gag orders," i.e. laws against journalists talking to prisoners. And visiting is very restricted. To a great extent, we in the community learn what is happening in prisons largely from the families of prisoners, who visit them and hear about their terrible straits, and then return to the community, and to their legislators, to talk about that. But supermaximum security units tend to be located far from population centers (California's Pelican Bay State Prison is a 7-hour drive north of San Francisco, and Illinois' Tamms is a comparable distance from Chicago). Then, visiting at supermax prisons is very restricted. The visitor has to sit on the far side of an indestructible fiberglass (lexsan) "window" with no contact, the prisoner is usually brought in wearing shackles, and quite a few prisoners tell me they actually dissuade their families from visiting because they do not want their loved ones to see them in shackles. The public hears little of what occurs in supermax prisons.

I have described a tragic phenomenon that is all too usual (Kupers 2008a). Prisoners in solitary confinement deteriorate and become more psychiatrically impaired and less capable of functioning back in the community. Then, as if to "hide the evidence" from the public that supermax facilities are destroying people rather than preparing them from a law-abiding post-release life in the community, new ways are invented to keep the prisoners locked up and out of sight even longer. Thus, most prisoners are serving determinate sentences, meaning that when the three or twelve years of their prison sentence elapse, they should be able to return home. But in recent years, there has been legislation in many states mandating new forms of post-release civil commitment, and increasingly new criminal charges are brought against prisoners for relatively minor misbehaviors that once would have been punished during their prison term with a short stint in segregation. So the prisoner who completes his prison term is faced with the possibility of being locked in a psychiatric hospital (if he suffers from serious mental illness) or the possibility of being found guilty of a new, in-prison crime because of his actions while locked in an isolation unit. It is as if there is a wish to hide the damage wreaked by years of solitary confinement.

What about the rest of the prisoners in long-term solitary confinement? After touring dozens of prisons and interviewing thousands of prisoners, staff and administrators, I have become convinced that the conditions and treatment that cause great harm to individuals suffering from serious mental illness also cause great harm to those who are relatively stable from a psychiatric

perspective. Indeed, relatively stable occupants of supermax cells also experience severe and disabling emotional symptoms, even if their condition and disability do not fit the picture of a diagnosable mental disorder. For example, echoing the findings of Haney, Grassian and others reported above, a large proportion of prisoners in long-term solitary confinement report that the isolation makes them anxious, paranoid and angry, and they have great difficulty with concentration, cognition and memory. Prisoners in supermax units around the country have independently told me that they no longer read in their isolation cell (a significant number of prisoners are illiterate, but here I am referring to those who can and ordinarily do read). As a relatively naïve investigator trying to understand their experience in isolation, I tell them I would imagine reading and writing are pretty much the only meaningful pursuits they have available in their cells, and I ask why they do not take advantage of reading. They universally tell me they cannot remember what they read three pages earlier, so they give up. The point is that when prisoners who do not suffer from a gross psychiatric disorder spend an inordinate amount of time in a supermax isolation unit, they also have a terrible time re-adjusting to social networks in the community (after all, they have spent years in a cell by themselves), and tragically, they are prone to get into trouble again soon after their release from prison. Their recidivism rate is disturbingly high, and rising (Lovell *et al.* 2007).

The take-away message is that prisoners with mental illness must be provided a safe place to serve their sentences (they need to be safe from victimization, from the unrestrained expression of their own most troubling proclivities, and from damaging conditions such as crowding and solitary confinement) and need to be provided an adequate level of mental health treatment and rehabilitation so that they can mend their ways and prepare to succeed in the community after they are released. And, of course, prisoners who do not suffer from serious mental illness need the same basic amenities and programs if they are to succeed at "going straight" after they are released from prison. This is the basic idea of rehabilitation.

The reason I find the notion of a "Prison-Industrial Complex" compelling is that it explains something that would otherwise seem quite inexplicable. Why, when we know from years of experience and much research, that a particular penological practice is ineffective and even harmful, do we continue performing that practice in our prisons? Substance abuse policies illustrate the point. Individuals who enter prison with a substance abuse problem, unless they undergo intensive treatment for the problem during their prison term, generally relapse into substance abuse after they leave prison. In other words, incarceration, on average, does not diminish substance abuse proclivities. On the other hand, research shows that when people with substance abuse problems complete a treatment program in the community, well over 50 percent of them remain clean and sober after three years (DATOS 2012). Why, then, are ex-prisoners on parole "violated" (i.e. returned to prison) for having a "dirty urine"? A much more effective and much less expensive consequence for the dirty urine would be mandatory drug treatment in the community. There has to be some reason why the system is so quick to return people to prison rather than providing the cheaper, more effective response to an exacerbation of their substance abuse. It is this kind of illogical response to developments that makes it clear there is some motivation other than rehabilitating prisoners at work, and it is quite logical that the interest groups who profit from an expanding prison system are behind the ineffective and harmful practices that the system keeps on employing. In other words, the interest groups who profit or sustain power when the prison industry expands are driving illogical prison programs such as violating parole for prisoners who turn in dirty urine. They are more interested in growing the prison population than in rehabilitating prisoners.

Supermaximum security isolation is another example of the illogic, and another instance where a Prison Industrial Complex works incessantly to expand the prison system rather than prioritizing

measures that improve the chances for prisoners to succeed at rehabilitation and at "going straight" after they are released. Supermaximum solitary confinement causes great harm, worsens rather than improves the violence and mental illness rates in the prisons, and creates a lot of very disabled and broken prisoners who will fail to adjust in the community and be prone to spend much of the remainder of their lives behind bars.

Beyond supermax confinement

By now there is a growing national trend away from the use of long-term solitary confinement in corrections (Goode 2012). Of course, there are compelling economic justifications that partially explain this trend. Supermax prisons are very expensive to operate. In addition, however, there are the important mental health concerns and public safety justifications discussed here. Because this kind of confinement is not only painful but also very damaging – and, for too many prisoners, irreversibly so – it is a cruel and singularly inappropriate form of punishment. Beyond doing more to debilitate than rehabilitate the prisoners who are subjected to it, solitary confinement undermines the ability of many of them to succeed in the community after their eventual release from prison (Lovell *et al.* 2007; Mears and Bales 2009). Conclusive evidence that it increases rather than reduces recidivism raises public safety concerns. Moreover, supermax prisons do not reliably reduce violence or disciplinary infractions within the larger prison systems in which they function; in some instances they appear to make it worse (Briggs *et al.* 2003). Nor do they alleviate the problem of prison gangs. As Craig Haney argues, the California Department of Corrections has aggressively pursued the use of long-term solitary confinement for more than 20 years and the state prison system is now plagued with perhaps the worst gang problem in the nation (Haney 2012).

By now, some of the better-run corrections departments are deciding that the supermax venture is a failure (Goode 2012). Psychiatric breakdown inside the supermaxes has reached epidemic proportions, the recidivism rate is higher, especially for individuals who "max out of the SHU," and the rate of violence on the prison yards has not diminished. The fiscal value of mass segregation is being questioned. Several states, including Virginia and Michigan, have decided to close supermax facilities or "convert" the architectural structures to other uses. In Illinois, the Governor has called for the closure of the state's supermax facility, Tamms.

Recently, I served as an expert witness, and then as a court-approved monitor, in litigation in Mississippi that required the Department of Corrections (Mississippi DOC) to ameliorate substandard conditions at the supermaximum Unit 32 of Mississippi State Penitentiary at Parchman, remove prisoners with serious mental illness from segregation, provide them with adequate treatment, and re-examine the entire classification system (Kupers *et al.* 2009). Pursuant to two federal consent decrees, the Mississippi DOC greatly reduced the population in administrative segregation and established a step-down mental health treatment unit for the prisoners excluded from administrative segregation. The Associate Commissioner of the DOC, Emmett Sparkman, personally reviewed with visiting expert Jim Austin the classification files of all prisoners in Unit 32, and they determined that many had been "over-classified" and did not need to be in the supermax facility any longer, nor on Administrative Segregation status. For example, some prisoners had been consigned to solitary only because of the seriousness of their crime, and this was in violation of DOC policies. The second part of the collaboration was to remove all prisoners from Unit 32 with Serious Mental Illness, and to establish a "step-down unit" of intermediate mental health care for them. This was a program inside Unit 32 consisting of three graduated phases with increasing freedoms and amenities, and the prisoners

would meet with mental health staff in therapy groups designed to help them attain each stage of advance. The "step-down" program became a route for prisoners to leave Unit 32.

After the majority of prisoners were removed from the supermax unit (and the unit was closed), the violence rate in the entire DOC decreased significantly. In other words, the prisoners who had been consigned to segregation did not resort to violence after being released from Unit 32, and the yards, on average, became more peaceful. The prisoners suffering from serious mental illness who had been relegated to solitary confinement and then were transferred to the step-down unit and eventually to general population received far fewer disciplinary infractions after they were transferred out of the supermax unit. After 800 of the approximately 1,000 prisoners in the supermaximum security unit were transferred out of isolated confinement, there was a large reduction in the rates of misconduct and violence, not only among the prisoners transferred out of supermax, but in the entire Mississippi Department of Corrections. Eventually, the number of prisoners remaining in Unit 32 dipped beneath 200 and it was decided to close Unit 32 (ibid.).

Thus, long-term solitary confinement places prisoners at grave risk of psychological harm without reliably producing any tangible benefits in return. There is no hard evidence that supermaximum security facilities actually ever reliably reduced system-wide prison violence or enhanced public safety. Fears that a significant reduction in the supermax population or the outright closure of a facility will result in heightened security threats and prison violence have not been borne out by experience.

Conclusion

There is a falsehood at the heart of the rationale for the imprisonment binge in the USA. The lie is the notion that, by locking up the people who would otherwise clearly remind us of the failures of our society in regard to our social responsibility, we become safer and happier. In spite of nearly 2 and a half million Americans incarcerated today, people are feeling both more strapped financially, and less safe in their communities than they did before the prison explosion of the 1970s and 1980s. In "locking 'em up and throwing away the key," we have also broken up the families of the tens of millions of people who have been forced to spend time in jail or prison. And the average citizen has had to shut down their critical mind, and continually deny the contradiction between the USA's claim of democracy and the reality of this country disappearing so many disadvantaged people behind bars. The only people happy with the massive Prison Industrial Complex that has evolved over the last three decades are those who make profits or enhance their power by regimenting those condemned to incarceration.

Long-term solitary confinement places prisoners at even graver risk of psychological harm. There is no hard evidence that supermaximum security facilities actually ever reliably reduced system-wide prison violence or enhanced public safety. Fears that a significant reduction in the supermax population or the outright closure of a facility will result in heightened security threats and prison violence have not been borne out by experience. In fact, recent experience in Mississippi found exactly the opposite – that a drastic reduction in the supermax population was followed by a reduction in system-wide misconduct and violence.

Let us hope that in the near future prison populations will decline, and the nation's correctional system will re-dedicate itself to program-oriented approaches to positive prisoner change. If that vision prevails, the resources previously expended on long-term solitary confinement and supermaximum security units can be re-directed to more cost-effective and rehabilitative solutions.

Discussion questions

1 Why have supermax prisons become so widespread in the USA?
2 What are some of the destructive effects of long-term solitary confinement?
3 How well does the culture of punishment serve the aim of rehabilitation?
4 How do countries other than the USA avoid widespread utilization of solitary confinement?

Websites

ACLU National Prison Project: http://www.aclu.org/prisoners-rights.
Center for Constitutional Rights: http://ccrjustice.org/.
Human Rights Watch: http://www.hrw.org/.
Solitary Watch: http://solitarywatch.com/.

References

Amicus Brief to the Supreme Court of the United States (2005) *Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondents*, Supreme Court of the United States, No. 04-495.

Briggs, C., Sundt, J. and Castellano, T. (2003) "The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence," *Criminology*, 41: 1341–1376.

Danner, M. (2004) "Abu Ghraib: The Hidden Story," *New York Review of Books*, October, 2004, available at: http://www.nybooks.com/articles/archives/2004/oct/07/abu-ghraib-the-hidden-story/?pagination=false (accessed 29 September 2012).

DATOS (2012) *The Drug Abuse Treatment Outcome Studies, Publications Summary*, Washington, DC: National Institute on Drug Abuse, available at: http://www.datos.org/publicationsJSAT03.html (accessed 9 September 2012).

Garland, D. (2001) *The Culture of Control: Crime and Social Order in Contemporary Society*, Chicago: University of Chicago Press.

Goode, E. (2012) "Prisons Rethink Isolation, Saving Money, Lives and Sanity," *New York Times*, March 10, 2012, available at: http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html?pagewanted=all (accessed 27 September 2012).

Goffman E. (1962) *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates*, Chicago: Aldine.

Grassian, S. (1983) "Psychopathological Effects of Solitary Confinement," *American Journal of Psychiatry*, 140: 1450–1454.

Grassian, S. and Friedman, N. (1986) "Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement," *International Journal of Law and Psychiatry*, 8: 49–65.

Grassian, S. and Kupers, T. (2011) "The Colorado Study vs. the Reality of Supermax Confinement," *Correctional Mental Health Report*, 13, May/June, 2011.

Haney, C. (2003) "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement," *Crime & Delinquency*, 49: 124.

Haney, C. (2006) *Reforming Punishment: Psychological Limits to the Pains of Imprisonment*, Washington, DC: American Psychological Association Books.

Haney, C. (2012) Personal communication.

Haney, C., Banks, C. and Zimbardo, P. (1973) "Interpersonal Dynamics in a Simulated Prison," *International Journal of Criminology and Penology*, 1: 69–97.

Hudgins, S. and Cote, G. (1991) "The Mental Health of Penitentiary Inmates in Isolation," *Canadian Journal of Criminology*, 46: 177–182.

Istanbul Statement on the Use and Effects of Solitary Confinement (2007) Annexed to the U.N. Special Rapporteur's 2008 interim report to the General Assembly (A/63/175, annex), available at: www2.ohchr.org/english/issues/torture/rapporteur/ (accessed 29 September 2012).

Kupers, T. (1999) *Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It*, San Francisco: Jossey-Bass/Wiley.

Kupers, T. (2008a) "What to Do with the Survivors?: Coping with the Long-Term Effects of Isolated Confinement," *Criminal Justice and Behavior*, 35(8): 1005–1016.

Kupers, T. (2008b) "Prison and the Decimation of Pro-Social Life Skills," in A. E. Ojeda (ed.) *The Trauma of Psychological Torture*, vol. 5 of *Disaster and Trauma Psychology Series*, Series Editor Gilbert Reyes, Westport, CT: Praeger, pp. 127–138.

Kupers, T. (2012) "Programming Cells Are Neither the Problem Nor the Solution," *Correctional Mental Health Report, 2012.*

Kupers, T., Dronet, T. *et al.* (2009) "Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs," *Criminal Justice and Behavior*, 36: 1037–1050.

Lovell, D. (2008) "Patterns of Disturbed Behaviour in a Supermax Population," *Criminal Justice and Behaviour*, 35(8): 985–1004.

Lovell, D., Johnson, L. C. and Cain, K. C. (2007) "Recidivism of Supermax Prisoners in Washington," *Crime & Delinquency*, 52(4): 633–656.

Mayer, J. (2007) "The Black Sites: A Rare Look Inside the C.I.A.'s Interrogation Program," *New Yorker*, August 13, available at: http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer (accessed 29 September 2012).

McCoy, A. (2007) *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror*, New York: Henry Holt & Co.

Mears, D. P. and Bales, W. (2009) "Supermax Incarceration and Recidivism," *Criminology*, 47: 11–31.

Mears, D. P. and Watson, J. (2006) "Towards a Fair and Balanced Assessment of Supermax Prisons," *Justice Quarterly*, 23(2): 232–270.

Méndez, J. (2011) *Interim Report Prepared by the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Accordance with General Assembly Resolution 65/205*, New York: United Nations, August 5, available at: www.ohchr.org/Documents/. . ./HRCouncil/. . ./A-HRC-19-1_en.pdf (accessed 28 September 2012).

Ministry of Justice, Italy (2000) "Long Distance Proceedings Through Videoconference: The Italian Experience, Ministry of Justice (Italy) at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, April 10–11," available at: www.uncjin.org/Documents/10thcongress/10cStatements/italy4e.pdf (accessed 9 September 2012).

O'Keefe, M. L., Klebe, K. J., Stucker, A., Strum, K. and Leggett, W. (2010) *One Year Longitudinal Study of the Psychological Effects of Administrative Segregation. Colorado Springs, CO: Colorado Department of Corrections*, available at: www.ncjrs.gov/pdffiles1/nij/grants/232973.pdf (accessed 25 September 2012).

Patterson, R. F. and Hughes, K. (2008) "Review of Completed Suicides in the California Department of Corrections and Rehabilitation, 1999 to 2004," *Psychiatric Services*, 59(6): 676–682.

Paulus, P. B., McCain, G. and Cox, V. C. (1978) "Death Rates, Psychiatric Commitments, Blood Pressure and Perceived Crowding as a Function of Institutional Crowding," *Environmental Psychology and Nonverbal Behavior*, 3: 107–117.

Rhodes, L. (2004) *Total Confinement: Madness and Reason in the Maximum Security Prison*, Berkeley, CA: University of California Press.

Scharff-Smith, P. (2006) "The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature," in M. Tonry (ed.) *Crime and Justice*, Vol. 34, Chicago: University of Chicago Press, pp. 441–528.

Scheff, T. (1966) *Being Mentally Ill*, Chicago: Aldine.

Shalev, S. (2009) *Supermax: Controlling Risk Through Solitary Confinement*, Portland, OR: Willan Publishing.

Shourd, S. (2011) "In an Iranian Prison: Tortured by Solitude," *New York Times*, November 5.

Thornberry, T. and Call, J. (1983) "Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects," *Hastings Law Journal*, 35: 313–353.

Toch, H. (1975) *Mosaic of Despair: Human Breakdown in Prison*, Washington, DC: American Psychological Association.

Way, B., Miraglia, R., Sawyer, D., Beer, R. and Eddy, J. (2005) "Factors Related to Suicide in New York State Prisons," *International Journal of Law and Psychiatry*, 28(3): 207–221.

Cases cited

Jones 'El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001).

Katka v. Montana DOC, Mont. 1st Judicial District, No BDV, 2009, 1163.

Madrid v. Gomez, 889 F Supp. 1146 (N.D. Calif., 1995).

Presley v. Epps, No. 4:05CV148-JAD (N.D. Mississippi, 2005 and 2007).

Walker v. Montana, MT 134 (Supreme Court of Montana, April 29, 2003).

11

Fabricated selves and the rehabilitative machine

Toward a phenomenology of the social construction of offender treatment

David Polizzi, Matthew Draper and Matt Andersen

Paul sat in his cell, waiting to meet with his therapist for his weekly session. His cellmate began with the mockery uncharacteristically early, albeit good-naturedly. "You goin' to tell that motherf★cker that you're all sober now, a changed man?" Paul just smiled at his cellmate and looked back through the worksheets his therapist had given him, worksheets he had to fill out that helped him counter his "irrational beliefs" that led to his substance abuse. His cellmate interrupted his review. "So, that means you ain't gonna party anymore, live the white-picket-fence life with your shirt, tie, wife and two and a half kids?" Paul sighed and looked at his cellmate. "Man, if I finish this program I get a year taken off my bit, which means I can be done with this place in six months." Paul carefully did not mention that in the prison's Thinking for a Change program, he was the model client, the one the therapist used as an example on how the principles of the program could be used by the clients to help them learn to live clean and sober lives. The time came for him to go to treatment, and he carefully parroted back to the therapist the language he had learned over the previous three months. He learned that he had to call himself an "addict" and admit that addicts had "irrational thoughts" which caused them to be addicted. He learned that "once an addict, always an addict" so he would have to exercise "rational thinking" in order not to engage in "addictive behaviors." Paul still did not consider himself an addict, and knew many people like him who used drugs when they wanted to, and didn't use drugs when they didn't want to, but that did not fit into the doctrine of the program, so he kept that to himself. He responded carefully to the therapist's questions about what he had learned and the systems of thinking he had practiced. When he finished, the therapist responded with a warm smile and a flourish of his pen as he signed Paul's program completion certificate. As he walked out Paul sighed with relief. He was done with prison, and couldn't wait to get out. Just six months to go. Back in his cell he and his cellmate joked about how much they looked forward to smoking weed and hanging out with girls once they got out. Both looked forward to the freedom of release, but Paul pointed out that he was done with drugs, and swore he'd never do anything but smoke weed, drink, and the occasional pills when he wanted to party.

The next day Paul received a visit from his mother. She came with news that Paul's older brothers had both lost their jobs. One because the factory he worked in closed, the other because the building industry slowed down in the recessed economy and nobody was hiring carpenters. Dave did his best to console his worried mother, who expressed dire concern for the welfare of her children and grandchildren, but who also occasionally needed financial help from her sons due to her own meager income. As he walked back to his cell he contemplated the prison he would find upon release, a prison without brick walls. Despite his cellmate's teasing, he knew that the white-picket-fence life was already out of the question, not necessarily due to a lack of desire on his part (although he did not know what that life would be like), but that as a two-time convict, the white-picket-fence jobs would remain closed to him. Unfortunately, his anticipation to work with his brother in the factory clashed with his mother's news. Ambivalently, he pondered going back to the one trade he knew, where he could make sufficient money, dealing drugs for parties and raves.

Six months went by, and Paul found himself once again on the streets. He spent weeks sleeping on the couch at his mother's house, looking for jobs and doing his best to stay away from drugs. During several interviews his status as ex-convict came up, and potential employers lost interest, all the while the financial needs of his mother and the rest of his family continued to build.

When the authors asked Paul how his experience in treatment in the prison related to his crisis of trying to figure out how to live and take care of the moral familial demands, he smiled and laughed gently. "I really liked my therapist," he replied. "He was a good guy, but he does not live in my world."

The incongruence between intent and action is clear by the degree to which this therapeutic encounter reflects the reality of Paul's lived-experience. At the heart of this blurred confluence of social worlds is the failed recognition of cultural difference and the role it plays within the social construction of crime, addiction and identity formation. On the one hand, there is Paul's lower-class and drug-friendly culture (so much so that marijuana and the recreational use of narcotic pills are not considered problematic and where the stresses of unemployment and underemployment are perpetual and real), and, on the other hand, the middle- and upper-class culture that designs and performs the therapeutic programs in prison (a culture that has a "zero tolerance" approach to substance use, and a group that rarely faces the stresses of poverty). A similar type of cultural incongruence is present within aboriginal communities who find themselves involved in the Canadian criminal justice system.

Martel, Brassard and Jaccoud in their article, "When two worlds collide: Aboriginal risk management in Canadian corrections," explore the difficulties encountered by aboriginal citizens who find themselves caught up in the Canadian criminal justice system. Though that system has attempted to incorporate what the authors identify as "indigenous philosophical orientations," (Martel *et al.* 2011: 237), this strategy of "inclusion" has been thwarted by the risk-assessment process that fails to recognize the specific cultural differences existing between aboriginal and non-aboriginal offenders living in Canadian society. As a result of this risk management process, the authors identify three contradictions which emerge in the classification and treatment of aboriginal inmates related to process, identity and agency. Most importantly, aboriginal offenders are regularly evaluated and identified by these "objective" risk-assessment measures as representing a high risk for recidivism, therefore rendering them ineligible for various prison programming. The authors observe that such a strategy of evaluation, though ostensibly focused on providing culturally neutral results, helps to widen this cultural gap by its inability to recognize these cultural differences. The authors observe that:

However, risk management's contended cultural neutrality translates into a praxis that, paradoxically, tends to act upon pathologies by managing a different set of circuits for aboriginal offenders, circuits of exclusion. Here, aboriginals are further *expelled* from spaces of civility and choice rather than be *affiliated* to them as originally planned in risk-based correctional management.

(Martel *et al.* 2011: 239)

In response to the contradictory logic found within the risk-assessment process used by the Canadian system, the authors offer the following observation:

For example, structural makers such as poverty and social markers such as residential instability, family/marital problems, school/employment difficulties, absence of positive leisure or recreational activities as well as substance abuse are melded actuarially with higher rates of (re)offending.

(ibid.: 240)

Within this classification process, the structural realities or markers facing aboriginal populations living in Canada help to identify them as a greater risk for future recidivism. These structural realities help to further marginalize an already marginalized social group whose existence is permanently defined by degrees of the extreme.

Marginalized life circumstances—known to be more prevalent in number and intensity amongst Indigenous peoples—tend to be recuperated within the logic of risk management as the very factors that come to reinforce risk levels and undergird higher risk assessment scores for aboriginal offenders.

(ibid.: 240)

As a result of this ongoing process of marginalization, aboriginal presence in Canadian society tends to reflect an ontologically criminogenic social visibility. Once confined within the penitentiary environment, this experience of marginalization results in the systemic conclusion concerning the "irredeemable" quality of these individuals. The intended cultural neutrality of "actuarial risk-assessment tools in criminal justice" (ibid.: 238) used in the classification process, helps to strengthen these social inequalities that exist within various offending populations. The inability to recognize existing social difference among offending populations sets in place an institutionally constructed contradiction that seeks to address the specific needs of aboriginal offenders, while at the same time ignoring the specific social context and challenges from which these needs emerge.

A second generated contradiction explored by the authors is related to the institutional construction of aboriginal identity. Though Martel *et al.* (2011) point out that the classification process does not view aboriginal ancestry as a cause of crime, they also observe that this same process fails to recognize that aboriginal inmates, given their marginalized location within Canadian society, are much more likely to be exposed to risk factors associated with criminal behavior and recidivism. They make the following observation:

Although ethnicity or race tend to be considered static factors (i.e. unchangeable factor), their association with one's social positioning facilitates their linkage to risk factors, hereby turning ethnicity—via the notion of culture—into a dynamic factor (i.e. changeable factor) that one can approve.

(ibid.: 241)

As such, aboriginal identity takes on a criminogenic character based upon its socially constructed meaning and its geographic location within Canadian society. Whether situated within isolated rural communities with substandard living conditions or within urban areas viewed as criminogenic, these individuals find themselves marginalized within areas that are institutionally viewed as representing a high-risk factor for subsequent criminal behavior. Most problematic to this process of identity formulation is the degree to which aboriginal identity is fabricated by the process of institutionalization employed by the Canadian criminal justice system. Within this context, the criminal justice system fabricates a type of generic aboriginal identity, which is viewed as appropriate for all individuals representing that ethnic group: "Put plainly, self-identifying as being aboriginal ancestry raises one's objective risk of recidivism; however, following the successful completion of culturally sensitive correctional programming, self-identifying as being of aboriginal ancestry now reduces one's risk of reoffending" (ibid.: 241).

In fact, once incarcerated, the risk factor of one's "aboriginality" becomes transformed and refabricated by this institutional process to reflect more mainstream identity markers that are viewed as essential to the elimination of recidivist behaviors. However, as Martel *et al.* observe, this process, due to its overly generalized construction, provides a type of one size fits all aboriginal identity that must be embraced by the individual, for it to be legitimately recognized by the correctional system (ibid.: 242). The potential risk for subsequent recidivist behavior relies not upon those aspects of traditional aboriginal culture and identity embraced by the individual, but upon the fabricated identity provided by the criminal justice system.

Finally, they describe what they call "an Agent-related contradictory logic" of risk management programs (ibid.: 246). Within this final contradiction, aboriginals released from the penitentiary are highly encouraged to return to aboriginal communities often located in rural areas away from urban centers noted for the greater risks they pose for subsequent criminal behavior. It is presumed by the state that such a return will allow aboriginal offenders to embrace their ethnic roots, which in turn will strengthen them against any future involvement in criminal behavior. However, a return to the community does little to address the lingering social and economic conditions that helped to create crime in the first place. As a result, any subsequent return to the criminal lifestyle becomes exclusively viewed as the failure of the individual who has reneged on the demand for individual responsibility required by aboriginal traditions.

A phenomenological hermeneutic of incarceration

What is portrayed in the above personal narrative and journal account of aboriginal involvement within the Canadian criminal justice system is the different ways in which the individual is fabricated to fit into a variety of narrative communities based on the expectation or what the they-self of these encounters demands. It also reflects the multiple variations of the they-self and the contextual contours of each of these manifestations. Each interaction reflects a different contextual relationship with the they that is often contradictory with other manifestations of this same process. The multi-layered quality of the they-self reflects a fluid *intervolvement* with multiple contexts often contained within a specific general structure (Polizzi 2003).

It may be recalled that Heidegger described the they-self as the averageness of being-with:

> In its being, the they is essentially concerned with averageness. Thus, the they maintains itself factically in the averageness of what belongs to it, what it does and does not consider valid, and what it grants or denies success. This averageness, which prescribes what can and may be ventured, watches over every exception which thrusts itself to the fore. Every priority is noiselessly squashed. Overnight, everything that is original is flattened down as

something long since known. Everything won through struggle becomes something manageable. Every mystery loses its power. The care of averageness reveals, in turn, an essential tendency of Dasein, which we call the leveling down of all possibilities of being.

(Heidegger 2010: 123)

Incarceration represents a multilayered interaction of various competing they-selves that are at times experienced as an exclusive encounter with a specific they and at other times as a contradictory set of demands or prohibitions that are often in direct conflict (Polizzi 2003; 2011a; 2011b). Though it may be true enough that the they-self reflected by the authoritarian demands of the criminal justice system generally, and the penitentiary cultural specifically, is always present, this overriding manifestation of the they-self is really only one aspect of this fluid and multilayered construct. In fact, the incarcerated individual is often caught between simultaneous competing demands of the they-self represented by the penitentiary authorities and the they-self of inmate culture. This multilayered reality is reflected in the personal narrative provided by Paul who struggles and must find a way to exist within the presence of various manifestations of the they-self.

For Heidegger, the conceptualization of the they-self is that which frees Dasein from the meaning of being (Heidegger 2010). The presence of this institutional they-self of the penitentiary helps to evoke a variety of other manifestations of the they-self that are equally as demanding concerning what will be deemed as valid and that which will not (Heidegger, 2010). Heidegger's description of the they-self has some similarities to what Foucault has described as the apparatus, insofar as it is the role of the apparatus, which instantiates the authority of the they-self.

In describing the apparatus, Foucault states that:

an apparatus is essentially strategic, which means that we are speaking about a certain manipulation of relations of forces, of a rational and concrete intervention in the relations of forces, either so as to develop them in a particular direction, or to block them, to stabilize them, and to utilize them. The apparatus is thus always inscribed into the play of power, but it is also always linked to certain limits of knowledge that arise from it and, to an equal degree, condition it.

(Foucault 1980: 195)

Agamben adds to this description by stating that the apparatus reflects a "set of practices, bodies of knowledge, measures, and institutions that aim to manage, govern, control, and orient – in a way that purports to be useful – the behaviors, gestures, and thoughts of human beings" (Agamben 2009: 12). Whether this purported usefulness of the apparatus is contextualized as a type of psychological intervention or treatment program or as a process of identity construction pursued for the "benefit" of the client, it remains a vehicle of disciplinary control. Stated differently, the apparatus imposes a type of disciplinary control upon the meaning of being, which requires a specific type of comportment on behalf of this fabricated self. "Discipline 'makes' individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise" (Foucault, 1979).

As can be viewed in the above narrative and journal account of aboriginal involvement in the Canadian criminal justice system, the apparatus of the correctional machine seeks to not only manage and control those held by its disciplinary regime, but also seeks to manifest that control within the thoughts and behaviors of these incarcerated individuals, which in turn attempts to re-fabricate the very identity of the self.

In Paul's narrative, a script is provided by his "treatment" program that outlines the parameters of personal discourse and personal identity. Though Paul seems to reject certain aspects of this process, he also recognizes that he must superficially embrace this "averageness" if he is to be granted parole. A similar dilemma seems to confront those aboriginals who find themselves in the criminal justice system. Though the specific circumstances may be different in each of the discussed situations, the general goal of the apparatus of the correctional/rehabilitative machine is the same: the creation of fabricated selves. Within this process, the apparatus of the correctional/rehabilitative machine produces what Agamben identifies as a new I that is calibrated by the techniques of correctional practice. However, as these two accounts also reveal, this process can also be subverted. But such a possibility also requires that we leave Foucault to explore the re-conceptualization of this process offered by Giorgio Agamben.

The concept of apparatuses is expanded by Agamben with the intent to go beyond its initial formulation provided by Foucault. Agamben begins by describing human existence as being contextualized within two general categories: living beings and apparatuses; Agamben defines this categorization of beings in the following way.

> I wish to propose to you nothing less than a general and massive portioning of beings into two large groups or classes: on the one, living beings (or substances), and on the other, apparatuses in which living beings are incessantly captured.
>
> (Agamben 2009: 13)

He continues by stating:

> Further expanding the already large class of Foucauldian apparatuses, I shall call an apparatus literally anything that has in some way the capacity to capture, orient, determine, intercept, model or control, or secure the gestures, behaviors, opinions, or discourses of living beings.
>
> (ibid.: 14)

Agamben then adds to his conceptualization of beings a third category or class, which he identifies as subjects. He describes this third category as follows. "I call a subject that which results from the relation and, so to speak, from the relentless fight between living beings and apparatuses" (ibid.: 14). It is important to note that Agamben's formulation reflects a dialogical conception of this process, insofar as the subject emerges from this in-between of living being and apparatus and not as a dialectical synthesis of these competing forces. The subject is made possible by the "incessant struggle between living beings and apparatus." To be a subject is to be a living being in relation to these apparatuses.

The subject outlined in the above narrative emerges through this struggle that unfolds within these competing encounters, which requires a specific set of expectations or signifiers from the speaker-subject. Each encounter represents a specific struggle between living being and apparatus, which conjures up a different manifestation of the subject. Within this context, the subject is provisional and never fixed or complete; what is consistent with one encounter will likely be different within another, given that the manifestation of the apparatus will evoke a different set of demands that will need to be addressed by the living being and it is this relation of living beings to the apparatus that is of interest to Agamben.

When Agamben states that: "Indeed, every apparatus implies a process of subjectification, without which it cannot function as an apparatus of governance, but is rather reduced to a mere exercise of violence" (2009: 19), this exercise of violence relates to the lack of redemption reflected in this relationship to the apparatus. The self which emerges from this encounter with the apparatus of the correctional and rehabilitation machine, becomes in Foucault's words, a "docile

self," a self that is required to reject the "offending I" so as to be better managed by these apparatuses. Within this process, the re-fabrication of the self is also required to repudiate the actions of the sinful I, of one's past history that helped to evoke these criminal acts. However, what remains unredeemed is the very context from which this behavior emerged.

Agamben's conceptualization of the apparatus seems to have some familiarity with Heidegger's concepts of being-in-the-world, thrownness and the they-self. Agamben's formulation of living being, apparatus and subject are presented as a type of structural gestalt. However, it is important to note that this process should not be viewed as a dialectical process that results in a synthesis, which is the subject. It appears that the possibility for a subject is predicated upon the degree to which this "incessant struggle" unfolds. It could be argued that the notion of apparatus is witnessed within the various manifestations of the they self reflected in each of these various interactions and represents the dialogical variability of the process outlined by Agamben.

The variability of the encounters discussed in the above description of the prison experience provides a glimpse into the ways in which this process, informed by the apparatus of the penitentiary environment, evokes a variety of subjects attempting escape from this process. The concept of apparatus imposes upon living being the need to escape this incessant experience of capture. How this occurs will be specific to each inmate and predicated upon a variety of encounters that the individual must endure. Various strategies of escape may emerge as an attempt to evoke a profile of the subject that is better able to embrace the potentiality of their own living being. However, the constituting power of the apparatus is often left unrecognized or so powerful that it will be difficult for any escape to be possible. Also, as the above narrative reveals, the contours of the apparatuses emerge in contextually specific ways that make escape virtually possible and thereby render human existence as nothing more than a collection of various manifestations of control that must in some way be resisted. Perhaps this incessant struggle is best captured in the following observation by Agamben where he discusses the subject and the remnant: "the subject is a sort of remnant . . . It is something that is left over – it represents a difference. It is the impossibility for a subject to completely coincide with itself; there always remains a remnant" (de la Durantaye 2009: 300).

The rehabilitative machine

In the above reflection, the terms correctional and rehabilitative machines have been introduced to describe the process the incarcerated individual will likely encounter while institutionally confined. It was observed that the apparatuses of the criminal justice system seek to re-fabricate the incarcerated self into a more docile "rehabilitated self" that will be better controlled by the disciplinary powers of remanded psychotherapy or parole/probation, each of which become implicated within this larger network of apparatuses of disciplinary control. In part, the construction of fabricated selves and the correctional/rehabilitative machine that controls this process, is itself a reconfigured theoretical conceptualization borrowed from the phrase used to describe the Nazi extermination machine in the death camps of World War II: the fabrication of corpses.

In his text, *Remnants of Auschwitz: The Witness and the Archive*, Agamben makes the following observation:

> In Auschwitz, people did not die; rather, corpses were produced. Corpses without death, non-humans whose decease is debased into a matter of serial production. And, according to a possible and widespread interpretation, precisely this degradation of death constitutes the specific offense of Auschwitz, the proper name of its horror.
>
> (Agamben 1999a: 72)

Heidegger in his Bremen lectures on technology given in the late 1940s makes a similar observation:

> Hundreds of thousands die in masses. Do they die? They perish. They are put down. Do they die? They become pieces of the inventory of a standing reserve for the fabrication of corpses. Do they die? They are unobtrusively liquidated in the extermination camps.
>
> (Heidegger 2012: 53)

The concept of the fabrication of corpses is a powerful one that also may be applied to a variety of conceptual localities other than the specific horror of the camps (Polizzi and Brown 2012). Polizzi and Brown (2012) have observed that:

> In a much more banal sense, this fabrication of corpses may also be applied to the notion of warehousing that is quite familiar to the readers of criminology and in fact, represents a type of logical conclusion reflected in the rationale of the penitentiary system.

Sykes ([1958] 2007), in his seminal text, *The Society of Captives*, describes the process each individual undergoes upon entering the world of the prison. "His age, name, crime and sentence, and other information are duly recorded; his civilian possessions are taken away and he puts on the prison uniform" (ibid.: 4). He continues by observing, "In a very fundamental sense, a man perpetually locked by himself in a cage is no longer a man at all; rather, he is a semi-human object, an organism with a number" (ibid.: 6).

Though clearly any comparison of the penitentiary with the Nazi death camps of World War II is related in degree and not kind, the metaphorical relationship relative to the "fabrication of corpses" is powerful. The American penitentiary system fabricates a type of social corpses, what has been called the ex-citizen or noncitizen (Gregory 2006; Braun 2012). Though not literally comparable, the example of the camps does reflect what Agamben has identified as a modern paradigm. For Agamben, "The paradigm is neither universal or particular, neither individual or general, it is a singularity which, showing itself as such, produces a new ontological context" (2002: 2). This new ontological context becomes the content of the rehabilitation machine. As such, the rehabilitation machine, through its disciplines of control, seeks to fabricate a manifestation of a rehabilitative self that will conform to the intended project of the apparatus of the criminal justice system that now includes by proxy the psychological apparatus of offender treatment (Pavlich 2005). The struggle between apparatus and living being is engaged, concerning the emergence of the subject, which becomes a type of artifact of this meaning-generating process.

From this new frame of reference, the fabrication of the rehabilitative self, an artifact of the rehabilitative machine, results in a moment of de-subjectification, which Agamben maintains is "implicit in every process of subjectification" (2005: 20). Agamben describes this process within the example of penance. "The split of the subject performed by the apparatus of penance resulted therefore, in the production of a new subject, which found its real truth in the nontruth of the already repudiated sinning I" (ibid.: 20). However, the rehabilitative self is not permitted to find truth under the auspices of this new subject. Unlike the apparatus of penance, which explicitly encourages the embrace of this new truth, the "sinning I", or offending I retains its connection to this new fabricated self, becoming little more than an extension of the offending I, which continues to evoke the real truth of the fabricated self. Though rehabilitative models such as the Risk-Need-Responsivity Model initially formulated by Andrews and Bonta (2010), in part, require the offending individual to repudiate this former sinning I, this aspect of the offending subject is never truly split away to allow this new subject to emerge. As Agamben (2005) argues,

this process of subjectification and de-subjectification in its most general sense has become reciprocally indifferent. Under such conditions, the possibility for a new subject to emerge is thwarted by the lingering identity of ex-con or ex-drug addict.

Given that the process of incarceration and rehabilitation never removes the "offender" designation, these individuals become fabricated into a different type of social existence. This conceptualization extends the American notion of warehousing to its logical conclusion. Penitentiaries warehouse these production artifacts and return them to the society. However, this return is not the return of a citizen to the community, but something different that exists within the in between of what Heidegger has described as the what and the who (Raffoul 1998). The attempt at programmatic reform becomes little more than the protocols by which these social corpses, or ex-citizens, these social objects or "whats" are fabricated in this process of mass production. The criminal act becomes a type of social raw material that is molded and re-fabricated into these reified images of social distrust and fear.

However, as the two above accounts show, the fabrication of this rehabilitative self often reflects a manifestation of a split self that is in part contingent upon the de-subjectified self of the rehabilitative machine whose "truths" remain predicated on the "sinning I," as well as an emerging subject that is revealed as the remnant of this process. The acquiescence to the disciplinary controls of the rehabilitative machine also provides an opportunity by which this process may be subverted. The fabrication of the "docile bodies" of the rehabilitative machine imaged in the presencing of the rehabilitative self, is never complete, never totally given over to Agamben's process of de-subjectification. Though the sinning I is never absent from the "truth" of the rehabilitative self, neither does this process completely preclude the simultaneous emergence of another type of truth that remains provisionally engaged with this de-subjectified subject.

The relationship between the rehabilitative machine and the fabricated self this process constructs is one predicated upon the disciplinary control employed by the criminal justice system. However, the fabricated self which emerges from this process need not be the exclusive or definitive identity of the individual. Though the means of disciplinary control available to the criminal justice system are widespread, they can be also subverted, as is witnessed in the personal narrative offered by Paul and by implication in the presentation offered by Martel *et al.* (2011). The imposition of this de-subjectified self, which becomes a requirement of this process of institutional validation, does not have to be accepted by the individual, even in those encounters when the individual appears to have acquiesced to its de-subjectifying demands. In the incessant struggle between living being and apparatus, a variety of subjectivities become possible.

The concept of the rehabilitative machine

The conceptualization of the rehabilitative machine and the fabrication of rehabilitative selves or corpses reflect a philosophical synthesis borrowed from Heidegger, Foucault and Agamben. The two most prominent conceptualizations from that synthesis are Heidegger's formulation of the they-self and Agamben's re-formulation of the Foucault's concept of the apparatus, which have been discussed above. Within the context of the rehabilitative machine, the notion of the they-self reflects a specific type of Agambenian apparatus. The disciplinary controls of the they-self of the criminal justice system, not only frees Dasein from the meaning of this type being, but seeks to objectify what Spinelli (2005) has described as the finite openness of being-in-the-world into that of a reified object of the rehabilitative machine. As such, this thrown reality must cover over or leave undisclosed, the possibilities for being-in-the-world as an open potentiality.

Agamben through his conceptualization of the apparatus as a type of dialogical struggle between living beings (subject) and apparatus, re-formulates the intervolvement of living being and apparatus by leaving open the possibilities for this process of subjectification. Though de-subjectification always looms as a potential eventuality, it never loses its ability to find some positive relief from the overbearing demands of the apparatus. This quality seems equally present within Heidegger's conceptualization of Dasein's relationship to thrownness and the they-self.

> In feeling my thrownness I make no practical or theoretical posits about particular causes that have made me as I am. I do, however, experience myself as made, and perhaps, as made by something different from myself. Thrownness involves subjection. So if I feel myself thrown from my own choices, I experience a detachment or alienation from those choices, and myself as subjected to them.
>
> (Richardson 2012: 111)

The possibility for being-in-the-world to be overwhelmed by the dictates of the they-self is predicated upon the degree to which Dasein is willing to give itself over to what they say. When Agamben contends that "apparatuses are not a mere accident in which humans are caught by chance, but rather rooted in the very process of 'humanization,'" (Agamben 2009: 16), we see a similar type of dynamic that is also reflected within Dasein's interaction with the they-self, insofar as being-in-the-world is always concerned with its own thrownness, and by definition with the various manifestations of the they-self this process reveals (Polizzi 2003; Nicholson 2009; Polizzi and Brown 2012; Richardson 2012). Perhaps more accurately stated, the presence of the apparatus reflects a specific manifestation or articulation of the they-self as this relates to being-in-the-world. For example, the they-self of the criminal justice system has at its disposal a variety of mechanisms of control and production, which greatly restrict the possibility to be.

It is the they-self through its recognition of what is deemed to be valued and that which is not that being-in-the-world as inmate, as addict, as mentally ill, as black, etc., becomes configured by the apparatuses of this type of relation. If the apparatus is "rooted in the very process of humanization," as Agamben (2009) contends, it is being-in-the-world's relationship to the "they" that gives the presence of the apparatus its specific contours of control. It is important to keep in mind that Agamben initially situates his discussion of the apparatus within a religious context relative to the notion of God and those practices or apparatuses, which emerged in the service of that law (Agamben 2009). Within this context, the they-self represents the dictates of sacred law and the apparatuses necessary to insure that the community of believers remains faithful to that creed. Returning to the formulation offered by Agamben (2005), a clearer picture emerges concerning the relationship between living being (subject) and apparatus and the they-self.

The emergence of the subject or subjectification occurs in the attempt of living being to free itself from the potentially de-subjectifying grasp of the apparatus. The struggle against the de-subjectification of the subject is witnessed in the personal narrative provided by Paul. In that reflection, Paul witnesses the various ways this incessant struggle with the apparatus may be waged. Though his position as prisoner, as inmate, prevents him from overtly rejecting the requirements placed upon him by his therapist, inmate culture or institution, this imbalance of power does not prevent him from escaping this process of self-negation. In fact, his narrative comes to represent an emerging sense of becoming of the subject that exists outside of the de-subjectification of the rehabilitated self.

Agamben's focus upon the incessant struggle with the apparatus concerning the emergence of the subject, shares some similarities with Heidegger's concept of being-in-the-world,

concealment and the they-self. For Heidegger, the possibility of existence is predicated upon the where of that existence, which in turn evokes one's thrownness and one's relationship to the they-self. It is important to note that being-in-the-world's thrownness is not a locality; rather, it is the vantage point from which this type of being is presenced and unconcealed to itself; and it is from this unfolding of being that it confronts or gives into the dictates of the they-self (Raffoul 1998; Heidegger 2010; Polizzi 2011b; Richardson 2012). "The project of presence as unconcealing, appears for us in the context of alternatives that remain hidden. Being shows itself as presence, but might have appeared in other basic ways not visible to us" (Richardson 2012: 268).

The presencing or unconcealing of being is always situated within the context of one's thrownness and the specific interactions with those manifestations of the they-self that this context presences. Within the practice of risk assessment generally or offender treatment specifically, the identified offender or addict must encounter the they-self of the rehabilitative machine relative to one's being-in-the-world-as-addict or being-in-the-world-as-criminal. The apparatuses employed by this process, which may be identified as an example of arrogant benevolence, seek "in a way that purports to be useful" (Agamben 2009: 12) the refabrication of the truth of self, by determining that which will be validated and that which will not. Within this example, living being's incessant struggle with the apparatus becomes the struggle by the subject against the total negation of the self produced by the rehabilitative machine. Just as the they-self seeks to free Dasein from the meaning of being, so too does the apparatus attempt to instill its own truth in the de-subjectification of the subject.

As such, this struggle also represents what Agamben has conceptualized as impotentiality that he argues is fundamental to what it means to be human:

> Other living beings are capable only of their specific potentiality, they can only do this or that. But human beings are the animals who are capable of their own impotentiality. The greatest of human potentiality is measured by the abyss of human impotentiality.
>
> (Agamben 1999b: 182)

Agamben's conceptualization of potentiality/impotentiality is similar to Heidegger's description of Dasein falling prey to what they say (Agamben 1999b; Heidegger 2012). The abyss of human impotentiality is viewed by the inability or unwillingness of the human subject to act. Whether this is viewed from the inauthentic stance of Dasein's willingness to fall prey or the covering over of potentiality for Agamben, being remains caught by its inability to embrace its own possibilities to be. Taken from the perspective of the two examples used above, both Paul specifically and the example of the aboriginal experience within the Canadian criminal justice system generally, reflect this incessant human struggle with the impotentiality and potentiality of existence. The desire to negate the overwhelming demands of the rehabilitative machine creates another demand to take up one's projects in a different way. Though the shadow of the they-self and the process of de-subjectification remains close at hand, so too does the promise of potentiality. "Agamben concludes that potentiality is not 'annulled' in the movement to actuality, but instead is saved in actuality and can always remain as a dynamic potential to do or not to do" (Murray 2010: 48).

International controversies of incarceration and clinical treatment

Internationally, prison psychotherapy systems have become the manifestations of control, one of the ways in which the apparatus applies its de-subjectifying energy to the incarcerated

population. However, this application of power is not without its detractors and remains a debate, because it seems unjust and unfair to many across the globe to exercise the power of the prison machine upon the mentally ill.

Peternelj-Taylor (2008) argues that since the deinstitutionalization movement, the penal institution has taken up the role of the mental health provider for many people. She cites the United States Department of Justice, reporting that there are 1,262,000 inmates suffering from mental illness and she demonstrates similar trends in the UK and Canada. This is a concern, because correctional staff have not been trained to work with the mentally ill as well as traditional mental health providers, and many of the mentally ill are seriously abused and assaulted in prison. The apparatus of retribution and control of the prison system, often dis-serves the mentally ill, because the machine does not fit the odd prisoner, one whose issue does not fit the assumptions of the system.

Because of this, diversionary programs have been designed to redirect the mentally ill into different programs than traditional incarceration. In Canada, for example, the researchers Mitton, Simpson, Gardner, Barnes and McDougall stated that, for the past forty years, managing the mentally ill within the prison system who were incarcerated after committing only minor offenses has proven challenging to the officers and administration. They researched the Calgary Diversion Program (a community-based alternative to incarceration for those who have committed minor offenses) and found that "justice system complaints, charges and court appearances" (Mitton *et al.* 2007: 145) had been reduced by 84 percent to 91 percent. Acute and emergency services normally utilized by these subjects were also reduced between 25 percent and 48 percent. In addition, both the mental health service providers and clients also reported that the diversionary program was a better experience compared to incarceration. Advantageously the researchers also found that the program cost less than traditional incarceration, reducing the cost by $1,721 per client on average. Although compelling, Mitton *et al.* (2007) acknowledge that these diversionary programs remain rare and controversial.

Such programs may also work for cases like Paul's, namely, those involving substance abuse. Recent data indicate that while the USA has 760 prisoners per 100,000 citizens, Germany has only 90, Japan has 63, France has 96, South Korea has 97, Britain has 153, Mexico has 208, and Brazil has 242. This massive difference between the United States and other countries is a relatively recent one, given that the USA had only 150 prisoners per 100,000 in 1980. This significant increase in incarceration rates in certain countries, like the USA, seems to be due to the war on drugs, given that the vast majority of the increase in incarceration is due to mandatory sentences for drug crimes (Zakaria, 2012).

Although the USA has the highest increase in incarceration rates in the past thirty years due to drug crimes, drug crimes remain of concern to the social apparatus in many countries. In Thailand, for example, researchers looked at the correlates between risk of incarceration and drug use. They found that "frequent public drunkenness, starting to take illicit drugs at an early age, involvement in the drug economy, tattooing, injecting drugs, and unprotected sex" were all factors that correlated with incarceration (Thomson *et al.* 2009: 1232). In another study, researchers found that the three primary predictors of incarceration were "drug and alcohol use, being less educated and a history of arrest and incarceration" (Sherman *et al.* 2010: 399). In addition, both studies found that after incarceration drug use remained a problem. These authors argue strongly that based on their research what would help society and the drug users the most would be intervention programs rather than incarceration.

What is missing from these studies is an engagement with the apparatus of addiction itself. Rather, what these researchers perpetuate is their position within the apparatus of a particular form of social control and maintenance, in contradistinction to the apparatus of addiction which

perpetuates inimically to their own. This creates a two-worlds process, when those (like Paul above) who are treated for addiction within the penitentiary system belong to one world and perpetuate one apparatus (that of addiction) while the therapist and prison itself belong to a different world that perpetuates an apparatus of a different sort of conformity, in essence, trying to make the prisoner a docile body that conforms to the apparatus of the prison.

These two worlds do not mesh well, sometimes leaving the drug-using prisoner feeling that the therapy system has little to offer, and the therapists wringing their hands anxiously about their "outcome data" relative to sobriety and recidivism. In the Thailand studies above, note that the punishment the subjects received did little to curb their alcohol and drug use upon release. Although the authors offer no evidence that the prison offered any psychotherapeutic treatment for these subjects, the world of the prison apparently made no difference to the world of the addict (relative to substance use), and hence incarceration perpetuates as an impotent device of the state, one that exists to force the subjects to conform, yet ultimately fails to do so.

Similarly, in the UK questions have arisen regarding the efficacy of these programs. According to the *New Scientist*, "there has been no assessment of whether prison-based provisions such as drug-free prison wings, have reduced drug use in the UK – even though investment in them has increased from £7 million to £80 million since 1997 in England and Wales" (Anon 2008: 197). This is of concern for those who perpetuate the prison system from within and outside. Some researchers have attempted to study prisoners incarcerated due to drug use, noting some of the problems with the process of incarceration for the drug addicted. Dooley (2003) discusses the text "Uncomfortably numb: a prison requiem," written about eight women who committed suicide in one of Ireland's prisons and notes that society's inability to aid these psychologically vulnerable women through different therapeutic techniques is to blame. The study also states that self-harm cannot be predicted or prevented by custodial means and strongly claim that without "adequate and appropriate social and therapeutic provision such unnecessary deaths will remain relatively commonplace" (ibid.: 41). Far removed from Ireland, Chinese researchers in Yunnan Province made a similar argument for treatment based on their findings. Zhu, Dong, and Hesketh (2009) found that the following month after release from prison was the most likely time for relapse to occur. The respondents identified three different factors that help decrease the rate of relapse: (1) detoxification centers need to counsel rather than punish; (2) familial support to assist in caregiving of the addict; (3) and relocating the addict to new environments that do not encourage addiction.

However, given that the motivation and agenda of the prison system (even the therapeutic one) stand at odds with the agenda of addiction, some researchers sought to explore the nature of addiction from the perspective of the addicted and to explore the factors that perpetuate addiction. Neale and Robertson (2005) found that recent life problems played a role in subjects' severe substance use. The life problems these subjects reported included the death of someone close, relationship breakdowns, and accommodation problems. The authors emphasize that therapists should also focus on these life problems when trying to help heroin users' life problems, rather than just focusing on the drug itself.

Even in rehabilitation programs this can prove difficult for an addicted prisoner. In the UK, Smith and Ferguson (2005) attempted to uncover the challenges faced by prisoners in a rehabilitation program by interviewing these prisoners intensively. The major theme in the stories of the participants was the challenge of "staying clean." Other researchers in Sweden applied a treatment technique called Motivational Interviewing to help their incarcerated clients maintain sobriety after prison (Forsberg *et al.* 2011). The researchers surveyed 296 drug-using inmates, applied Motivational Interviewing to three groups of them, and then attempted to track them after release. Among some subjects they found some reduction in drug and alcohol

use. Given that the researchers could only complete their data with 38 percent of their subjects, the efficacy of their treatment program remains unclear.

Sobriety is challenging for the formerly incarcerated throughout the world. Zurhold *et al.* (2011) surveyed women released from prisons across different cities and found that the most helpful factor was preparation for release. One major factor that weakened integration was living with a current drug user and a history of heroin use by the subject before their 18th year. In order to address this difficulty, prisons and rehabilitation programs have increasingly turned to maintenance and drug-replacement therapies. In Germany, researchers found that substitution treatment (ST) and prison-based methadone maintenance treatment (PMMT) were very effective in reducing drug use in prisons (Stallwitz and Stöver 2007). However, in order for ST to work, prisoners need a high dose of methadone and the duration of treatment must last the entire period of imprisonment. Likewise DeBeck *et al.* (2009) found a positive correlation between methadone treatment and heroin injection desistance, indicating to the researchers that methadone treatments can be effective in drug rehabilitation.

Across the Atlantic, however, the issue proves complicated. In France, for example, researchers undertook a three-year outcome study examining re-incarceration and mortality rates of opioid-dependent patients who had gone through maintenance therapy. They found that the majority of those who received maintenance therapy "had poorer health status, heavier opioid use and prison history and were less socially integrated than the remaining patients" (Marzo *et al.* 2009: 1233), and maintenance therapy had no effect on reducing re-incarceration. The authors conclude that while maintenance therapy has been a popular form of treatment in France, it has not been effective in treating opioid-dependent patients. They conclude by arguing that stronger efforts are needed in the enforcement and practice of preventive policies.

These disparate findings in drug treatment, whether in the form of sobriety and prevention programs or drug substitution and maintenance programs vividly illustrate the two-worlds problem, or the two-apparatuses problem. According to O'Farrell, Foucault defines "apparatus" as a "strategic relationship between diverse elements consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral, and philanthropic propositions" (O'Farrell 2006: 129). He argues that these structures are used to preserve and augment the power that is within the social body. The social bodies of addiction and sobriety perpetuate inimically to one another. Many of these incarceration and treatment programs arise within separate apparatuses, ones that overlap only in the domain of the exercise of power of the dominant societal apparatus over the disapproved and societally-rejected apparatus of addiction. Given that both of these apparatuses inform one another anti-thetically through the system of crime, on one hand, and punishment/treatment, on the other, the punishment-treatment side seeks to create docile bodies through either sobriety (as created by punishment or therapy) or by state-controlled drug addiction (maintenance or substitution therapy). The prisoner in question remains pulled by these two de-subjectifying processes, both of which potentially pull the subject out of an authentic way of *Being*, and cast him into the choice between two inauthentic options. Some, like Paul above, try to choose authenticity over the two extremes of mainstream societal obeisance and a life fueled by illegal drugs. Others find themselves lost in a world where the dominant discourse proves too contradictory or exclusive, and the drug-addicted discourse too dangerous (like some of the Canadian aboriginals above).

The issue of considering criminal behavior such as addiction, and the choice of programs of treatment, whether those involve sobriety-creation or maintenance/substitution, must acknowledge the role of the modern understanding of the *subject* in this issue. Clinicians assume a modern subject, and this assumption permeates their theory, research, and practice in prisons. The modern subject is a "self-certain actant" that chooses his or her ways of being, an ultimately

distanced knower, ontologically apart from the world and able to rationally choose a course of action from this ultimately privileged place (de la Durantaye 2009: 291). This modern subject possesses certain inherent ontological characteristics that allow it to not only choose, but to choose in a way that others could universally evaluate in terms of rationality. This very Kantian cultural assumption advantageously allows for the evaluation and assessment of behavior upon this rational foundation. Disadvantageously, the assumption of "rationality" leads the assessors, clinicians, and policy-makers to assert that the convict or addict has made "irrational choices" and that they need to once again be made "rational" through the intervention of the state via incarceration or drug treatment. This implies that the actant in question does not behave rationally, and that the actant is not a being, but a disengaged subject. Because of this, the state's system will remain out of touch, ignoring the world of the actant (the modern subject of the offender), and inadvertently failing to intervene where much intervention could be helpful, namely, the world of the incarcerated, the world that informs Being.

Policy implications

A new understanding of the subject, a better understanding of the subject, would inform policy and practice in a way that would reduce the overall incidence of crime and addiction. Agamben's concept of subject entails a re-understanding of the subject ontologically, starting with what he calls "operators." These operators are the "modal categories of possibility, impossibility, contingency, and necessity" (de la Durantaye 2009: 291). These contextualizing modes are not ones that beings choose, but rather ones they find themselves situated within, in relation to, and inextricably intertwined within. As Agamben states:

> [M]odal categories, as operators of Being, never stand before the subject as something he can choose or reject; and they do not confront him as a task he can decide to assume or not to assume in a privileged moment. The subject, rather, is a field of forces always already traversed by the incandescent and historically determined currents of potentiality and impotentiality.
>
> (2002: 147–148)

Agamben's consideration stands in contrast to the Kantian assumption tacitly held in much of the theory and practice of corrections and clinical treatment. The incarcerated does not stand apart from the world as a distanced rational actor, but instead finds him situated deeply in a world that forms the subjectivity he takes up. "This is a subject that is above all subjected – that is, subject to forces, as much as it is a self-affirming source of action" (de la Durantaye 2009: 291). In the case of Paul above, we see him living as a field uniting the operators of his Being. There are those issues that are possible, impossible, contingent, and necessary, few of which the sobriety program that he attended and mastered mentioned or even acknowledged. Some forms of sobriety present themselves in his world as possible, like avoiding certain forms of drugs. In his world, unlike the world of the clinical treatment systems of the prison, some drugs are not problematic and the use of otherwise dangerous drugs is not worrisome if consumed in small and occasional quantities. Therefore, drug use remains an active possibility. What seemed impossible to Paul, however, was the white-picket-fence lifestyle of those who live comfortably middle- and upper-class lives. He also lives a contingent life, one deeply intertwined with others. His friends, family, and community all present very real demands for his care. Living up to these demands, whether tacit or explicit, situates them in a way that their therapists in prison not only did not help them prepare for, but puts them at risk at times of re-arrest and

re-incarceration (or relapse). There are many like Paul who recidivate and when asked why they engaged in behavior that brought them back to prison describe how they had to take necessary action in their deeply contingent situation. In some of these cases, few therapized individuals acting rationally would have acted any differently. In Paul's case, for example, the factory shut down, his mother and brother feel increasingly desperate and look to him to "pull his weight." With few jobs open and available, the quick money selling drugs becomes highly attractive and sensible, even if risky.

The prison system and the psychotherapeutic practices within prison often seek to de-subjectify the prisoner, to limit those transcendent elements of him and to situate him in a place of absolute immanence. Immanence, in this case, means the perceptible and comprehensible nature of the other, that of him that is easily defined and understood. Transcendence entails those potentials of the other, the *arete* that lies beyond the capacity of the totalizing gaze (Marion 2004). By de-subjectifying the prisoner, by attempting to deny or remove the forces that he finds himself situated within, the system seeks to make his behavior predictable and controllable in a way approved by the system, reducing him to a position of supposed absolute immanence. Any transcendent capacity the system needs to constrain, lest the prisoner engage in dangerous behavior. There are good reasons for this, pragmatically speaking, based on the assumption that bad criminal men will do criminal things unless they are carefully observed and controlled (Foucault 1979). The failures of this system of belief and its incumbent practice are legion. For example, the numbers of incarcerated individuals in the United States have skyrocketed since 1985, and the numbers are only increasing, demonstrating the failure of the current practice. Or, as Leder described this phenomenon,

> I have heard it said that if a mad scientist wished to create a system designed to increase criminality, he or she would come up with the something like our modern prison system, now caging more than two million Americans and peripherally affecting tens of millions more of their dependents, family members, associates, and friends.
>
> (2004: 65)

The inherent problems of de-subjectification policy-makers can counter with a process of re-subjectification. What we mean by re-subjectification is not re-subjectifying the prisoner himself (which would prove impossible, given that except in the most extreme circumstances any apparatus cannot remove subjectivity), but rather a matter of re-subjectifying policy. Policy-makers can re-subjectify their rules and procedures by building in an understanding of those forces a prisoner is subject to, and would work to change those forces as much as to change the prisoner himself. In other words, policy-makers can re-examine their faulty assumptions that a prisoner is merely immanent and can instead embrace the ways in which a prisoner may transcend the given and take on new possibilities for Being. This process would take a fair bit of humility and not an insignificant amount of risk on the part of the policy-makers because although the system may assess and engage with subjectifying forces (including their own), many forces may prove difficult to change.

From our perspective, this re-subjectification process needs to occur at three levels relative to crime and the apparatus of the prison system, which purportedly exists to decrease crime. Those levels are, first, the psychotherapeutic or rehabilitative processes and practices within prison. Second, the policy and practice of the prison institutions themselves, and, third, the criminogenic socio-cultural policies and practices.

In terms of psychotherapeutic or rehabilitation practices within prison, re-subjectification could begin with a humble acknowledgement that although current standards of practice

have helped many offenders rehabilitate, this issue remains greatly problematic both morally and practically (Szasz 2007). As noted above, the greatest challenge to continued sobriety (and presumably continued non-criminal behavior) is not prison itself, but the life-world of the former prisoner once they are released. Insofar as prison psychotherapeutic systems engage with the offender as de-subjectified from the world, and able to take up the world from a privileged place of therapeutically-created pure rationality (as perpetuated by many cognitive behavioral "empirically-validated treatments"), the failure of psychotherapists to help the offender-as-subject will continue (see Leukefeld *et al.* 2011; Pollock *et al.* 2005, for examples). Instead, more holistic treatments that entail the assumption of the transcendent subject may prove more helpful, both in guiding prisoner behavior within the system of incarceration, but also help them to mindfully plan for their lives upon release. Rather than the therapeutic system assuming that any drug-taking or otherwise criminal behavior is irrational (which it would be for the therapist, who embodies a very different sort of subjectivity), instead the practice could entail understanding *why* chemical intoxication and criminal behavior present themselves not just as options for the prisoner, but *good* options or even *necessary* ones. Only when rehabilitative practice can engage with these good and necessary options from the perspective of the prisoner can they seek to help to mitigate those options. We freely admit that one of the first things we must give up is our therapeutic hubris, the one-size-fits-all cures marketed to governments as panaceas to our societal ills, and instead take up a more engaged and far riskier endeavor of joining with the incarcerated to examine the possibilities, impossibilities, contingencies and necessities of their lives (see Polizzi and Braswell 2009, for examples). Doing so, by definition, does not guarantee sobriety or crime-free behavior, but it does deal more thoroughly with the life-world of the incarcerated rather than perpetuating the manualized non-speak of the therapist who inadvertently uses the prisoner as a clinical ventriloquist's dummy (as in the case of Paul, above, who learned to mimic the appropriate words to demonstrate he was "healthy" or "rehabilitated" or had changed his "stinkin' thinkin'").

Likewise, the therapists can wisely acknowledge that they too are subjects, and that their subjectivity informs their *Being* as much as their patient's subjectivity informs the *Being* of the patient. However, they should not make the mistake of believing that the subjectivity of the therapist and the subjectivity of the client exist in two distinct worlds, separated by an unbridgeable chasm, because insofar as the counselor and client authentically work together, they become co-subject in that space through the process of dialogue (Baxter 2004; Erdinast-Vulcan 2008; Draper *et al.* 2009). When engaged in dialogue together, the ontological operators change as well (de la Durantaye 2009). New possibilities emerge, new ideas or practices become impossible and new necessities and contingencies unfold, because *the they-self* of the incarcerated and those seeking to rehabilitate them proves very layered and ripe with new meaning (Polizzi 2003; 2010).

We are not advocating doing away with, or discounting, much of the quality rehabilitative work that can take place in prison. Some researchers have found some success with prompting behavioral change around issues of crime and addiction by utilizing Motivational Interviewing and other techniques (McMurran 2002; Marlatt *et al.* 2011). We support these efforts and argue that they will only become more engaged, meaningful, and helpful insofar as they ontologically ground their practice in inter-subjective dialogue in an authentic and engaged manner. In the United States, for example, a few psychologists are trying to blend the normally de-subjectifying process of cognitive behavioral treatment with a more subject-engaging humanist model designed to flexibly meet the needs of the incarcerated (Dahlen and Johnson 2010). In Cuba, treatment professionals have sought to integrate spirituality, ethics, and humanism into their treatment model for alcoholism and addiction, to good effect (González 2005). Unfortunately,

this perspective remains contentious, with those who value de-subjectification debating with those who would engage subjectively. Currently, there are those who would try to re-subjectify clinical practice in prisons to a degree by promoting a "positive, strengths-based, and restorative model of rehabilitation," also called the "Good Lives Model" or "GLM" (Andrews *et al.* 2011: 735). However, advocates of the standard, de-subjectifying, deficits-based risk assessment model find that GLM merely adds some minor insight to the standard practice, failing to see the ontological differences between the perspectives (see Ward *et al.* 2011; Wormith *et al.* 2011).

Admittedly, the practice of psychotherapy and rehabilitation is always already grounded in the context of the larger prison culture and policy, which can prove a powerfully constraining force. However, some countries have acknowledged (if not embraced) the role of prison practice and policy in rehabilitation. The first step would entail a re-focusing of the prison to re-subjectify policy, such that the goal of reducing the prisoner to the merely immanent is removed or reduced and replaced with the goal of building on the transcendent nature of the incarcerated.

The effects of the de-subjectifying policies and practices of prison officials in an effort to reduce prisoners down to the merely immanent was noted by various authors and penologists as early as the 1830s. In particular, the dreadful effects of the reductive force of Bentham's panopticon could be seen in the great Eastern Penitentiary at Philadelphia in the USA, where "all . . . prisoners were silent, invisible abstractions to the man in his solitary cell . . . leaving only a disoriented, passive obedience" (Hughes 1986: 520). A young Charles Dickens, upon visiting the penitentiary, noted:

> There is a terrible endurance in it which none by the sufferers can fathom. I hold that slow daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body; and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as the scars upon flesh; because its wounds are not upon the surface.
>
> (cited in Hughes 1986: 520)

In the British system, a reformer worked in relative obscurity to re-subjectify one of the most notorious of prison colonies, that of Norfolk Island. Alexander Maconochie, who had himself suffered as a prisoner-of-war at the hands of the French, took over the brutal penal system of the island in 1840 and immediately set out to re-subjectify the system. He argued that the prison system of his time "destroys both soul and body – both master and man – both colonial character and . . . national reputation" (Hughes 1986: 491). In Maconochie's philosophy, the men rehabilitated through learning valuable skills, self-control, and contribution to the general welfare of others. Maconochie's attitude toward his charges proves the most interesting and vital ingredient to the success of his program (his detractors commented at length about Maconochie's humanism, failing to realize or appreciate the positive benefit). He associated with the prisoners, took the bars off of the Warden's house and walked familiarly among them. Wrote Maconochie:

> I bade them stand up like Men, whomever they addressed . . . I told them repeatedly I could work no miracles with them, I had not come to be their Gaoler, but if possible their reformer; that I could do much in this if they would assist me, but nothing without . . . I thus omitted nothing, which I thought could touch their Hearts and Feelings, and thus give them an elevated direction.
>
> (ibid.: 509)

Unfortunately, Maconochie's philosophy proved too far ahead of his time, and despite his theoretical and applied advancements in penology, he died in relative obscurity, his works virtually

ignored during his day (ibid.). Hughes, however, notes the fruit of Maconochie's efforts and points out that the recidivism rate after his rehabilitation system was only 4 percent.

Such attempts to re-subjectify policy and practice did not completely vanish, and we see many examples changing the apparatus of the prison system internationally. More recently Norwegian prisons have sought to re-subjectify policy and practice. They work to keep the prisons small and they focus on life-skills training and the rehabilitation of the incarcerated (Johnsen *et al.* 2011). In the United States, some prisons allow for victim-sensitive offender dialogue, wherein the prison treatment staff seek to find a "common ground between victim and offender, helping one another heal, and forgiveness" (Umbreit *et al.* 1999: 321). Such dialogue could only occur if the offender in these cases is an active participating agent in their world. Likewise, Leder (2000; 2004) found that even though the apparatus of the prison proves powerfully de-subjectifying, the incarcerated remain participating subjects and live in that space to the extent that "the living present is reclaimed as a scene for fulfilling and purposive action" (Leder 2004: 55). The incarcerated already reclaim the prison space and make meaning within it, generally with very few tools at their disposal to build upon the meaning they create. With this in mind, policy-makers can reform prisons to an even greater degree by examining closely the life-world of the incarcerated not only within prison itself, but within the larger societal context and provide the tools to bridge these two seemingly disparate worlds.

Prisons exist and perpetuate within the larger context of our societies, and insofar as our societies remain criminogenic, then too will crime remain a problem. An absolutely crime-free society seems impossible, given the capacity of human beings to surprise us with their choices (Kane 2005). However, societies can engage with the ways in which we perpetuate unnecessary criminogenic policies and practices. For example, in many Western societies, poverty within a given area predicts crime in that area. As poverty and unemployment diminish, so too does crime (Hipp and Yates 2011; Yearwood and Koinis 2011). Poverty fuels the apparatus of crime, and the apparatus of cultural materialism fuels poverty. In the case of Paul, the factories that provided jobs in his hometown no longer existed, their owners outsourcing the labor overseas. So, even if Paul had received ideal rehabilitative interventions while in prison, they would not have mattered, given that he walked into a world devoid of certain employment possibilities, the very possibilities he hoped to embrace to keep him away from criminal practice. Race complicates this dynamic further, as we can see in the case of the aboriginals above. The policy-makers of the state interpreted the aboriginal status as a negative marker relative to crime. Realizing this, the state apparatus re-created the aboriginal self in a manner compatible with the state itself, treating the state-created aboriginal status as a positive marker, one that would reduce crime if adequately spread back on the reservation (Martel *et al.* 2011).

Such a de-subjectifying state-created aboriginal self denies the operators existing back in the very communities the state apparatus hopes to change. With poverty, racial oppression, lack of social dialogue informing the operators of the subjects, the state's artificially-created aboriginal self does little good to the population they seek to bring into conformity. Similarly, in the USA, Percival (2010) found a significant relationship between the ideologies of the population in a given county and the rates of incarceration of ethnic minority populations. The more ideologically conservative population of a county, the higher the incarceration rates of ethnic minorities. Upon release, the system sends them back to the same counties, the social apparatus of which greatly increases their chances of re-arrest and re-incarceration. In addition, ethnic minority populations often live in socio-economically disadvantaged areas within these cities and counties, informing the operators of the subjects living there (Hill and Witherspoon 2011). If societies continue to fail to address the ways in which poverty, classism, and racism inform the operators of these subjects, the apparatus of the legal and incarceration system will continue

to fuel itself on the souls of the subjects who, in revolving door fashion, are sucked in by the system, both because of their actions and also because of the apparatus of the system itself. Often, the policy-making members of these societies can turn a blind eye to the profoundly negative effects of the prison apparatus because it does not affect them directly (given that they are disproportionately members of a wealthy ethnic majority and from those parts of their countries lacking criminogenic factors). However, indirect effects continue to build, largely due to the social and economic cost of prisons in some countries, particularly the USA (Raphael and Stoll 2009; Joseph 2010). This may motivate them to re-subjectify their laws and policies not just relative to prisons, but cultural policies as well relative to poverty. A new war on poverty may help reduce crime to a significant degree in many countries.

Conclusion

We live within a system of apparatuses, each apparatus informing our subjectivity, our *Being*, in an inescapable fashion. These apparatuses, however, do not determine any of us, but rather present certain possibilities and impossibilities we must negotiate. This is a characteristic we all share, regardless of our position within the legal system. The goal then, is not to pretend we can do away with any apparatus (obviously the authors are subject to the apparatus of rehabilitation), because in the end, the apparatus remains but can be transformed from one that attempts to manufacture psychological/social corpses to one that engages deliberately with subjects through re-subjectified policies and practices.

Discussion questions

1. The chapter asserts that the prison system is an "apparatus" from Agamben's perspective. Can you think of other apparatuses in our lives? Which apparatuses are criminogenic, and which ones help prevent crime?
2. The chapter asserts that the apparatus of treatment in prison serves to create "docile bodies" for the state. Do you agree or disagree? Cite specific evidence to support your agreement or disagreement.
3. The chapter asserts that the system of rehabilitation or psychotherapy in prisons is neither created nor perpetuated from the perspective of the prisoners, and does not have their best interest in mind. Discuss how therapists in prison could create a system of therapy designed to help the prisoners in a way that would meet the prisoners' needs.
4. The chapter cites many international examples of the apparatus of the prison and prison rehabilitation. How are prisons conducted in your country? What purpose do they serve? Do they actually fulfill their purpose?
5. Imagine that you were in a position of greater power within your society and had the opportunity to reform both the justice system and the prison system. How would you do it? What would be the first part of that apparatus you would seek to change? What else would you try to accomplish?

Websites

Agamben: http://en.wikipedia.org/wiki/Giorgio_Agamben.
Agamben: http://www.iep.utm.edu/agamben/.
Foucault: http://en.wikipedia.org/wiki/Michel_Foucault.
http://www.press.uchicago.edu/Misc/Chicago/009254.html.
Prison Reform Trust: http://www.prisonreformtrust.org.uk/.

References

Agamben, G. (1999a) *Remnants of Auschwitz*, New York: Zone Books.

Agamben, G. (1999b) *Potentialities: Collected Essays in Philosophy*, trans. D. Heller-Roazen, Stanford, CA: Stanford University Press.

Agamben, G. (2002) "Giorgio Agamben: What Is a Paradigm?" Lecture at European Graduate School. Available at: www.egs.edu/faculty/giorgio-agamben/articles/what-is-a-paradigm (accessed 10 August 2012).

Agamben, G. (2005) *State of Exception*, Chicago: University of Chicago Press.

Agamben, G. (2009) *What Is an Apparatus? And Other Essays*, trans. D. Kishik and S. Pedatella, Stanford, CA: Stanford University Press.

Andrews, D. A. and Bonta, J. (2010) *The Psychology of Criminal Conduct*, New Providence: Anderson Publishing.

Andrews, D. A., Bonta, J. and Wormith, J. S. (2011) "The Risk-Need-Responsivity (RNR) Model: Does Adding the Good Lives Model Contribute to Effective Crime Prevention?," *Criminal Justice and Behavior*, 38: 735–755.

Anon (2008) "Does Prison-Based Rehabilitation of Drug-Addicts Work?," *New Scientist*, 197(2648): 7.

Baxter, L. (2004) "Relationships as Dialogues," *Personal Relationships* 11: 1–22.

Braun, S. (2012) "My First Dime: An Ex-Civilian's Perspective of his First Ten Years Post-Incarceration," presentation given at the annual meeting of the Western Society of Criminology, Critical Criminology and Justice Studies Conference 16 February.

Celentano, D. D. (2009) "Correlates of Incarceration among Young Methamphetamine Users in Chiang Mai, Thailand," *American Journal of Public Health*, 99(7): 1232–1238.

Dahlen, K. and Johnson, R. (2010) "The Humanism Is in the Details: An Insider's Account of Humanistic Modifications to a Cognitive-Behavioral Treatment Program in a Maximum-Security Prison," *The Prison Journal*, 90(1): 115–135.

DeBeck, K., Kerr, T., Li, K., Milloy, M., Montaner, J. and Wood, E. (2009) "Incarceration and Drug Use Patterns Among a Cohort of Injection Drug Users," *Addiction*, 104: 69–76.

de la Durantaye, L. (2009) *Giorgio Agamben: A Critical Introduction*, Stanford, CA: Stanford University Press.

Dooley, E. (2003) "Review of Uncomfortably Numb – a Prison Requiem," *Crisis: The Journal of Crisis Intervention and Suicide Prevention*, 24(1): 41.

Draper, M., Green, M. and Faulkner, G. (2009) "Dialogue: A Unique Perspective for Correctional Counseling," in D. Polizzi and M. Braswell (eds.) *Transforming Corrections: Humanistic Approaches to Corrections and Offender Treatment*. Durham, NC: Carolina Academic Press.

Erdinast-Vulcan, D. (2008) "Between the Face and the Voice: Bakhtin Meets Levinas," *Continental Philosophy Review*, 41(1): 43–58.

Forsberg, L., Ernst, D., Sundqvist, K. and Farbring, C. (2011) "Motivational Interviewing Delivered by Existing Prison Staff: A Randomized Controlled Study of Effectiveness on Substance Use after Release," *Substance Use and Misuse*, 46(12): 1477–1485.

Foucault, M. (1979) *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan, New York: Vintage Books.

Foucault, M. (1980) *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed. C. Gordon, New York: Pantheon Books, pp. 194–196.

González Menéndez, R. (2005) "Chemical Addiction Experiences in Havana's Psychiatric Hospital," *Addictive Disorders and Their Treatment*, 4(4): 139–144.

Gregory, M. (2006) "The Offender as Citizen: Socially Inclusive Strategies for Working with Offenders within the Community," in K. Gorman, M. Gregory, M. Hayes and N. Parton (eds.) *Constructive Work with Offenders*, London and Philadelphia: Jessica Kingsley Publishers, pp. 49–65.

Heidegger, M. (2010) *Being and Time*, trans. J. Stambaugh and D. Schmidt, Albany: SUNY Press.

Heidegger, M. (2012) *Bremen and Freiburg Lectures: Insight into That Which Is and Basic Principles of Thinking*, trans. A. Mitchell, Bloomington, IN: Indiana University Press.

Hill, N. E. and Witherspoon, D. P. (2011) "Race, Ethnicity, and Social Class," in M. K. Underwood and L. H. Rosen (eds.), *Social Development: Relationships in Infancy, Childhood, and Adolescence*, New York: Guildford Press, pp. 316–346.

Hipp, J. R. and Yates, D. K. (2011) "Ghettos, Thresholds, and Crime: Does Concentrated Poverty Really Have an Accelerating Increasing Effect on Crime?," *Criminology: An Interdisciplinary Journal*, 49(4): 955–990.

Hughes, R. (1986) *The Fatal Shore: The Epic of Australia's Founding*, New York: Alfred A. Knopf, Inc.

Johnsen, B., Granheim, P. K. and Helgesen, J. (2011) "Exceptional Prison Conditions and the Quality of Prison Life: Prison Size and Prison Culture in Norwegian Closed Prisons," *European Journal of Criminology*, 8(6): 515–529.

Joseph, M. L. (2010) "Understanding the Economic Costs of Incarceration for African American Males," in W. R. Johnson (ed.) *Social Work with African American Males: Health, Mental Health, and Social Policy*, Oxford: Oxford University Press, pp. 311–324.

Kane, R. (2005) *A Contemporary Introduction to Free Will*, New York: Oxford University Press.

Leder, D. (2000) *The Soul Knows No Bars: Inmates Reflect on Life, Death, and Hope*, Lanham, MD: Rowman and Littlefield.

Leder, D. (2004) "Imprisoned Bodies: The Life-World of the Incarcerated," *Social Justice*, 31(1–2): 51–66.

Leukefeld, C., Gullotta, T. and Gregrich, J. (2011) *Handbook of Evidence-Based Substance Abuse Treatment in Criminal Justice Settings: Issues in Children's and Families' Lives*, New York: Springer.

Marion, J. L. (2004) *In Excess: Studies of Saturated Phenomena*, New York: Fordham University Press.

Marlatt, G. A., Larimer, M. E. and Witkiewitz, K. (2011) *Harm Reduction*, 2nd edn, New York: The Guilford Press.

Martel, J., Brassard, R. and Jaccoud, M. (2011) "When Two Worlds Collide: Aboriginal Risk Management in Canadian Corrections," *British Journal of Criminology*, 51(1): 235–255.

Marzo, J., Rotily, M., Meroueh, F., Varastet, M., Hunault, C., Obradovic, I. and Zin, A. (2009) "Maintenance Therapy and 3-Year Outcome of Opioid-Dependent Prisoners: A Prospective Study in France (2003–06)," *Addiction*, 104(7): 1233–1240.

McMurran, M. (2002) *Motivating Offenders to Change: A Guide to Enhancing Engagement in Therapy*, Chichester: Wiley.

Mitton, C., Simpson, L., Gardner, L., Barnes, F. and McDougall, G. (2007) "Calgary Diversion Program: A Community-Based Alternative to Incarceration for Mentally Ill Offenders," *Journal of Mental Health Policy and Economics*, 10(3): 145–151.

Murray, A. (2010) *Giorgio Agamben*, New York: Routledge.

Neale, J. and Robertson, M. (2005) "Recent Life Problems and Non-Fatal Overdose among Heroin Users Entering Treatment," *Addiction*, 100(2): 168–175.

Nicholson, G. (2009) *Justifying Our Existence: An Essay in Applied Phenomenology*, Toronto: University of Toronto Press.

O'Farrell, C. (2006) *Michel Foucault*, London: Sage.

Pavlich, G. (2005) *Governing Paradoxes of Restorative Justice*, London: Glasshouse Press.

Percival, G. L. (2010) "Ideology, Diversity, and Imprisonment: Considering the Influence of Local Politics on Racial and Ethnic Minority Incarceration Rates," *Social Science Quarterly*, 91(4): 1063–1082.

Peternelj-Taylor, C. (2008) "Criminalization of the Mentally Ill," *Journal of Forensic Nursing*, 4(4): 185–187.

Polizzi, D. (2003) "The Experience of Anti-Black Racism: A Phenomenological Hermeneutic of the Autobiography of Malcolm X," available from UMI Dissertation Services (UMINO. 3069293).

Polizzi, D. (2010) "Agnew's General Strain Theory Reconsidered: A Phenomenological Perspective," *International Journal of Offender Therapy and Comparative Criminology*, 55 (7): 1051–1071.

Polizzi, D. (2011a) "Phenomenology of Deviance," in C. D. Bryant (ed.) *Routledge Handbook of Deviant Behavior*, London: Routledge, pp. 129–134.

Polizzi, D. (2011b) "Heidegger, Restorative Justice and Desistance: A Phenomenological Perspective," in J. Hardie-Bick and R. Lippens (eds.) *Crime, Governance, and Existential Predicaments*, New York: Palgrave Macmillan, pp. 129–155.

Polizzi, D. and Braswell, M. (2009) *Transforming Corrections: Humanistic Approaches to Corrections and Offender Treatment*, Durham, NC: Carolina Academic Press.

Polizzi, D. and Brown, M. (2012) "In Search of an Ethics in Criminal Justice Practice," *Journal of Theoretical and Philosophical Criminology*, 4(2): 65–90.

Pollock, P., Gopfert, M. and Stowell-Smith, M. (2005) *Cognitive Analytic Therapy for Offenders,* New York: Routledge.

Raffoul, F. (1998) *Heidegger and the Subject*, trans. D. Pettigrew and G. Recco, New York: Humanity Books.

Raphael, S. and Stoll, M. (2009) *Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom*, New York: Russell Sage Foundation.

Richardson, J. (2012) *Heidegger*, New York: Routledge.

Sherman, S. G., Sutcliffe, C. G., Sirirojn, B., German, D., Thomson, N., Aramrattana, A. and Celentano, D. D. (2010) "Predictors and Consequences of Incarceration Among a Sample of Young Thai Methamphetamine Users," *Drug and Alcohol Review*, 29(4): 399–405.

Smith, S. and Ferguson, N. (2005) "Getting Clean in a Drug Rehabilitation Program in Prison: A Grounded Theory Analysis," *Journal of Offender Rehabilitation*, 42(1): 51–74.

Spinelli, E. (2005) *The Interpreted World: An Introduction to Phenomenological Psychology*, 2nd edn, London: Sage Publications.

Stallwitz, A. and Stöver, H. (2007) "The Impact of Substitution Treatment in Prisons: A Literature Review," *International Journal of Drug Policy*, 18(6): 464–474.

Sykes, G. M. ([1958] 2007) *The Society of Captives: A Study of a Maximum Security Prison*, Princeton, NJ: Princeton University Press.

Szasz, T. (2007) "Secular Humanism and 'Scientific Psychiatry'," in P. Kurtz (ed.) *Science and Ethics: Can Science Help Us Make Wise Moral Judgments?*, Amherst, MA: Prometheus Books, pp. 195–203.

Thomson, N., Sutcliffe, C. G., Sirirojn, B., Keawvichit, R., Wongworapat, K., Sintupat, K., and Wei Zing, Z., Jia Qiang, D. and Hesketh, T. (2009) "Preventing Relapse in Incarcerated Drug Users in Yunnan Province, China," *Drug and Alcohol Review*, 28(6): 641–647.

Umbreit, M. S., Bradshaw, W. and Coates, R. B. (1999) "Victims of Severe Violence Meet the Offender: Restorative Justice through Dialogue," *International Review of Victimology*, 6(4): 321–343.

Ward, T., Yates, P. and Willis, G. (2011) "The Good Lives Model and the Risk Need Responsivity Model: A Critical Response to Andrews, Bonta, and Wormith (2011)," *Criminal Justice and Behavior*, 39(1): 94–110.

Wormith, S., Gendreau, P. and Bonta, J. (2011) "Deferring to Clarity, Parsimony, and Evidence in Reply to Ward, Yates, and Willis," *Criminal Justice and Behavior*, 39(1): 111–120.

Yearwood, D. L. and Koinis, G. (2011) "Revisiting *Property Crime and Economic Conditions*: An Exploratory Study to Identify Predictive Indicators Beyond Unemployment Rates," in *The Social Science Journal*, 48(1): 145–158.

Zakaria, F. (2012) "Incarceration Nation," *Time*, 179(13): 18.

Zurhold, H., Moskalewicz, J., Sanclemente, C., Schmied, G., Shewan, D. and Verthein, U. (2011) "What Affects Reintegration of Female Drug Users After Prison Release? Results of a European Follow-Up Study," *Journal of Offender Rehabilitation*, 50(2): 49–65.

12

The society-of-captives thesis and the harm of social dis-ease

The case of Guantánamo Bay

Bruce A. Arrigo and Heather Y. Bersot

Introduction

In two recent books (Arrigo and Milovanovic 2009; Arrigo *et al.* 2011), the authors suggest a provocative thesis concerning their identification of a pervasive and insidious social pathology or dis-ease.[1] This pathology is the "ultramodern" madness (Arrigo 2011a; in press) that sustains (rather than overcomes) the captivity of a society imprisoned by its hyper-vigilant fears and panoptic desperations. The etiology of this dis-ease is sourced within a struggle involving the social person (the self/society mutuality) and the interactive and interdependent forces this mutuality anxiously experiences and dangerously reifies. These forces are symbolic, linguistic, material and cultural in composition. They represent the constituents of the ultramodern condition (e.g., Arrigo 2010; 2011b).

Currently, the intensities that these ultramodern forces co-produce set limits to and impose barriers on the social person's productive and dynamic potential (Arrigo and Milovanovic 2009; Arrigo *et al.* 2011). These limits and barriers are reified through the prevailing institutional mechanisms/techniques that manage risk. The risk that is managed through this reification is difference. This difference is the social person being human and doing humanness differently (i.e., another way). The dominant institutional mechanisms/techniques of risk management (whether in law, psychiatry, penology, social work, or at their intersections), reduce/repress expressions of difference to sameness. These activities are expressions of harm, and they extend to and reach within those who are confined, those who treat and heal the kept, those who educate and legislate about them, and those who observe (often passively and complacently) captivity's unfolding. Under these collective conditions, humanness is normalized, knowledge about difference is territorialized, the self/society mutuality is homogenized, and dynamic potential is vanquished. The authors therefore maintain that the forces of fear and desperation nurturing how human risk is presently experienced and institutionally managed only further the marginalization of identity (pathologize, criminalize, demonize, or sanitize difference).

Investing in this risk management, this marginalization, ensures not only injury to the social person but harm for and about one and all. This is the dysfunctional and maladaptive juncture wherein a society of captives (i.e., those whose difference is reduced/repressed both fearfully

and desperately through extant institutional mechanisms/techniques that manage human risk dangerously) yields society's own captivity (Sloop 1996; Delanda 2006). Indeed, as Arrigo and Milovanovic (2009:10) summarily cautioned in regard to this risk management phenomenon, this prison industrial complex:

> Debates over being in and out of prison, over building more or less facilities, about prison overcrowding and prison overspending, about abuses in prison rather than the abuse that is prison, about alternatives to incarceration and challenges to those defending prison, all essentialize PRISON. Moreover, the participants to these prison debates neglect to consider the continuous and re-constitutive effects that this historically structured disciplinary discourse legitimizes through their ongoing and excessive elaboration.[2]

As developed in their thesis, Arrigo *et al.* (2011) claim that the transition from the society of captives to the captivity of society represents a totalizing madness, a systemic pathology. This is the prison industrial complex *culturalized* (Brown 2009), or captivity itself as a conspicuously consumed commodity. The harm of this all-encompassing social dis-ease extends to the kept (those held captive), as well as to their keepers (those who enforce this imprisonment), regulators (those who administer and inspect this confinement), and watchers (those who insist on or slavishly feed and desperately depend on captivity's maintenance). What is culturally consumed as commodities are the governing (although certainly circumscribed) images, narratives, and practices that reduce and/or repress the potential of being human differently and of making a difference innovatively given this humanness. Representations of difference as the presence of disease, deviance, and danger; along with their written and lived narratives (e.g., the texts of mental health, hospital, and correctional law that so brand this difference); and corresponding institutional and community-based "best practices" (e.g., deficit and desistance models that discipline difference, recovery and community reentry strategies that domesticate difference), render the social person's more vibrant human capacities as largely unimaginable, unspeakable, and uninhabitable (Arrigo 2011a). Thus, excessive investments in the ultramodern intensities that maintain a society of captives are counterproductive and anti-therapeutic. They are not correctives for the debilitating harm of systemic pathology or social dis-ease (Arrigo 2011a; 2011b) personified in the prison industrial complex culturalized. This is a culture of totalizing madness.

Overcoming the totalizing madness of captivity depends on forces and intensities that manage the social person's difference more as human potential (e.g., Davidson 2003; Sen 2011), as unexcavated and thus untold and unlived transformative productivity (Lacan 1991; Maruna 2001), rather than as human risk warranting reified marginalization. The possibility of igniting such a revolution (Appelbaum 1994) or overcoming (Nietzsche [1886] 1966), entails a mode of being/doing (i.e., a praxis) steeped in a critical cosmopolitan imagination (Delanty 2009). This type of "mindfulness" honors and affirms the possibilities of difference virtuously, treats and heals the harms of captivity dynamically, and restores and transforms one and all innovatively. A clinical praxis guided by such principles portends a radicalized psychological jurisprudence (Arrigo 2002; 2010), a critical reformist agenda in mental health and justice system theory, research, policy, and education.

The constitutive forces needed to grow this revolution-in-the-making are symbolic, linguistic, material, and cultural in composition. The intensities co-produced from investments in this proposed mindfulness have the power to re-conceive the self/society mutuality in countless transformative-filled ways (Arrigo *et al.* 2011). This is being/doing in which will is mobilized to power productively (Nietzsche [1888] 1968). Investing in this praxis is a journey into captivity's madness. Undertaking this journey nomadically (Deleuze and Guattari 1984; 1986) signifies a

departure in how a quality of human/social change (i.e., making a difference through one's humanness as creative and dynamic potential) can be made more realizable for a people yet to come (Deleuze and Guattari 1987). Commenting on the nearness of this revolution, the overcoming that awaits, Arrigo *et al.* (2011: 172) concluded:

> This moment, energized by cascading instances of will mobilized to power, is the locus of transformation. Seizing this moment, then, is our collective challenge. The emergents that most assuredly will follow signal an untapped direction for cultivating unimagined and ever-evolving self/society flourishing.

The society-of-captives thesis as outlined above (including revolutionizing it) is particularly relevant to the institutional and community-based treatment philosophies that currently underscore and inform the mental health and criminal justice systems. In order to demonstrate this significance, the ensuing article addresses four matters. First, the constitutive features of the Arrigo and Milovanovic (2009) and Arrigo *et al.* (2011) argument are presented in some greater detail. This commentary will emphasize how captivity's totalizing madness co-produces harms that extend to and implicate one and all given the dominant intensities by which human risk presently is managed. Second, a cursory review of prevailing offender treatment and correctional philosophy literature will be presented. The analysis will describe the deficit and desistance models of recovery and reentry, including the limits and barriers these models set and/or impose on human productivity and dynamic potential. Third, the case of Guantánamo Bay will be used to provisionally demonstrate the international reach of the society-of-captives thesis. This commentary will suggest how the indefinite and preventive detainment without legal process of enemy combatants (i.e., militant Islamist extremists) suspected of engaging in terrorist activities in a post-9/11 era, constitutes an instance of totalizing madness. Fourth, a clinical praxis that is consistent with overcoming the harm of social dis-ease and the society-of-captives thesis will be tentatively enumerated. Delineating and exploring the ethical footing of this praxis (understood as being/doing a critical mindfulness) suggests a novel direction for reform at the crossroads of mental health and criminal justice.

Totalizing madness: on self/society risk, captivity, and harm

The society-of-captives thesis as suggested by Arrigo and Milovanovic (2009) and Arrigo *et al.* (2011) links Goffman's (1961) social-psychological treatise on total institutions with Sykes's (1958) penological disputation on the sub-culture of imprisonment. The proposed integration is rooted in continental philosophy with insights principally derived from a unique blend of existential-phenomenological humanism (Sartre [1943] 1956; Levinas 1969, 2004; Bakhtin 1982), neo-Freudian revisionism (Lacan 1977; 1981; 1991), Frankfurt School socio-cultural criticism (Fromm 1994; 2003; 2005), postmodern textual constructivism (Foucault 1965; 1973; 1977; Derrida 1973; 1977; 1978), the systems theory of hyper-realism (Baudrillard 1972; 1976; 1983) and schizoanalysis (Deleuze 1983; Deleuze and Guattari, 1984, 1987), and explanatory commentary by several "second-wave" luminaries (e.g., Dyer-Witheford 1999; Hardt and Negri 2000; 2004; Delanda 2002; 2006). The thesis itself begins by focusing on a re-diagnosis of madness. The subject of inquiry is the social person and the forces and intensities that normalize violence experienced by this self that is both in-and-of-society. Arrigo *et al.* (2011: 3) characterized this violence as:

> the power to harm, to deny another person their humanity . . . This harm as denial can manifest itself through formal or informal mechanisms of restraint/surveillance (e.g., solitary

confinement; the underground pariah economy of prisons), as well through conscious or unconscious belief systems (e.g., the mentally ill are diseased, deviant, and dangerous; juveniles who "do the crime" must "do the time", sexually violent predators (SVPs) are less than human).

The re-diagnosis of madness is an assessment of the self in-and-of society (the social person), and the limits set and the barriers imposed on this mutuality's productive and dynamic potential. The origins of these limits and barriers are sourced in the moral entrepreneurship (the consumable panic) of governing through crime (Simon 2009). The harm of this governance consists of hyper-vigilant fear and panoptic desperation regarding *would-be* offenders and *potential* offending.[3] The ubiquity of images, texts, and practices for and about possible violence, anticipated hazards, and likely injury (Bogard 1996; Beck 2009), has led to "disciplinary" bodies of knowledge/truth (e.g., in psychiatry, education, penology, and law) (Foucault 1977) that control, contain, and/or correct this presumed danger through investments in threat-avoidance mechanisms and techniques (O'Malley 2004; Lyon 2006). However, these bodies of knowledge/truth administer inspection, ensure compliance, or otherwise make the social person obedient through increasingly techno-rational mechanisms of disciplining (e.g., radio frequency identification ["tagging"] of paroled sex offenders; global positioning system monitoring ["tracking"] of diverted juveniles) and proliferating techniques of punishing (e.g., FMRI competency restoration evaluations administered to those awaiting criminal trial; the bio-medical engineering of lethal injection applied to those awaiting execution). These mechanisms and techniques support a micro-physics of power and guarantee an ordering of things (Foucault 1973).

This micro-physics and ordering establish fixed relational worlds, diagrams of power, and regimes of truth (Foucault 1965; 1977) into which the social person is inserted and from which this in-and-of-society self takes up residence (Giddens 1986). These worlds, diagrams, and regimes form the basis of the social person's habitus (the horizon of perception, thought, and action) (Bourdieu 1977). This reified habitus is the disciplinary (Foucault 1977) and control (Deleuze and Guattari 1986) society in which the social person is hailed, branded, and stigmatized, and from which the social person lives, experiences, and makes meaning. When this habitus is recursively sustained, being and becoming human are finalized (Bakhtin 1982). This finalization is bad faith (Sartre [1943] 1956). Maintaining this bad faith is criminal (Arrigo and Milovanovic 2009).

What is managed by and through this domestication is human risk (Giddens 1991). This is the risk of being in-and-of society differently (Deleuze 1983). Sustaining this domestication (governing through this criminality), limits and/or denies the social person's productive and dynamic potential. This is the potential to recover the humanness of being, differently (i.e., otherwise than), and to transform the humanness of becoming, innovatively (i.e., becoming otherwise than being) (Levinas 2004). In far too many instances and for far too many citizens, recovery is reduced and transformation is repressed for the in-and-of-society self. These activities in reduction and repression are expressions of harm that marginalize identities and grow a society of captives.[4]

The society of captives consists of multiple prisoner and offender groups (Arrigo *et al.* 2011). Those subjected to the ultramodern forces and intensities of risk management that reduce/repress human risk include the kept and their keepers, as well as their regulators and their watchers. The kept are composed of the institutionally restrained – those subjected to the "disciplinary apparatuses" erected in the name of captivity (Foucault 1977: 228). The mentally ill, the criminally confined, the sexually deviant, and the chemically addicted are some of this group's usual suspects. However, those who treat and correct the kept, those who educate and legislate about treatment

and corrections, and those who uncritically monitor and passively observe captivity also may be wrongfully and destructively incapacitated. The disciplinary apparatuses erected in captivity's name for the latter group (i.e., the "watchers" as kept) extend to the families, schools, and work sites (e.g., Rusche and Kirchheimer [1939] 1968; Laing 1983) that domesticate and manage risk in ways that reduce being human differently and repress becoming human differently (Deleuze and Guattari 1984). Indeed, consistent with the society-of-captives thesis, the kept include diverse prisoner groups (Arrigo and Milovanovic 2009) with varied spoiled identities (Goffman 1963).

Members from each of the above groups (i.e., affiliates of the kept) can also assume other master statuses (Goffman 1961) in the society of captives. These statuses are interpellations of or subject-positions occupied by the social person (Althusser 1971). Inhabiting these subject-positions (i.e., hailed as keeper, regulator, or watcher of the kept), depends on the forces and intensities to which the social person is subjected and from which this in-and-of-society self makes choice and undertakes action. Thus, by way of illustration, when psychiatrists, psychologists, penologists, and other mental health and correctional professionals treat and correct the kept (i.e., inmates, convicts, or addicts) through a reliance on institutional mechanisms of disciplining and techniques of punishing that reduce being and repress becoming, then they occupy the master status of *keepers of the kept* given how they (these professionals) are in-and-of society.

The same logic applies to hospital and prison administrators; medical, graduate, and law school educators; and others whose expertise requires that they engage in regulatory functions. Those who administer to others (govern, officiate, and teach) through the use of mechanisms of compliance (including industrial "tools" and institutional "texts" of obedience and docility) that exact discipline (i.e., feed uncritical submission to authority, nurture unreflective automaton conformity) as the preferred corrective for managing human risk (i.e., employee and student difference), occupy the master status of *regulators of the kept*.

Another social person group implicated in the society-of-captives thesis includes the performances conducted by the general public. For many in this collective, the culturalized prison industrial complex is consumed digitally and rapaciously as a commodity. The technology deployed (e.g., internet, satellite, and cyber-connectivity) disciplines through the information consumption of reality's continuous simulation (Baudrillard 1983; Dyer-Witheford 1999). This industry (e.g., DVD games, music CDs, YouTube sites) derivatively manufactures pseudo-social persons. What is supported is the carnival-like consumption of how to manage human risk virtually (Baudrillard 1972; Delanda 2006). This infotainment (e.g., reality TV, 24/7 news cycles, and docudramas about work and life behind bars) is theater. It consists of caricatures that are anxiously and dangerously devoured as if authentic and true, rather than as counterfeits for and about (replicas of) the kept as well as their keepers and administrators. The digitally supported culturalized consumption of human risk as imitation reduces being human differently to (and represses becoming human innovatively through reliance on) copies of the same (Baudrillard 1976). For those who inhabit this "liquid" mutuality (Bauman 2000), they occupy the master status of *watchers of the kept*.

According to the society-of-captive thesis, those who assume the subject-position of keeper, regulator, or watcher of the kept constitute the "offenders" of confinement. Interestingly, however, inmates, convicts, addicts, etc., subjected to surveillance, inspection, and/or disciplining also can be affiliates of this group. This membership occurs when these "prisoners" endorse (often unwittingly) the forces and intensities that normalize the harm done to them through reifying and, consequently, legitimizing the power that denies them their human difference and dynamic potential. When the kept "help create the very structures and institutions that dominate them" such that these "structures take on objective-like qualities" that are, "to various degrees,

worshipped" (Milovanovic 2003: 121), then they are contributing to their own hegemonic captivity (Gramsci 1971).

What these assorted prisoner and offender collectives suggest, then, is that the social person's affinity for and allegiance to a particular master status (as kept, keeper, regulator, or watcher) are more fluid rather than fixed. Thus, occupying any one of these subject-positions depends on the influencing forces and fluctuating intensities to which the in-and-of-society self is interconnected and from which the social person interacts. Moreover, given the porous nature of how the social person is interpellated, each subject-position can undergo deterritorialization and reterritorialization (Deleuze and Guattari 1984). These activities make it possible to disassemble the forces and intensities that sustain the reductive/repressive master statuses inhabiting a society of captives, and to reassemble them as more dynamic and transformative potential for a people yet to come (Deleuze 1983; Deleuze and Guattari 1987). A deracinated revolution-in-the-making is energized as will that is mobilized to power (Nietzsche [1888] 1968) through deterritorializing and reterritorializing. This mobilization constitutes a novel basis for subverting captivity's empire (Hardt and Negri 2000) and for actualizing the multitude's indigenous and emergent productivity (Hardt and Negri 2004).

As an operating principle, the society-of-captives thesis recognizes that the notion of "prison" is a social construction whose reductive/repressive reification can be disassembled for the totalities of harm that it recursively manufactures. Indeed, as Arrigo and Milovanovic (2009: 39) noted:

> [Incapacitation] falsely separates what goes on internally within the prison milieu from what goes on externally throughout society at large. By strategically focusing on confining or containing the offender's physical body . . ., incapacitation ignores or remains silent on the multiple ways that the [kept] impact the very society from which the transgressor is supposed to be isolated. Missing from [this] logic . . . is the recognition that being in prison *is* being in society . . . This is because prison is physically, socio-culturally, and symbolically integrated into our everyday experience. Thus, the conviction that there exist impermeable walls of imprisonment is a myth. Instead, there is continuity between what occurs within the prison environment and what occurs outside of it. This occurs not only through the offender's relations with other prisoners but also with his or her connections to prison workers and through the impact of confinement on the incarcerate's family and friends who are outside the prison walls.

The prisoner and offender groups that populate a society of captives are maintained by ultramodern forces that feed hyper-vigilant fears and nurture panoptic desperations. The society-of-captives thesis (regarding the kept, and their keepers, regulators, and watchers) transitions into society's captivity (a totalizing madness of systemic pathology) when the totalities of harm that follow from "essentializing" or reifying the prison construct are recursively sustained. These recurring harms represent aesthetical (symbolic), epistemological (linguistic), ethical (material), and ontological (cultural) limits to and denials of the social person being/doing humanness differently. The interdependencies of these spheres of influence presently co-produce harm-generating intensities for and about the in-and-of-society self. Figure 12.1 situates the social person within these forces, mindful of the society-of-captives thesis, the management of human risk phenomenon, and the harm (i.e., normalized violence) of social dis-ease.

The symbolic sphere involves the consumption of images. This ingestion extends to the kept, as well as to their keepers, regulators, and watchers. These consumed representations are unconscious constructions (pictures in one's mind) about, for example, mental illness, sexual predation, chemical dependency, and criminality; violence and victimization; treatment and corrective

Symbolic

Unconscious realm
Imageconsumption
Shared meanings
Privileged aesthetic
Incompleteness

Linguistic

Textual realm
Fragmented stories
Dominant narratives
Epistemic sameness
Difference as deferred

Social Person Mutuality

Unimaginable portraits
Captivity narratives
Docility (in being/doing)
Negative freedom

Cultural

Hyper-real realm
Virtual replications
Carnival simulations
Digitized information
Pseudo-ontology

Material

Corporeal realm
Lived history
Embodied truths
Ethical domestication
Absent body

Figure 12.1 The society-of-captives thesis

mechanisms; and institutional recovery and community reentry techniques. The repository for these dominant images is located within the psychic apparatus (Lacan 1977). When these symbolizations are retrieved and spoken, they communicate shared and consensual meanings for and about the social person whose humanness is filtered through these consumable, although circumscribed, representations (Lacan 1981). Indeed, the union of image, speech, and subjectivity that is mobilized by the psychic apparatus captures a preferred and conveys a privileged aesthetic. This aesthetic signifies a type of being and becoming (a rendition of restoring and transforming humanness), but the possibility of cultivating a more fully developed portrait of creative and

dynamic potential is rendered unimaginable given such incomplete and governing symbolizations (Lacan 1991).

The linguistic sphere entails the production and circulation of partial and fragmented stories. When the agreed upon meanings regarding the society of captives' unconscious symbolizations are spoken, these significations become an animated text. These accounts encompass the prevailing narratives for and about the kept and their keepers, as well as their regulators and their watchers. Given prevailing symbolizations at the level of the unconscious, the textual landscape for and about the social person is an accounting of "less than," "lack," and "not-all." As a captivity narrative, the terrain of this circumscription and incompleteness extends beyond the geography of presence (Derrida 1978) and outside the topography of manifest psychic production (Lacan 1977). Instead, this terrain is about the unspoken and unwritten landscape of difference that is deferred, postponed, and made textually absent (Derrida 1973). For the society of captives, the content of this absent geography is being human differently and becoming human innovatively. Difference (and with it, innovation) disappear within (is held captive to and rendered unknowable by) the value that is made present (Derrida 1977; 1978). This value is the epistemology of sameness (i.e., normalization, de-pathologization, homogenization, and sanitization); it territorializes the social person's otherwise productive and dynamic potential.

The material sphere consists of bodies of (systems of) knowledge that discipline the in-and-of-society self. When the text of sameness is repeatedly hailed and the text of difference is continuously silenced, then this binary (i.e., sameness over difference) operates as lived history, as an embodied regime of truth (Foucault 1973). As a regimen for and about ethical human/social existence and comportment, this truth functions as the power to harm, the power to normalize violence. This normalization ensures docility, utility, and an ordering of things such that limits to and denials of difference as dynamic productivity are vanquished and, therefore, made uninhabitable. Consistent with the society-of-captives thesis, it is the absent body (Leder 1991) (the deferred in-and-of-society self) that is undone by mechanisms, techniques, and apparatuses whose deployment domesticates authoritatively and normatively (Foucault 1965; 1977). This is how being human differently and becoming human innovatively are incapacitated both existentially and corporally. As such, captivity's materiality inscribes bodies of (and bodies of knowledge about) difference through the reductive/repressive instrumentation of (the "best practices" of) sameness.

The cultural sphere includes the synoptic[5] replication of images, texts, and practices that reproduce the social person as static and fixed (Arrigo and Milovanovic 2009), as caricaturized and finalized (Bakhtin 1982). In this realm, equilibrium intensities and status quo dynamics are communicated about mental illness and criminality, violence and victimization, treatment and corrections, recovery and reentry. These messages are disseminated through digitally manufactured simulations of reality (Baudrillard 1983). However, at best, these communiqués are carnival-like derivatives of who the kept and their keepers, as well as their administrators and their watchers are or could be. This virtual (rather than visceral) and sensational (rather than sensual) hyper-reality (Delanda 2002) signifies how the prison industrial complex is a voraciously consumed informational commodity. As the manifestation of negative freedom (Fromm [1941] 1994), this consumption supports acquisitive anxiety (to contain reductively and repressively) rather than generative creativity (to celebrate dynamically and innovatively) when contemplating the restorative and transformative possibilities of difference for one and about all (Fromm [1995] 2003; see also Hardt and Negri 2004). As pseudo-ontology, this industry's commerce promotes the desperate need to have rather than the emancipating need to be (Fromm [1976] 2005).[6] Arrigo *et al.* (2011: 165) commented on the prison industrial complex as anxiety-saturated and desperation-filled cultural commodity:

> This is the manufactured *industry* of fictionalized or representational reality in which print and electronic media continuously and repetitively circulate imitations of "serial sexual offenders", "mind hunters", "crazed psychotic killers", "clinical forensic specialists", "crime scene experts" and the like, *ad infinitum*. This illusory and derivative state of affairs functions as both the source and product of the fragmented depiction and counterfactual consumption that nurtures and maintains the forces of captivity. As such, the nature of being is immersed in reduction; its counterpart, becoming, is ensconced in repression. Both circumstances reflect no more than the *shadow* of our potential human flourishing.

Marginalized identities: on the deficit and desistance models of institutional recovery and community reentry

The harm of social dis-ease normalized both domesticates a society of captives and guarantees society's own confinement. The interdependent forces of partial images, absent texts, homogenized practices, and the culturally consumed and derivatively manufactured reproductions of each of them constitute a debilitating madness. As such, the harm-generating intensities that follow to and from their interconnections (i.e., unimaginable portraits, captivity narratives, docility in being/doing humanness differently, negative freedom) reductively and repressively impact the social person. This injury signifies the reification of the prison construct wherein limits to and denials of difference for the kept and their keepers, regulators and watchers are recursively sustained. The maintenance of this cyclical process is the presence of systemic pathology.

One outlet for examining the veracity of the society-of-captives thesis is found within the offender treatment and correctional philosophy literature. Specifically, this includes the deficit model of institutional recovery and the desistance model of community reentry. These approaches to restoring and transforming the in-and-of-society self are briefly enumerated, and their relevancies for managing risk, marginalizing identities, and reproducing harm are provisionally explored.

The pains of imprisonment: on deficit and desistance captivity in policy and practice

The contemporary deficit model of offender treatment and correctional recovery is an exercise in interpellating the subject (e.g., Halsey 2007; Polizzi and Braswell 2009). This interpellation focuses "on failures, on punishing transgressors, on 'going straight,' on the singularity of the event, on unilaterally constructed plans (operative while incarcerated and in release plans), [and] on the behavioral surface of bodies" (Arrigo and Milovanovic 2009: 119). This is the subject-position into which the kept (i.e., inmates, convicts, addicts) are inserted and from which they undergo restoration. Commenting on the quality of this recovery, Halsey (2007: 1222) observed that:

> [Y]oung men in custody generally are not permitted, let alone expected, to show initiative or to take anything approaching a meaningful degree of responsibility for their daily lives. Instead things are done to them and for them and only very rarely with them (and/or with their consent). In this sense, [the kept] are taught to react rather than to act. They are taught to respond rather than to initiate. They are taught what to think rather than how to (un)reason.

The captivity engendered by sustaining the deficit model of institutional recovery is replicated in the desistance strategy of community reentry. Here, the post-custodial subject undergoes

reintegration (Maruna 2001; Farrall and Calverley 2006). As a form of re-socialization, the subject experiences communal immersion in which the "good lives" philosophy of establishing "stable" employment, maintaining "healthy" family relationships, and promoting "collective" aspirations or hopes (e.g., the American dream) is balanced against the normative aims of reducing risks and avoiding hazards (Ward and Maruna 2007).[7] However, what is reinforced through this rehabilitative cleansing process is the duality of the "deviant or conforming citizen" (Uggen *et al*. 2004: 287). This duality, as an artifact of the prison industrial complex culturalized, is normalized and reified through, among other things, the structured release plan that insists on compliance, supervision, and inspection, presumably for the interpellated subject's own restorative benefit (Acorn 2004) and transformative prospects (Pavlich 2005). Indeed, "in the desistance model, it is not the imagery of 'going straight' but of 'going crooked'. . . that pervades the social consciousness" (Arrigo and Milovanovic 2009: 120; see also, Maruna 2001). The potential danger conjured through this consciousness (i.e., as habitus) furthers the hyper-vigilance and panopticism of a society held captive by its fears and desperations (e.g., O'Malley 2004; Brown 2009; Simon 2009).[8]

The pains of imprisonment (Sykes 1958; see also Haney 2006) that recursively follow from the deficit and desistance models are the "prison rules [themselves that] place people [including the kept, their keepers, and their regulators] under an institutional routine [a regime of truth] that virtually suspends their power" (Farrall and Calverley 2006: 181). These rules function as the fixed relational script that legitimizes the deployment of the prison construct's techno-rational mechanisms of disciplining and its proliferating techniques of punishing. Interestingly, however, it is this deferred power that has the nearest potential to restore humanness (being) dynamically and to transform humanness (becoming) innovatively. Indeed, what remain suspended are the images, texts, practices, and emergent representations of each that could reterritorialize the social person, thereby signifying a revolution-in-the-making. It is this untapped and unharnessed productivity that awaits symbolization and activation as will that is mobilized to power. This latent production is the "lack" or "not-all" that is the absent text and body of knowledge in offender treatment, institutional recovery, and community reentry. Its unimagined, unspoken, and incorporeal ambit extends inconspicuously to correctional policy and practice.

Consider, for example, the custodial subject (the convict) whose conditional release is contemplated wherein offender treatment and reentry curatives must be specified and hurdled. What follows, then, is a "master plan," a discourse (Lacan 1977), that focuses not only on creating "bodies of docility and utility (Foucault 1977) but tend[s] toward the stabilization of reactive forces – the separation of the body from what it can potentially do" (Arrigo and Milovanovic 2009: 98). As Taxman, Young, and Byrne (2004: 244) note, "[d]uring structured re-entry, offenders sign behavioral contracts that set priorities, specify supervision requirements and service participation, and detail sanctions for not complying with the contract."[9] However, in this repetitively uninspired process of constructing reductive/repressive subject-positions for the society of captives (i.e. the kept, as well as their keepers, regulators, and watchers), "opportunities for disruption" must nonetheless occur (Halsey 2007: 1230). These opportunities are the critical situations themselves in which a more humanistic approach to the social person can (and should) be envisioned. This approach "demands that . . . educators, penitentiary administrators, correctional officers, and psychotherapists examine the way[s] in which policies, theories, and ideological proclivities have helped to perpetuate the status quo and [have] insure[d] a consistent record of failure" (Polizzi and Braswell 2009: 8–9).

When human risk is managed through static rules, procedures, codes of conduct, and evidentiary outlets that support fixed, axiomatic categories (e.g., employment based on the capitalist mode of production; intimacy and fellowship governed by the nuclear family model;

hoping and dreaming defined by collectivist aspirations; violence, victimization, and recidivism regulated on the terms of actuarial science; offender treatment, institutional recovery, and community reentry as categories to classify, record and compartmentalize), then limits to and denials of the in-and-of-society self most assuredly follow. What is resisted through reliance on this ordering of things is their harm-producing tendency toward closure and to barrier-obliging configurations for the in-and-of-society self.[10] When these configurations are repetitively reified, identities within a society of captives are marginalized for one and about all. This is how the social person is reduced in being and repressed in becoming. When this process of marginalization is cyclically sustained, it fosters a totalizing madness, a systemic pathology. Overcoming the harm of this social dis-ease requires a journey through captivity's madness. This journey is a strange departure in how human/social change (i.e., making a difference through one's humanness as dynamic potential unleashed) can be made more conceivable and more attainable for a people yet to come (Deleuze and Guattari 1987).

The society-of-captives thesis and the case of Guantánamo Bay

On September 11, 2001,[11] America's conception of the aberrant "worst of the worst" (Lewis and Schmitt 2004: A1) was redefined. Prior to the attacks, media-constructed portrayals of "sexually violent predators" and "psychopathic serial killers" pervaded the collective American psyche. On 9/11, however, citizens (i.e., the watchers) encountered a new and perhaps far more enigmatic threat by which to be captivated: the militant Islamist terrorist. Prevailing sentiment regarding the assault on America by "terrorist madmen" (Howell 2007: 30)[12] demanded an unprecedented response to ensure that the nation would never again be vulnerable to such acts. One month following 9/11, President Bush issued a military order as an integral component of the War on Terror authorizing the preventive detainment of enemy combatants suspected of engaging in terrorist activities targeting America (Blank 2012). For the first time in history, the US military formally initiated a system of indefinite detention legal process (Ellis 2010).[13] The militant Islamist terrorist had "become one more figure in [the] list of irredeemably mad (non)subjects, subject to sequestration in the form of indefinite detention" (Howell 2007: 32).

A deeply disturbing development in risk management, the GiTMO camps at the Guantánamo Bay[14] represent a manifestation of hyper-vigilant fears and panoptic desperations pervasively symptomatic of the ultramodern condition. Although developments at Guantánamo Bay have largely occurred in secrecy, the existence of seven camps has been confirmed. Each camp was designed to house detainees (i.e., the kept) based on their "level of compliance and intelligence value" (Ivey 2009: 357). Those deemed high value prisoners are held in the top-secret Camp Seven (Honigsberg 2009). Although classified documents released by Wikileaks in 2011 revealed that as many as 15 "enemy juvenile combatants" (McKenna 2003: 10) have been detained at Guantánamo Bay, testimonies from former detainees and international sources have suggested that the number has exceeded 46 (Center for the Study of Human Rights in the Americas 2011).[15]

For the expressed purpose of preventing future attacks, the Bush administration (i.e., the regulators) approved the use of enhanced interrogation techniques (EITs) by Department of Defense and Central Intelligence Agency (CIA) agents (i.e., the keepers). The EITs, which had been historically regarded as torture, were deemed "safe, legal and effective" (Physicians for Human Rights 2010: 3). Long-term solitary confinement, extensive mechanical restraints, temperature extremes, sleep deprivation, and forced nudity are only some of the conditions to which detainees have been subjected (Rubenstein and Annas 2009; Physicians for Human Rights 2010; Iacopino and Xenakis 2011).[16] Waterboarding, which simulates the experience of

drowning, is perhaps the most controversial EIT that has been utilized (Physicians for Human Rights 2010; Iacopino and Xenakis 2011).[17] Reports indicate that health professionals (i.e., the keepers) have participated in activities (e.g., providing interrogators with information on detainees' phobias and monitoring vital signs during EITs) that may implicate them in a range of legal and ethical violations, including crimes against humanity (Bloche and Marks 2005; Rubenstein and Annas 2009; Physicians for Human Rights 2010).

Amid growing national and international criticism of the Bush administration (i.e., the regulators) and its Guantánamo policies, new narratives for and about the kept, the keepers, their regulators, and their watchers emerged. In 2007, presidential candidate and then-Senator Barack Obama declared that, "[W]e should close Guantánamo Bay and stop tolerating the torture of our enemies. Because it's not who we are. It's not consistent with our traditions of justice and fairness. And it offends our conscience." Following his inauguration as president in January 2009, Obama signaled that he intended to fulfill his campaign promise by issuing an executive order mandating Guantánamo's closure within one year (Ivey 2009; Yin 2011). Although he is poised to begin his second term in January 2013, Guantánamo remains in operation. While some "suspected terrorists" are awaiting prosecution in military courts, others remain uncharged or cleared, but unreleased (Yin 2011).[18]

The case of Guantánamo Bay and the indefinite detainment status of suspected enemy combatants are indicative of how risk is managed fearfully and how identities are marginalized desperately. When these risk/identity dynamics are sustained, violence is normalized and madness (i.e., the harm of social dis–ease) is culturalized. Indeed, while the ambit of GiTMO's madness squarely focuses on the United States and its treatment of would-be militant Islamist extremists, GiTMO's conditions of control (i.e., fear and desperation) continue to captivate worldwide. We can begin to specify how this normalized violence is totalizing for one and about all by recalling the interactive and interdependent forces that recursively maintain the society of captives as presented in Figure 12.1.

Guantánamo Bay symbolizes. The *symbolic* is the realm in which images are consumed. The reach of this symbolization extends to and includes the kept (GiTMO detainees suspected of terrorist activities), as well as their keepers (camp military personnel and health service providers), regulators (the Bush and Obama administrations), and watchers (the general public, political pundits). The images that are consumed are unconscious constructions (pictures in one's mind) about, for example, militant Islamist extremism; violence and victimization; enhanced interrogation techniques; punishment and treatment correctives; rule of law, citizenship, and dignity. The psychic apparatus (the unconscious) functions as the repository for the dominant mental representations that are conjured for and about these phenomena by the various captivity-generating "offender" and "prisoner" groups.[19] Interestingly, in the case of Guantánamo Bay, prevailing (i.e., shared and consensual) symbolizations for the kept (detainees as terrorist madmen, as non-subjects), their keepers (camp military personnel as justified interrogators, healthcare providers as necessary informants), regulators (President Bush and Obama as master politicians and/or dutiful punishers), and watchers (the public as supporters of nationalist outrage, pundits as defenders of "democratic" freedom) inhabit much of the collective US psyche. To be clear, however, humanness (for one and about all) is filtered through these consumable, although circumscribed, representations. Indeed, the union of image, speech, and subjectivity that is mobilized by the psychic apparatus captures a preferred and conveys a privileged Guantánamo Bay aesthetic. This aesthetic signifies a type of being and becoming (a rendition of self/society healing and overcoming in the wake of 9/11); however, the possibility of cultivating a more fully developed portrait of creative, dynamic, and yet-to-be unleashed potential is rendered unimaginable given such incomplete, although governing, symbolizations.

Guantánamo Bay tells a story. The *linguistic* is the realm that produces and circulates partial and fragmented stories. When the agreed upon meanings pertaining to the society of captives' unconscious symbolizations are spoken, these meanings become an animated text. These accounts consist of the dominant narratives for and about the kept, their keepers, regulators and watchers. Given the prevailing symbolizations for and about GiTMO, the textual landscape regarding the social person (e.g., as camp detainee, military officer, healthcare provider, or commander-in-chief), is an accounting of "less than" and "not-all." This "lack" is itself a text waiting to be spoken of and written about. This missing or lacking text constitutes the landscape of difference – deferred, postponed, and made textually absent – yet waiting to be recognized and recounted. In the instance of Guantánamo Bay, the management of risk and the marginalization of identity tell the story of fear and desperation. The epistemology of this text values sameness (e.g., all suspected enemy combatants are indefinitely detained without legal process, all terrorist madmen are sequestered based on their compliance level and intelligence value, GiTMO military personnel occupy the subject-position of interrogator, camp health service providers occupy the subject-position of informant). This text territorializes the social person's otherwise productive, dynamic, and yet-to-be spoken of or written about meaning-making/ generating potential.

The prevailing images of and stories about Guantánamo Bay make possible only certain forms of disciplinary practice (i.e., enhanced interrogation techniques, including waterboarding; protracted solitary confinement, reliance on extensive mechanical restraints; deprivation through temperature extremes and sleep loss; and de-personalization through forced nudity). The *material* realm consists of bodies of (systems of) knowledge that discipline (i.e., domesticate) the in-and-of-society self. When the text of sameness is repeatedly hailed and the text of difference is continuously silenced, then this binary (i.e., sameness over difference) operates as lived history, as an embodied regime of truth. The inscribed "truth" of Guantánamo Bay, then, functions as a regimen for and about ethical human/social existence and comportment. So what is this truth that is practiced and inhabited? It is a truth that standardizes the indefinite sequestration of suspected enemy combatants, and the monitoring and inspection of them without legal process. It is a truth that makes acceptable the use of military personnel as interrogators, de-humanizers, and would-be torturers. It is a truth that endorses reliance on healthcare providers as non-authorized information-gatherers, moles and/or spies. It is a truth that legitimizes presidential decision-making based on party politics and strategic interests rather than on ethical principles and human rights. It is a truth that assigns dignity and respect only to those who support Western democracy and who defend its version of freedom and citizenship. The truth of GiTMO, then, functions as the power to harm, the power to normalize violence. This normalization ensures an ordering of things (i.e., inevitability, docility, efficiency) such that limits to and denials of difference as dynamic productivity are vanquished and made uninhabitable for and by the society of captives. This difference is the absent body (a system of knowledge) that awaits inscription, embodiment, and practiced truth.

Guantánamo Bay has become hyper-realized. This is the *cultural* realm where pseudo-selves and pseudo-thinking prevail. This is the sphere of digitally manufactured replication. Guantánamo Bay – through image, text, and practice – is located in derivatives of the same replayed incessantly on YouTube sites, communicated instantaneously by way of cyberspace chat-rooms and social network messaging, and disseminated globally through other information-only outlets that re-present GiTMO as virtual, simulated, and consumable cultural commodity. The commodity that is purchased and circulated is risk/identity dynamics (hyper-vigilant fear and panoptic desperation) caricaturized and stylized as an industry for an international audience of insatiable post-9/11 watchers. Maintaining and reproducing this normalized violence

transforms a society of captives into the captivity of society. It is this condition that constitutes a totalizing madness.

Revolutionizing captivity: journeying as a people yet to come

In order to initiate release from the society of captives and the all-encompassing and recurring madness that is the harm of social dis-ease, a different clinical praxis must be envisioned. This praxis recognizes that overcoming the struggle that the social person mutuality anxiously experiences and dangerously reifies begins by appropriating a critical cosmopolitan imagination (Delanty 2009). This cosmopolitanism images the in-and-of-society self differently, that is, not as axiomatic categories to be contained or controlled; not as fixed or static subject-positions to be finalized; and not as expressions of human risk to be assigned the status of lack, deferred and postponed, and made docile. A critical cosmopolitan imagination de-codes and, thus, deterrito-rializes the unstated (and often privileged) cultural footing of terms that situate or locate the social person within a particular habitus. These terms (e.g., inmate, convict, addict, psychother-apist, correctional worker, warden) are freighted with ideological content whose de-stabilization reveals "social and economic . . . and political implications which require a new kind of imagination" (ibid.: ix). This imagination challenges, resists, and debunks the (temporarily) constructed reality that such situated terms establish, especially given the distinct effects or "incorporeal transformations" (Deleuze and Guattari 1987: 81) that these implications assure for the in-and-of-society self.

To illustrate, both prison staff and convicts utilize the language of treatment, recovery, and reentry as they navigate the pains of imprisonment. However, by invoking this argot, a particular rendition of prison life is being discursively constructed, cyclically renewed, and problematically reified. A critical cosmopolitan imagination specifies the ideological content of this rendering, noting how both the kept and their keepers co-produce a diagram of power about who the lawbreaker is and "what it takes to be rehabilitated" (Arrigo and Milovanovic 2009: 52). These situated meanings (sustained by the kept as well as their keepers and regulators), then, are the limit-setting and denial imposing restrictions that forestall and undo greater prospects for recovery in being and transformation in becoming. Thus, as Polizzi and Braswell (2009: 4) cautioned:

> Current attitudes in corrections and offender treatment and the policy initiatives these evoke, reveal an underlying set of negatively defined socially constructed meanings about offenders that effectively contradict and undercut any superficial [let alone detailed] discussion about the benefits of rehabilitation, reentry, or restorative justice practices. It is very difficult to envision what successful work in corrections, offender psychotherapy, or rehabilitation would actually look like in such an environment. Successful work with offender populations will be difficult to achieve without first thoroughly addressing the way in which these socially-generated definitions, concerning who and what the offender is, both restrict and actually prevent the type of success the criminal justice [and mental health] system[s] appear willing to pursue.

Cultivating a critical cosmopolitan imagination requires a mindfulness that embraces reflexivity (Bourdieu and Wacquant 1992). This reflexivity entails being/doing difference as human potential and dynamic productivity. The reflexivity that is proposed extends to the master status groups that constitute the society of captives. In each instance, the image-crafting of the social person is reconceived as flourishing or excellence.[20] Developing this excellence (as narrative,

practice, and replicated cultural artifact) is a habit of character that, when manifested, represents an intrinsic dimension of the human condition (of who we are and can more fully become) that is affirmed when the habit is regularly exercised. As Aristotle described it:

> Anything that we have to learn to do we learn by the actual doing of it. People become builders by building and instrumentalists by playing instruments. Similarly, we become just by performing just acts, temperate by performing temperate ones, brave by performing brave ones.
>
> (1976: 91–92)

Thus, what must be cultivated for, by, and about the social person, are representations of being human differently and of becoming human innovatively whose interpellations constitute unfinished, in-process, and mutating expressions of virtuous citizenship (Arrigo *et al.* 2011).

This imagined, spoken, written, and embodied excellence is the journey through the totalizing madness of captivity's systemic pathology and harm-generating social dis-ease. Indeed, when fitted to institutional and community-based offender treatment and correctional philosophy, it is, admittedly, a strange and uncharted path. This path signifies a "calling into question of the Same by the Other" (Levinas 1969: 33). This is an inspired, care-centered ethic of re-engagement in which one's "responsibility to the Other," including the Other's "uniqueness and alterity," is "infinite" (Cornell 1998: 140). As clinical praxis, the critical and reflexive mindfulness that ensues disassembles the ultramodern forces and intensities that reduce being and repress becoming for one and about all (Arrigo 2010; 2011a; 2011b). Further, as clinical praxis, the critical cosmopolitan imagination that follows reassembles – provisionally, positionally, and relationally – the ultramodern forces and intensities that have the nearest potential to overcome the debilitating shadows cast for and about the in-and-of-society self. This is the revolution that awaits development in criminal justice and mental health theory, research, education and policy. It is a paradigmatic shift, a *trans-desistance* philosophy (Arrigo and Milovanovic 2009) whose emergent features have yet to be delineated (but see Arrigo 2012).

However, as an exercise in growing dynamic and transformative habits of character excellently, three strategic recommendations can be tentatively enumerated in support of this cosmopolitan metamorphosis. First, what must be examined are the symbolic, linguistic, material, and cultural meanings that are legitimized when advancing *any* institutional strategy of recovery or *any* community-based model of reentry. To illustrate, as noted by Arrigo *et al.*:

> to speak of growing dignity, healing, care, restoration, and community as artifacts of [clinical] praxis made more realizable by way of [critical mindfulness], is to question the very basis on which these constructs are given preferred aesthetical, epistemological, ethical, and ontological grounding.
>
> (2011: 169)

Indeed, as Dyer-Witheford (1999: 191) noted, "[T]he aim should be to create a space where a diversity of social, cultural, and economic ways of being can coexist."

This perspective leads to the second reformist proposal. If the humanistic intention is to overcome limits to being (the recovering social person) and to transcend denials of becoming (the transforming social person), then reliance on a critical cosmopolitan imagination necessitates that its own potential for barrier-imposing tendencies also be diagnosed and, where necessary, dismantled. This inquiry furthers the effort to avoid harm-generating totalities for and about all those immersed in the society of captives. As such, when a clinical praxis is pursued in offender

therapy and correctional treatment as reflexive mindfulness, the question is begged: What forces and intensities are propagated and disseminated,

> (1) by, for, and about vulnerable, troubled, and distressed individuals (the kept); (2) by those professionals who educate, litigate, and legislate about such collectives (their keepers); (3) by those specialists whose programming expertise includes treatment, corrections, and societal reentry for offenders and those victimized [their regulators]; and (4) by those who question, critique, or otherwise observe the unfolding of it all (their watchers)[?] In short, on what conditions . . . and on whose terms . . . does the [clinical] praxis . . . take place?
>
> (Arrigo *et al.* 2011: 169)

Third, and finally, this concern for obviating injury to the in-and-of-society self extends to the ethical grounding that fuels and sustains the overcoming that is will mobilized to power, that is the proposed antidote to systemic pathology. In other words, what is recommended here is a moral philosophy that advances an ethical activism (Cornell 1998) in which dynamic potential and human productivity are celebrated innovatively – otherwise than as being (Levinas 2004). Pursuing this unrealized and awaiting metamorphosis is a part of the clinical praxis path of journeying nomadically as an unfamiliar people yet to come (Deleuze and Guattari 1984; 1987), and of revolutionizing captivity for, by and about one and all (Arrigo and Milovanovic 2009). Undertaking this departure helps to see how human/social change (i.e., making a difference through one's humanness) can be rendered more imaginable and thus more achievable for a society held captive by its hyper-vigilant fears and panoptic desperations.

Conclusion

The society-of-captives thesis and its reified harm of social dis-ease represent recurring expressions of normalized violence co-produced from the interdependent ultramodern intensities that routinely manage human risk as sameness. This mundane risk management marginalizes identities. The repetitive maintenance of this cyclical process of marginality (as reduction and repression) constitutes a totalizing and debilitating madness for and about one and all. If the mental health and justice systems are to resist and hurdle the intensities that manufacture such guaranteed systemic pathology, then institutional recovery and community reentry must be envisioned differently. Guantánamo Bay is one case in point with global implications.

At the level of clinical praxis, being/doing humanness in another way means that the therapeutic interventions to ponder include, among other things, inhabiting alternative offender therapy and restorative treatment subject-position correctives that warrant more exhaustive ethico-cosmopolitan consideration. Thus, for example, when psychiatrically disordered convicts are placed in long-term disciplinary isolation, how and for whom does this practice exhibit courage, compassion, and generosity? When criminally adjudicated sex offenders are subsequently subjected to protracted civil commitment followed by multiple forms of communal inspection and monitoring, how and for whom is dignity affirmed, stigma averted, and healing advanced? When cognitively impaired juveniles are waived to the adult system, found competent to stand trial, and sentenced and punished accordingly, what version of nobility is celebrated and on whom is this goodness bestowed?[21]

Perhaps questions such as these would not warrant attention as reflexive mindfulness if it were not for the fact that the anxiety felt and danger reified about would-be offending that currently feed the above-stated practices are not based on scientific reason (Arrigo *et al.* 2011). This is why the captivity of a society imprisoned by its consumable panic and terror must be

overcome and transcended. Indeed, the forms of captivity for and about the social person – manifested in its present-day constitutive intensities – are increasingly destructive sadomasochistic seductions that pathologically nurture a recurring social dis-ease. Thus, activating a journey whose intention is departure (movement toward inhabiting the path of difference), is a revolution-in-the-making for the in-and-of-society self.[22] Seizing this departure both productively and innovatively anticipates us all. As such, reforming correctional policy and programming as tentatively proposed in this chapter is but one exemplar of how captivity's release signifies character's promise.

Discussion questions

1   Beyond the penal system, how is human risk institutionally managed in your country? How are these practices sustained by the forces described in the chapter?
2   Consider your country's media coverage of the 9/11 attacks. What images, texts, and bodies of knowledge for and about "terrorists" and "victims" were replicated through informational outlets (e.g., television and the internet)? How do you think these images, texts, and bodies of knowledge thwart prospects for healing, restoration, and justice?
3   The conditions to which GiTMO detainees have been or are currently subjected were briefly described in the chapter. How do you envision virtue-informed policies and programming changing these conditions? In what specific ways would these reformed practices promote dignity for the kept, the keepers, the regulators, and the watchers?

Websites

Amnesty International and Guantánamo Bay: http://www.amnestyusa.org/our-work/issues/security- and-human-rights/Guantanamo.
Human Rights Watch and Guantánamo Bay: http://www.hrw.org/topic/counterterrorism/Guantanamo.
International Centre for Prison Studies: http://www.prisonstudies.org.
Penal Reform International: http://www.penalreform.org.

Notes

1 This chapter represents a revision and application of "Managing risk and marginalizing identities: On the society of captives thesis and the harm of social dis-ease," that appeared in the *International Journal of Offender Therapy and Comparative Criminology* (Arrigo 2013: 672–693).
2 The prison industrial "complex" is akin to Adler's (1917) notion of an inferiority condition in that both represent a partially unconscious, clearly aggressive, overly-compensatory, and maladaptive response to feelings of insecurity. These feelings are experienced as overwhelming and they yield a form of neuroticism. The neuroticism of the prison industrial complex is exhibited through hyper-vigilant fear and panoptic desperation. And, much like all neuroses, nurturing and/or sustaining its excesses guarantee a quality of captivity that is existential and material in composition. Indeed, "the neurotic . . . is nailed to the cross of his [or her] fiction" (ibid.: 66).
3 Arrigo *et al.* (2011) commented on the institutional and community-based fall-out that follows from maintaining such hyper-vigilance and panopticism, especially when noting the dearth of evidence-based scholarship that supports their scientific legitimacy. As they explained, "[W]hen the logic of risk management governs choice, action, and progress, policy efforts that support experimentation and innovation are not simply perceived generally with caution, they are interpreted mostly as hazardous" (ibid.: 4).
4 Harms of reduction occur when an individual's ability *to make a difference productively* is hindered through the choices/actions of some system's agent/representative. For example, an ex-offender in recovery may be prevented from earning a living wage or completing a college degree because of a relapse addiction and criminal recidivism history. The person is rendered less than what he or she could be (i.e., as in further restored, recovered, or healed in "being," financially or educationally). Harms of

repression occur when an individual's ability *to be different dynamically* is made inconceivable given the choices/actions of some system's agent/ representative. Here, the subject's innovative self-in-society possibilities are inexpressible because of one's reified status as an ex-offender in substance abuse treatment (e.g., the potential options of inhabiting one's difference as "otherwise than being" or as "becoming" are rendered unimaginable given one's already marginalized and finite standing).

5 In the digital age of mass media–sourced information and its conspicuous consumption, the synopticon represents a parallel and reciprocal mechanism of social control to Foucault's (1977) panopticon (i.e., the few see the many). The synopticon posits a "viewer society [in which] 'the many' see 'the few'" (Mathiesen 1997: 215–216). Applications of the synopticon include, among others, the role of the media in relation to the 9/11 attacks (Lyon 2006), white-collar crimes (Levi 2006), and therapeutic courts (Moore 2011). For the purpose of this chapter, the panopticon and synopticon are recognized as two complementary apparatuses for self-in-society surveillance.

6 Indeed, as Adler (1917: 16) cautioned, "The greater the feeling of inferiority that has been experienced, the more powerful is the urge to conquest and the more violent the emotional agitation."

7 In the Good Lives Model (GLM), the treatment goal is "optimal personal fulfillment" as a way to address "basic human needs" otherwise expressed anti-socially and/or criminally (Andrews *et al.* 2011: 736). These primary needs or goods include a quality of restoration that makes possible "friendship, enjoyable work, loving relationships, creative pursuits, sexual satisfaction, positive self-regard, and an intellectually challenging environment" (Ward and Stewart 2003: 142). While GLM's rehabilitative corrective promotes restorative (recovering) subject-position *categories*, the model does not consider how harm-generating tendencies consistent with the society-of-captives thesis are sustained when the ideological content that co-shapes these categories is recursively reified.

8 A comparable anxiety is found in the discharge plans of psychiatric patients and substance abusers where potential decompensation and relapse respectively are dangerously managed as risk. In these normalizing instances, mental health and drug court are the reified therapeutic correctives whose jurisprudence authoritatively domesticates (i.e., reduces and represses human difference for one and about all to sameness) (Arrigo 2004).

9 Given the rigidity of such release plans, the deadening of dynamic productivity, and the finalization of human potential, it is no surprise that some custodial subjects refuse structured reentry on occasion and opt, instead, to remain physically behind bars (Halsey 2007).

10 This resistance may even be warranted with humanistically-inspired and empirically animated programming such as the risk-need-responsivity (RNR) model (e.g., Andrews *et al.* 1990). While the model intends "to help offenders ... and the communit[ies] around them ... through compassionate, collaborative, and dignified human service intervention" (Polaschek 2012: 3), the loci of intervention are the factors that predict criminal behavior (Andrews *et al.* 2011). But in RNR programming, these factors emphasize the *criminogenic* subject's "promising targets for change" (Andrews and Bonta 1994: 233) in which "behavioral and cognitive behavioral techniques such as teaching skills and prosocial behavior" (Polaschek 2012: 3) form the *disciplines* of *individual* reform. Thus, the RNR model neglects to problematize the subject as a social person; instead, it reifies (i.e., excessively empiricizes) subject-positions (e.g., "offender," "drug user," "mental health consumer," "desistor") without fundamentally considering the symbolic, linguistic, material, and cultural constitutive intensities that co-shape and co-produce the circumscribed (dominant aesthetical, epistemological, ethical, and ontological) compositions that these subject-positions inhabit. Absent this ultramodern consideration, the in-and-of-society self is susceptible to harms of reduction and repression.

11 Commonly referred to as 9/11, the tragic events on this date involved 19 members of the militant Islamist group al-Qaeda hijacking four commercial airplanes. Two planes were flown into the Twin Towers of the World Trade Center in New York City. A third plane was crashed into the Pentagon in Washington, DC. After passengers and crew attempted to regain control of the fourth plane, it was brought down in a Shanksville, Pennsylvania field. Approximately 3,000 people perished in the attacks. Thousands more were injured. The extent of psychological trauma experienced by those directly and indirectly affected by 9/11 will likely never be conclusively determined.

12 Butler elaborated on the implicit meaning of the term madmen as follows:

> The terrorists are *like* the mentally ill because their mind-set is unfathomable, because they are outside of reason, because they are outside of "civilization," if we understand that to be the catchword for a self-defined Western perspective that considers itself bound to certain versions of rationality.

> (2004: 72, emphasis in original)

13 Military prisoners and others deemed threats to America have been protected under the 1929 Geneva Conventions, which the US government has traditionally followed (Ivey 2009; Ellis 2010). For an overview of the legal history surrounding preventive detention and suspected terrorists, see Cole (2009).

14 Guantánamo Bay, located on the southeastern corner of the island of Cuba, has been leased by the USA for decades for the purpose of maintaining a naval base there. The call sign for the base is GTMO, which is typically called GiTMO. The detention facilities located within GiTMO are known as the GiTMO camps, but are frequently referred to as Guantánamo Bay (Ellis 2010).

15 Designed specifically for detainees under the age of 16, Camp Iguana was intended to provide juveniles with a "semblance of normal life" (Baxter 2003: 18). In addition to amenities such as air conditioning, twin beds, and board games, educational and religious instruction was provided (Baxter 2003). For an in-depth examination of special legal and policy concerns surrounding juveniles at Guantánamo, see Jamison (2005).

16 Although some assert that Guantánamo is unlike any other American detention facility, others argue that it is merely an extension of the nation's penal apparatus (Levy 2006; Annas 2011). For instance, Levy (2006) asserted the following:

> You can argue about whether or not Guantánamo should be closed . . . [w]hat you cannot possibly say is that Guantánamo is a UFO, fallen from some unknown, obscure disaster. What you are bound to recognize is that it is a *miniature, a condensation, of the entire American prison system*.
>
> (227, emphasis in original)

17 One waterboarding technique involves securing an individual to a gurney with a wet cloth placed over their face and their feet elevated. Up to 1.5 gallons of water or a saline solution is slowly poured directly into the individual's face. High value detainee and 9/11 conspirator, Khalid Sheik Mohammed, was subjected to waterboarding at least 183 times (Physicians for Human Rights 2010).

18 Although President Obama expressed concerns regarding the National Defense Authorization Act (NDAA) for 2012's provisions for interrogation and detention, he signed the Act into law. The NDAA expanded the military's ability to indefinitely detain individuals during wartime regardless of their national citizenship (including Americans) or level of involvement in US-directed hostilities (Physicians for Human Rights 2012).

19 Recall that the society of captives is populated by multiple offender and prisoner groups. Stated differently, the kept and their keepers, regulators, and watchers all participate, often unwittingly and to varying degrees, in the construction of risk/identity dynamics.

20 This view of excellence (i.e., *eudaimonia*) is reasoned in Aristotle (1976) as purposefully embodying virtue. This view extends to Levinas' (2004) phenomenology of "becoming other" (i.e., beyond essence or outside of ontology) as subjectively inhabiting care ethics. This view passes through Deleuze and Guattari's (1984) schizoanalysis as a "body without organs" (i.e., the smooth space through which movement/change can occur unfettered by underlying or unifying principles of constraint, rigidity, or permanence as in a system of organization) journeying nomadically in becoming minoritarian, becoming imperceptible, or becoming (ethically) revolutionary.

21 Still further, consider how the society-of-captives thesis and the harm of social dis-ease are implicated in the present-day constitution of "victim" and "offender" subject-positions. On the one hand, extant cosmopolitan forces interpellate victims as offenders through excessive investments in disciplinary mechanisms and normalizing techniques that sustain the intensities of fearful hyper-vigilance and dangerous panopticism. This is how the keepers, regulators, and watchers of the kept as society's captives (i.e., its "victims") are transformed into "offenders." On the other hand, extant cosmopolitan forces interpellate offenders as victims through excessive investments in disciplinary "best practices" that erode being (i.e., the social person's difference as human productivity unleashed is reduced) and thwart becoming (i.e., the social person's difference as dynamic potential manifested is repressed) for everyone. This is how the kept as society's "offenders" (i.e., all those who experience and/or nurture captivity) are transformed into its "victims." The constitution of these victim/offender subject-positions yields regimes of truths and regimens of human/social existence (i.e., governmentality) that discipline bodies (i.e., the society of captives) incompletely through inadequate bodies of knowledge (in law, psychiatry, education, penology, etc.). Indeed, the cosmopolitan images, narratives, inscriptions, and replications of victims and offenders as currently constructed and recursively disseminated are far less than what they could be or could become for and about one and all. This is the harm of social dis-ease. Critically overcoming (deterritorializing) and then humanistically transforming (reterritorializing) these self-in-society partialities, is how clinical praxis as reflexive mindfulness more fully inhabits lived excellence.

22 Delinquency (e.g., "tearing down the streets") is both productive and dynamic when imagined, spoken, and lived as graffiti artist/art (Ferrell 2002). Psychiatric illness (e.g., "order within and out of chaos") is both productive and dynamic when imagined, spoken, and lived as mental health consumer advocate/advocacy (Saks 2008). Criminality ("the edgework of voluntary risk-taking") is both productive and dynamic when imagined, spoken, and lived as boundary transcendor/transcendence (e.g., BASE jumper, dumpster diver, identity extremist) (Lyng 2004). When subject-position departures such as these function as habitus nomadicized, they comprise incipient directions for overcoming the sequelae of a society of captives and for making more realizable the journey of a people yet to come. As clinical praxis unleashed, the constituents of this cosmopolitan journey await further de/re-territorialization.

References

Acorn, A. E. (2004) *Compulsory Compassion: A Critique of Restorative Justice*, Vancouver: University of British Columbia.

Adler, A. (1917) *The Neurotic Constitution: Outlines of a Comparative and Individualistic Psychology and Psychotherapy*, New York: Moffat, Yard, & Company.

Althusser, L. (1971) *Lenin and Philosophy and Other Essays*, New York: Monthly Review Press.

Andrews, D. A. and Bonta, J. (1994) *The Psychology of Criminal Conduct*, Cincinnati, OH: Anderson Publishing.

Andrews, D. A., Bonta, J. and Hoge, R. D. (1990) "Classification for Effective Rehabilitation: Rediscovering Psychology," *Criminal Justice and Behavior*, 17: 19–52.

Andrews, D. A., Bonta, J. and Wormith, J. S. (2011) "The Risk–Need–Responsivity Model: Does the Good Lives Model Contribute to Effective Crime Prevention?," *Criminal Justice and Behavior*, 38: 735–775.

Annas, G. J. (2011) "American Vertigo: 'Dual Use', Prison Physicians, Research, and Guantánamo," *Case Western Reserve Journal of International Law*, 43(3): 631–650.

Appelbaum, P. S. (1994) *Almost a Revolution: Mental Health Law and the Limits of Change*, New York: Oxford University Press.

Aristotle (1976) *Ethics*, trans. J. A. K. Thomson, New York: Penguin.

Arrigo, B. A. (2002) "The Critical Agenda in Psychological Jurisprudence: Theoretical Advances and Epistemological Assumptions," *International Journal of Law and Psychiatry*, 25(2): 151–172.

Arrigo, B. A. (2004) "The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Inquiry of Law, Psychology, and Crime," *Psychiatry, Psychology, and Law: An Interdisciplinary Journal*, 11(1): 23–43.

Arrigo, B. A. (2010) "De/Reconstructing Critical Psychological Jurisprudence: Strategies of Resistance and Struggles for Justice," *International Journal of Law in Context*, 6(4): 363–396.

Arrigo, B. A. (2011a) "Madness, Citizenship, and Social Justice: On the Ethics of the Shadow and the Ultramodern," *Law and Literature*, 23(3): 405–441.

Arrigo, B. A. (2011b) "Guest Editorial: Forensic Psychiatry and Clinical Criminology: On Risk, Captivity, and Harm," *International Journal of Offender Therapy and Comparative Criminology*, 55(3): 347–349.

Arrigo, B. A. (2012) "The Ultramodern Condition: On the Phenomenology of the Shadow as Transgression," *Human Studies: A Journal for Philosophy and the Social Sciences*, 35(3): 429–445.

Arrigo, B. A. and Milovanovic, D. (2009) *Revolution in Penology: Rethinking the Society of Captives*, New York: Rowman and Littlefield.

Arrigo, B. A., Bersot, H. Y. and Sellers, B. G. (2011) *The Ethics of Total Confinement: A Critique of Madness, Citizenship, and Social Justice*, New York: Oxford University Press.

Bakhtin, M. (1982) *The Dialogic Imagination: Four Essays*, Austin, TX: University of Texas Press.

Baudrillard, J. (1972) *For a Critique of the Political Economy of the Sign*, St Louis, MO: Telos Press.

Baudrillard, J. (1976) *L'échange symbolique et la mort*, Paris: Gallimard.

Baudrillard, J. (1983) *Simulations*, New York: Semiotext(e).

Bauman, Z. (2000) *Liquid Modernity*, Cambridge: Polity Press.

Baxter, S. (2003) "Secret World of Cuba's Boy Captives," *Sunday Times* (London), 22 June.

Beck, U. (2009) *World at Risk*, Cambridge: Polity Press.

Blank, L. R. (2012) "The Consequences of a 'War' Paradigm for Counterterrorism: What Impact on Basic Rights and Values?," *Georgia Law Review*, 46: 719–741.

Bloche, G. M. and Marks, J. H. (2005) "When Doctors Go to War," *New England Journal of Medicine*, 352(1): 3–7.

Bogard, W. (1996) *The Simulation of Surveillance: Hypercontrol in Telematic Society*, Cambridge: Cambridge University Press.

Bourdieu, P. (1977) *Outline of a Theory of Practice*, Cambridge: Cambridge University Press.

Bourdieu, P. and Wacquant, L. (1992) *Invitation to Reflexive Sociology*, Chicago: University of Chicago Press.

Brown, M. (2009) *The Culture of Punishment: Prison, Society, and Spectacle*, New York: NYU Press.

Butler, J. (2004) *Precarious Life: The Powers of Mourning and Violence*, London: Verso.

Center for the Study of Human Rights in the Americas (2011) *The Guantánamo Testimonials Project*, available at: http://humanrights.ucdavis.edu/projects/the-Guantánamo-testimonials-project.

Cole, D. (2009) "Out of the Shadows: Preventive Detention, Suspected Terrorists, and War," *California Law Review*, 97: 639–750.

Cornell, D. (1998) *At the Heart of Freedom*, Princeton, NJ: Princeton University Press.

Davidson, L. (2003) *Living Outside Mental Illness: Qualitative Studies Of Recovery in Schizophrenia*, New York: New York University Press.

Delanda, M. (2002) *Intensive Science and Virtual Philosophy*, New York: Continuum.

Delanda, M. (2006) *A New Philosophy of Punishment: Assemblage Theory and Social Complexity*, New York: Continuum.

Delanty, G. (2009) *The Cosmopolitan Imagination: The Renewal of Critical Social Theory*, New York: Cambridge University Press.

Deleuze, G. (1983) *Nietzsche and Philosophy*, New York: Columbia University Press.

Deleuze, G. and Guattari, F. (1984) *Anti-Oedipus: Capitalism and Schizophrenia*, Minneapolis, MN: University of Minnesota Press.

Deleuze, G. and Guattari, F. (1986) *Kafka: Toward a Minor Literature*, Minneapolis, MN: University of Minnesota Press.

Deleuze, G. and Guattari, F. (1987) *A Thousand Plateaus*, Minneapolis, MN: University of Minnesota Press.

Derrida, J. (1973) *Speech and Other Phenomena*, Evanston, IL: Northwestern University Press.

Derrida, J. (1977) *Of Grammatology*, Baltimore, MD: Johns Hopkins University Press.

Derrida, J. (1978) *Writing and Difference*, Chicago: University of Chicago Press.

Dyer-Witheford, N. (1999) *Cyber-Marx*, Chicago: University of Illinois Press.

Ellis, R. J. (2010) "'I Know for Certain . . . that These Are Bad People': The Intractable Problem of Guantánamo," *Comparative American Studies*, 8(3): 169–184.

Farrall, S. and Calverley, A. (2006) *Understanding Desistance from Crime*, Maidenhead: Open University Press.

Ferrell, J. (2002) *Tearing Down the Streets: Adventures in Urban Anarchy*, Basingstoke: Palgrave Macmillan.

Foucault, M. (1965) *Madness and Civilization: A History of Insanity in the Age of Reason*, New York: Vintage.

Foucault, M. (1973) *The Order of Things*, New York: Vintage.

Foucault, M. (1977) *Discipline and Punish: The Birth of the Prison*, New York: Pantheon.

Fromm, E. ([1941] 1994) *Escape from Freedom*, New York: Henry Holt & Company.

Fromm, E. ([1955] 2003) *The Sane Society*, New York: Routledge.

Fromm, E. ([1976] 2005) *To Have Or To Be?*, London: Continuum.

Giddens, A. (1986) *The Constitution of Society: Outline of the Theory of Structuration*, Berkeley, CA: University of California Press.

Giddens, A. (1991) *The Consequences of Modernity*, Stanford, CA: Stanford University Press.

Goffman, E. (1961) *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates*, Garden City, NY: Anchor Books.

Goffman, E. (1963) *Stigma: Notes on the Management of Spoiled Identity*, New York: Simon & Schuster, Inc.

Gramsci, A. (1971) *Prison Notebooks*, London: Lawrence and Wishart.

Halsey, M. (2007) "Assembling Recidivism: The Promise and Contingencies of Post-Release Life," *Journal of Criminal Law and Criminology*, 97(4): 1209–1260.

Haney, C. (2006) *Reforming Punishment: Psychological Limitations to the Pains of Imprisonment*, Washington, DC: American Psychological Association.

Hardt, M. and Negri, A. (2000) *Empire*, Cambridge, MA: Harvard University Press.

Hardt, M. and Negri, A. (2004) *Multitude*, New York: Penguin Press.

Honigsberg, P. (2009) *Our Nation Unhinged: The Human Consequences of the War on Terror*, Berkeley, CA: University of California Press.

Howell, A. (2007) "Victims or Madmen? The Diagnostic Competition over 'Terrorist' Detainees at Guantánamo Bay," *International Political Sociology*, 1: 29–47.

Iacopino, V. and Xenakis, S. N. (2011) "Neglect of Medical Evidence of Torture in Guantánamo Bay: A Case Series," *PLoS Medical*, 8(4): e1001027.

Ivey, M. (2009) "A Framework for Closing Guantánamo Bay," *Boston College International & Comparative Law Review*, 32: 353–376.

Jamison, M. A. (2005) "Detention of Juvenile Enemy Combatants at Guantánamo Bay: The Special Concerns of Children," *UC Davis Journal of Juvenile Law & Policy*, 9(1): 127–170.

Lacan, J. (1977) *Ecrits: A Selection*, New York: W. W. Norton.

Lacan, J. (1981) *The Four Fundamental Concepts of Psychoanalysis*, New York: W. W. Norton.

Lacan, J. (1991) *L'Envers de la psychoanalyse*, Paris: Editions du Seuil.

Laing, R. D. (1983) *The Politics of Experience*, New York: Pantheon.

Leder, D. (1991) *The Absent Body*, Chicago: University of Chicago Press.

Levi, M. (2006) "The Media Construction of Financial White Collar Crimes," *British Journal of Criminology*, 46(6): 1037–1057.

Levinas, E. (1969) *Totality and Infinity*, Pittsburgh, PA: Duquesne University Press.

Levinas, E. (2004) *Otherwise Than Being*, Pittsburgh, PA: Duquesne University Press.

Levy, B. H. (2006) *American Vertigo: Traveling America in the Footsteps of Tocqueville*, New York: Random House.

Lewis, N. A. and Schmitt, E. (2014) "Cuba Detentions May Last Years," *New York Times*, 13 February.

Lyng, S. (2004) *Edgework: The Sociology of Risk-Taking*, New York: Routledge.

Lyon, D. (ed.) (2006) *Theorizing Surveillance: The Panoptic and Beyond*, Cullompton: Willan Press.

Maruna, S. (2001) *Making Good: How Ex-Offenders Reform and Reclaim Their Lives*, Washington, DC: American Psychological Association Books.

Mathiesen, T. (1997) "The Viewer Society: Michel Foucault's 'Panopticon Revisited'," *Theoretical Criminology*, 1(2): 215–234.

McKenna, M. (2003) "War on Terror: the Detainees – The Child Captives in Irons at Camp Cuba," *The Advertiser*.

Milovanovic, D. (2003) *Introduction to the Sociology of Law*, New York: Criminal Justice Press.

Moore, D. (2011) "The Benevolent Watch: Therapeutic Surveillance in Drug Treatment Court," *Theoretical Criminology*, 15(3): 255–268.

Nietzsche, F. W. ([1886] 1966) *Beyond Good and Evil: Prelude to a Philosophy of the Future*, ed. W. Kaufmann, new edn, New York: Vintage.

Nietzsche, F. W. ([1888] 1968) *The Will to Power*, ed. W. Kaufmann, new edn, New York: Vintage.

Obama, B. (2007) "Address at the United Church of Christ General Synad: A Politics of Conscience," 23 June, available at: www.barackobama.com/2007/06/23/a_politics_of_conscience_1.php.

O'Malley, P. (2004) *Risk, Uncertainty, and Government*, London: The Glasshouse Press.

Pavlich, G. I. (2005) *The Paradoxes of Restorative Justice*, London: Glasshouse Press.

Physicians for Human Rights (2010) *Experiments in Torture*, available at: http://physiciansfor humanrights.org/library/reports/experiments-in-torture-2010.html.

Physicians for Human Rights (2012) *PHR Condemns President Obama's Signing of National Defense Authorization Act for 2012 (NDAA)*, available at: http://physiciansforhumanrights.org/library/statements/ phr-condemns-president-obamas-signing-of-national-defense-authorization-act-for-2012-ndaa.html.

Polaschek, D. L. L. (2012) "An Appraisal of the Risk-Need-Responsivity (RNR) Model of Offender Rehabilitation and Its Application in Correctional Treatment," *Legal and Criminal Psychology*, 17: 1–17.

Polizzi, D. and Braswell, M. (2009) "Introduction," in D. Polizzi and M. Braswell (eds.) *Transforming Corrections: Humanistic Approaches to Corrections and Offender Treatment*, Durham, NC: Carolina Academic Press.

Rubenstein, L. S. and Annas, G. J. (2009) "Medical Ethics at Guantánamo Bay Detention Centre and in the US Military: A Time for Reform," *Lancet* 374(9686): 353–355.

Rusche, G. and Kirchheimer, O. ([1939] 1968) *Punishment and Social Structure*, Totowa, NJ: Transaction Publishers.

Saks, E.R. (2008) *The Center Cannot Hold: My Journey Through Madness*, New York: Hyperion.

Sartre, J-P. ([1943] 1956) *Being and Nothingness: An Essay on Phenomenological Ontology*, New York: Philosophical Library Press.

Sen, A. (2011) *The Idea of Justice*, Cambridge, MA: Belknap Press of Harvard University.

Simon, J. (2009) *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*, New York: Oxford University Press.

Sloop, J. (1996) *The Cultural Prison: Discourse, Prisoners and Punishment*, Tuscaloosa, AL: University of Alabama Press.

Sykes, G. (1958) *Society of Captives: A Study of a Maximum Security Prison*, Princeton, NJ: Princeton University Press.

Taxman, F. S., Young, D. and Byrne, J. M. (2004) "Eyes Wide Open: New Models for Reentry," in S. Maruna and R. Immarigeon (eds.) *After Crime and Punishment: Pathways to Offender Reintegration*, Cullompton: Willan Publishing, pp. 231–263.

Uggen, C., Manza, J. and Behrens, A. (2004) "Less Than the Average Citizen," in S. Maruna and R. Immarigeon (eds.) *After Crime and Punishment: Pathways to Offender Reintegration*, Cullompton: Willan Publishing.

Ward, T. and Maruna, S. (2007) *Rehabilitation: Beyond the Risk Paradigm*, London: Routledge.

Ward, T. and Stewart, C. (2003) "Criminogenic Needs and Human Needs: A Theoretical Model," *Psychology, Law, and Crime*, 9: 125–143.

Yin, T. (2011) "Anything but Bush? The Obama Administration and Guantánamo Bay," *Harvard Journal of Law & Public Policy*, 34(2): 453–492.

Part V

The criminal enterprise

Types of commerce, consumerism, and conspicuous consumption

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13

Global white-collar crime

Mary Dodge and Gilbert Geis

Introduction

The Great Economic Meltdown, the severe financial crisis that first showed its dour face in late 2008, highlighted the strong interconnection between nations in what has become an intertwined global marketplace. The collapse in the United States of investment houses, banks, and insurance companies, among other commercial entities, was like a plague that in short order traveled around the world, infecting people and institutions on every continent. The small, seemingly isolated island of Iceland, for instance, proved to be a poster child of the malaise, teetering on the brink of bankruptcy before domestic measures and foreign resources salvaged it.

Underlying the financial disaster was the phenomenon of "white-collar crime." The term was introduced into the world of social science in 1939 by Edwin H. Sutherland, a professor at Indiana University, during a joint session of the American Sociological Society and the American Economics Association. In his presidential address to the first-named scholarly group Sutherland rather loosely applied the term "white-collar crime" to a variety of behaviors. The acts so designated might be officially proscribed in penal codes as criminal or they were regulatory violations, civil offenses, or clearly nefarious and wicked behaviors. The offenders were persons of power who carried out their wrongful acts in the course of their occupation. The behaviors in the realm of statutory offenses involved matters such as antitrust violations, kickbacks from specialists to referring physicians, and false information in advertising by corporations.

Government actions also can be seen as a form of global white-collar crime. According to some commentators, for instance, the United States' preemptive invasion of Iraq can be so regarded. Others see the invasion not as a white-collar crime but as an attempt to eliminate an abhorrent dictator and move the nations of the Middle East toward democratic regimes. Almost inevitably, it is the victor who comes to define whether what has happened should be prosecuted by the International Court of Justice in The Hague or whether it was a reasonable and innocent if not a commendable act (Haas 1989; see also Hagan 2003). The best illustration of this occurred when near the end of World War II, Adolf Hitler, the most villainous human being in contemporary history, responsible for the deliberate slaughter of more than eight million Jews, gypsies, and communists, among others, commented in what would be his last "Order of the Day" before his own suicide on the recent death of Franklin Delano Roosevelt, the American president, that "fate has removed the greatest war criminal of all time from this earth" (Bessel 2009: 96).

Sutherland maintained that his only interest was in bulldozing theories of crime that focused on immigrant status, broken homes, mental retardation, and Freudian distempers. He noted

that these theories failed to include white-collar offenders who characteristically had none of the alleged causal conditions. But it was obvious that Sutherland was also muckraking, trying to turn the spotlight on a group that traditionally had been ignored by criminologists (Sutherland 1940; 1949; 1983).

Sutherland's contribution was challenged by sociologists who held law degrees (Caldwell 1958; Tappan 1947) and by lawyers (Edelhertz 1970; Baker 2004). They essentially argued that Sutherland and his acolytes were fastening the label of "criminal" on persons who had not been convicted in a proper court proceeding. Sutherland's reply was that as a social scientist his primary interest was in behavior itself and not in the often arbitrary manner in which the authorities responded to such behavior. For tactical or political reasons, or perhaps because of limited resources (Pontell 1984), Sutherland pointed out, many acts that obviously could be prosecuted as white-collar crimes never were addressed by the justice system (Sutherland 1945; see also Sellin 1938).

The debate regarding a proper definition of white-collar crime picked up considerable steam in the United States in the early 1980s when a highly-talented team of scholars associated with the Yale Law School was awarded a research grant by the National Institute of Justice to study white-collar crime. The group opted for a legal approach since it would allow them to gather information and generalize about persons (they did not attend to corporate crime) who had been charged with one of a roster of predetermined violations of the federal penal code. The offenses were chosen by asking a cadre of federal prosecutors what illegal acts they regarded as white-collar crimes. They chose eight offenses: securities fraud, antitrust violations, bribery, tax offenses, bank embezzlement, postal or wire fraud, false claims and statements, and credit and lending institution fraud. The Yale researchers concluded that white-collar crimes largely are committed by middle-class persons (Weisburd *et al.* 1991), a conclusion that obviously was the result of the definition to which they had adhered (Wheeler 1993; see also Johnson and Leo 1993). The Yale work never fully resolved the difficulties of classifying acts. Martha Stewart, for instance, a lifestyle guru, was convicted of perjury for lying to a grand jury, although her important offense was insider trading, a much more difficult crime to prove in a trial. Neither perjury nor insider trading were acts that would have qualified Stewart for inclusion in the Yale sample of white-collar offenders (Stewart 2011).

For the purposes of this chapter, it would be feckless to employ legal categories to provide an international portrait of white-collar crime. For one thing, the criminal laws of countries differ, often dramatically, in regard to the kinds of elite workplace behavior that they proscribe. Besides, truly comparable material on white-collar crime in different nations is scarce and usually non-existent. Although the term and the idea of white-collar crime have found their way into the vocabulary and awareness of criminologists throughout the world (Green 2006), almost invariably it is brought to bear in reports regarding infamous acts or failures to act by the elite. It is to these sources that we will necessarily attend.

This chapter principally inventories selected episodes that reflect and signify basic considerations in regard to international elements of the phenomenon of white-collar crime. We first look at the worldwide implications of the Great Economic Depression that ran from 1929 to the beginning of World War II in 1939. Then we scrutinize the activities of Ivar Kreuger, the Swedish match king, who in the period between the two world wars inveigled more than a dozen countries into granting him a commercial monopoly in matches in return for loans that in the end proved to be bogus since they were made with swindled funds. From there we provide a case study that focuses on Nicholas Leeson, a British subject who, operating from Singapore, brought about the insolvency and disappearance of the 233-year-old Barings Bank,

headquartered in London. Leeson's financial crimes are much in line with the nefarious offenses of Michael Milken in the United States. Milken, like Leeson, had removed himself and his operations to an office thousands of miles away from his company's home base, the site where monitoring was much more likely to detect wrongdoing. Similarly, in 2002, Allied Irish Bank in Dublin, which has branches throughout the world, lost $691 million from camouflaged deficits incurred by John Rusnak, who was engaged in currency trading from the company's American subsidiary in Baltimore, well out of sight of the home office. Rusnak served six years of his seven and a half year prison sentence before he was released (Creaton and O'Cleary 2002).

Subsequently, the chapter examines white-collar crimes that link Asia and countries elsewhere, particularly payoffs to public officials in order to obtain lucrative contracts, a situation exemplified by the actions of the Lockheed executives in the bribery of Japanese officials. We then examine instances of transnational white-collar crime involving African and European countries. After that, we focus on corruption, the only crime for which empirical work exists that attempts to measure the extent of a particular white-collar offense in more than 150 countries.

Thereafter, we consider the global implications of the Great Economic Meltdown that began toward the end of the first decade of the present century, with a sidebar look at Iceland as a sad and then happier example of the global eddying implications of the financial crisis. We will conclude with recommendations for the direction of future research, observations on possible remedial policies to reduce and somewhat control global white-collar crime, and general statements on what the chapter has sought to demonstrate.

Parameters of the debate

Before beginning our substantive survey, it is important to consider that the concept of a global village – an interlocked world – is rife with a good deal of uncertainty about its future or, for that matter, about its present condition. There is the example of the United Nations (the UN) that has outlasted the ill-fated League of Nations by many years. The UN was ineffective in averting the preemptive invasion of Iraq by the United States and seems to be futile in its efforts to resolve the Israel–Palestine standoff. Another international association, the 27-member European Union has established standards that are incumbent upon all members and a common currency in the Euro, although the United Kingdom prefers to retain its own monetary system, and there are occasional reports that some members, such as Germany and Slovakia, would prefer to return to their prior independent currency rather than to remain responsible for what they regard as the fiscal irresponsibility of some of the Union's other members.

More significantly, the tendency of religious and ethnic minorities to separate themselves, often by force of arms, into independent nations does not bode well for the idea of a global village. The Soviet Union splintered into an array of independent new nations such as Kyrrgystan, Tajukistan, and Turkmenistan. Yugoslavia broke apart into separate domains, and Kosovo is pressing for sovereignty. In the United Kingdom, many in Northern Island would prefer to rule themselves. In the United States, except for the Civil War (1861–1865), a mélange of religious and ethnic minorities appear to identify as a nation. For essayist Willie Morris, among others, the relative harmony seems puzzling. "I sometimes wonder how the nation stays together," Morris has written. "The differences in the land sometimes seem too deep for pacific coexistence; we are a good paste-up job" (Morris 1967: 350). There are clues in these kinds of circumstances regarding the genesis and control of white-collar crime with transnational ingredients.

As of the future of such law-breaking, if there were an IPO for a hypothetical corporation called Fraud, Inc., a business that would make white-collar crime its operational priority, any

sensible stock broker would advise clients to invest heavily in it. "Honesty is the best policy," a corporate executive tells a middle manager in a cartoon, "but it's not our policy." Put another way the Golden Rule appears to have been transmuted by alchemy performed by the wealthy into the axiom "Gold Rules." Capitalist enterprises are by definition dedicated to maximizing their profitability, at times by illegal or unethical means. Ironically, honest executives occasionally will be replaced by boards of directors because they are unable to match the results produced by crooked competitors. We cannot envisage a downturn in international white-collar crime.

Literature review

Our trek through what has been written or otherwise is known about global white-collar crimes begins with an economic crisis, the Great Depression of 1929–1938 and ends with a similar financial catastrophe that has been labeled the Great Economic Meltdown. According to the prominent economist-jurist Richard Posner (2009), the current downturn should be seen as a Depression. But those who control such designations are aware that public attitudes, whether of fear and anxiety or of hope and optimism, will play a considerable role in a desired recovery, so that government and business officials carefully avoid terms that might undermine consumer confidence.

Entries in two comprehensive encyclopedias on white-collar crime will provide interested readers with additional information about the subject in general and about matters addressed in this chapter. Helpful sources are volumes edited by Salinger (2005) and Gerber, Jensen, and Kuhena (2007). Liebl and Liebl (1985) offer an earlier inventory of writings about white-collar crime that is particularly useful for its heavier focus on publications in jurisdictions other than the United States and the United Kingdom.

An insightful discussion of the global economy can be found in O'Connor (2002) while valuable reviews of the virtues and vulnerabilities of economic globalization are considered in an edited book by Kouzmin and Haynes (1999).

The Great Depression

Throughout history, dire occurrences in one place often have had eddying effects elsewhere in the world. Ancient Rome, for instance, relied heavily on foreign shipments for its grain supply, particularly imports from Sardinia and Sicily, the latter was the granary of the world at the time. Failure of overseas crops led to strict Roman laws against white-collar merchants who hid food supplies in the hope that the dearth would justify higher prices for their wares in the local marketplace (Garnsey 1988).

Such global implications were particularly pronounced during the Great Depression that began for the United States in late 1929 when the stock market crashed. The disaster was caused by the consequences of misjudgments in economic affairs, malfeasance and deceptions by financiers that produced cataclysmic reverberations throughout the world.

A series of hearings by the US Senate Committee on Banking and Currency, spearheaded by the committee's chief counsel Ferdinand Pecora, a former New York prosecutor, found a range of unsavory (if not then illegal) practices that fed into the Depression. There were, among other matters, conflicts of interest and the underwriting of unsound securities in order to pay off bad debts. Feeding the public's sense of frustration and anger was the revelation by Pecora that J.P. Morgan, the richest man in America, and some of his business partners had not paid a cent in income taxes in 1931 and 1933 (Pecora 1939; see also Perino 2010).

As Liquat Ahamed has pointed out:

> During a three-year period [1930–1933], real GDP [Gross Domestic Product] in the major economies fell by over 25 percent, a quarter of the adult male population was thrown out of work, commodity prices fell in half, consumer prices declined by 30 percent, wages were cut by a third. Bank credit in the United States shrank by 40 percent and in many countries the whole banking system collapsed. Almost every major sovereign debtor among the developing countries and in Central and Eastern Europe defaulted, including Germany, the third largest economy in the world. The economic turmoil created hardships in every corner of the world, from the prairies of Canada to the teeming cities of Asia, from the industrial heartland of America to the smallest village in India.
>
> (Ahamed 2009: 340; see also Garraty 1987; Friedman and Schwartz 2008)

As Ahamed indicates, the Great Depression, with its constituent causal elements wrapped in episodes of white-collar crime, spread throughout the world, challenging the legitimacy of capitalism as an economic policy (Garside 1995). Some countries were less direly affected than others. In France, for instance, unemployment was not a problem until well after 1929, because the country, having lost 1.3 million persons and millions wounded in the war, coupled with a low postwar birth rate, faced a shortage of workers. France was a nation of small businesses and had a large agricultural base, both of which made it more able to withstand the ravages of the Depression than most of the major European countries. Ultimately, however, global considerations drew France into the economic maelstrom. Particularly harmful to recovery were the draconian and debilitating reparation demands made upon Germany in the treaties that ended the war, demands Germany could not reasonably satisfy. Then the devaluation of the American dollar occurred, the consequent instability of German currency, and that country's soaring inflation rate (Jackson 1985).

The result of this global catastrophe saw Germany defaulting on its payments to victorious countries, the United States ceasing to help finance the Weimar Republic in Germany, a staggering unemployment rate there in 1932 that reached 30 percent, and the ascent of a fascist regime under Adolf Hitler who in 1933 assumed political control of the country (Stachura 1986).

Ivar Kreuger

The white-collar crookedness of the Swedish match king Ivar Kreuger provides a particularly vivid illustration of the global reach achieved by the tentacles of an elite con artist. Kreuger has been described as a mysterious person, one of the shadowy figures who hovered over the European financial scene during the years between the First and Second World Wars. Kreuger made a fortune in suspicious deals with numerous governments. He maintained a dozen residences, including three summer homes in Sweden, a penthouse apartment suite at the posh Carlton Hotel in London, apartments in Berlin, on Park Avenue in Manhattan, and on the Avenue Victor Emmanuel in Paris. It was in the last of these sites that Kreuger killed himself when the authorities were on their way to arrest him.

Kreuger's ill-gotten fortune was reaped from nothing grander than matches. He came to control three-quarters of the world's manufacture of matches. He would float loans and lend the proceeds to governments around the globe that were short of cash. Among the bonds he posted as security were forged Italian certificates. When investigators showed them to the Italian Finance Minister, he pointed out that his signature had been spelled in three different ways on the forgeries.

In 1930, at the height of the Great Depression, Kreuger had given various countries $387 million, a sum that today would come to $10 billion. Table 13.1 is a roster of the nations Kreuger invested in so that he could gain monopoly control of their match industry.

The profits from Kreuger's match monopolies and his considerable holdings in mines, timber, and real estate were insufficient to finance all this outpouring of money. Kreuger paid 16–20 percent in annual dividends to his shareholders, employing a Ponzi scheme in which he used the funds of new investors to pay dividends and deal with withdrawals (Allen 1932; Stoneham 1932; Shaplen 1960; Partnoy 2010). John Kenneth Galbraith, the eminent Harvard economist, summed up Kreuger's doings in the following terms: "Boiler room operators, peddlers of stocks in the imaginary Canadian mines, mutual-fund managers whose genius and imagination are uncontrolled by integrity, as well as all less exotic larcenists should read about Kreuger," Galbraith commented. "He was the Leonardo [da Vinci] of the craft" (Galbraith, 1960: x).

Barings Bank: Nicholas Leeson

What became the Barings Bank was a company founded in 1762 in England by two brothers from the German city of Bremen. They began as wool merchants and later branched out into the banking business. At one time the company was considered to be one of the six great powers in Europe: "England, France, Prussia, Austria, Russia, and Baring Brothers" (Ziegler, 1988: 10). The company, which was the oldest of England's investment institutions, was brought to ruin after 233 years by the illegal and inept trading actions of Nicholas Leeson, operating in remote isolation in Singapore.

Leeson had taken a job with Barings in 1989 as a settlement clerk. He did the work so well that he was sent to Jakarta in Indonesia for ten months to straighten out the disorganized affairs in the company branch there. On his return to London, Leeson applied to the Financial Service Authority for a trader's license. The application was rejected on the ground that he had failed to respond truthfully to the question asking whether there had been any adverse decisions against

Table 13.1 Kreuger's national investments

Country	Year	Amount
Poland I	1925	$6 million
Poland II	1939	$32.4 million
Danzig Free State	1930	$1 million
Greece I	1920	£1 million
Greece II	1971	£1 million
France	1927	$75 million
Yugoslavia	1928	$22 million
Hungary	1928	$36 million
Germany I	1929	$1.25 million
Germany II	1930	$1.5 million
Latvia	1928	$6 million
Romania	1930	$30 million
Lithuania	1930	$6 million
Bolivia	1930	$2 million
Estonia	1928	7.6 Swedish krona
Guatemala	1930	$2 million
Turkey	1930	$2.5 million

him in court proceedings. The Authority had discovered that the National Westminster Bank had obtained a judgment against Leeson in a county court for his failing to pay an overdraft of £639. But the Authority failed to ask for an explanation, requesting only whether Barings desired to proceed with the application. Nine days after the turndown, in March 1992, Leeson was dispatched to open a new branch office in Singapore. When Leeson filed for a trading license in Singapore neither Barings nor Leeson told the authorities there about the British turndown and nor did Leeson's Singapore application mention the English court judgment against him. The license was granted.

Leeson initially performed brilliantly in Singapore in his speculative endeavors. By the end of 1992 he was generating 10 percent of Barings' total earnings and in 1994 he was named "trader of the year" by SIMEX, the fledgling Singapore Monetary Exchange. But Leeson's luck soon turned sour. On 16 January 1995, for instance, he bet heavily that the Singapore and Tokyo stock exchanges would remain quiescent, a highly risky options tactic known as a "straddle" (Drummond 2008: 37). The following day Leeson suffered heavy losses in the wake of a devastating earthquake in the Japanese seaport city of Kobe in which 5,500 people were killed and more than 26,000 injured. The quake wreaked damages estimated at $200 billion and sent Asian stock exchanges reeling. Driven by ever-more frantic and risky efforts to recoup his losses, Leeson put Barings into the hole to the tune of $1.4 billion, hiding 61,000 of his unsuccessful transactions in an account numbered 88888 (eight is considered a lucky number in Singapore) that originally had been established to list deficits that had been incurred by trading errors – such as might happen when a broker purchased a stock that a customer has asked him or her to sell. The account was never reviewed by the London headquarters of Barings.

When his predicament became known, Leeson skipped town, leaving a note saying only: "I'm sorry." He was barely 28 years old at the time. He was apprehended in Germany, having purchased an airline ticket in his own name. Extradited to Singapore, he was charged with deceiving banks and auditors and sentenced to a six and a half-year prison term. He was released two years into his sentence when he was diagnosed with colon cancer that subsequently was treated successfully with chemotherapy. Leeson moved to Galway in Ireland and, not without some irony, marketed himself as an after-dinner speaker on the subject of corporate responsibility.

Barings had been made aware of the danger of Leeson's actions that were occurring so far from his home office. A 1993 internal memorandum warned Barings' directors not to allow Leeson to operate both as a trader and a settlement officer; that is, to make trades without another person being responsible for handling the financial details of the transactions. The memorandum presciently warned that if Barings did not monitor Leeson more closely it would be "in danger of setting up a system that will prove disastrous." And so it did (see Rawnsley 1995; Hunt and Heinrich 1996; Leeson and Whitely 1996; Fay 1997; Gapper and Denton 1997; Drummond 2008). Government reports were published by the Bank of England (Bank of England Board of Banking Supervision 1995) and Ministry for Finance (1995).

Andrew Brown is unsparingly critical of the Bank of England Report. He sees it as "a product of an authorial strategy that demonizes an individual [Leeson], presenting him as single-handedly responsible for negative outcomes" while a more accurate version could well have "emphasized that there were a number of other Barings' personnel who had significant roles in the collapse" (Brown 2005: 1588). The report, Brown believes, was aimed at quieting reservations that citizens might have formed regarding the honesty and the competence of their country's financial realm.

Barings was sold for £1 to the Dutch company ING (standing for Internationale Nederlanden Group), the largest banking/financial insurance company in the world, with its latest reported annual income being $77 billion.

The Asian connection

Japan

A major element of global white-collar crime was pinpointed in 1995 when a Japanese judge awarded $770 million in damages against the Board of Directors of the Daiwa Bank. The judge emphasized the failure of bank executives to abandon traditional Japanese customs when operating in a venue with different legal requirements than those in their own country. "The defendants," he declared, "had persisted in following informal local rules that apply in Japan despite the fact that its operation had expanded on a global scale" (Milhaupt 2001: 2016).

The branch of the Daiwa Bank in the United States had concealed billions of dollars in losses that resulted from an official at the bank illegally trading in US Treasury notes over a period of more than eleven years. After the home office in Japan learned of the fraud, the information was concealed from American authorities and the Japanese public for almost two months (Instefjord *et al.* 1998). The company would plead guilty to 19 criminal counts and was fined $340 million by an American court and barred from doing business in the United States (Hall 1998).

An earlier episode involved a Japanese firm that also became entangled with American law. Nippon Paper Industries (NPI) had conspired with another Japanese corporation to fix prices on the sale of thermal facsimile paper in the United States, an act that was a crime under American antitrust law. NPI relied for its defense on the position that the violation had been committed in Japan and was beyond America's jurisdiction. A US circuit court of appeals thought otherwise and observed in rather acerbic language that it had reviewed the defendant's "exhortations" and found them "hollow" (*United States v. Nippon Paper Industries* 1997:16). Regarding the fact that there was no clear legal precedent to provide guidance, the court declared: "There is a first time for everything, and the absence of earlier criminal actions is probably more of a demonstration of the increasingly global nature of our economy" (*United States v. Nippon Paper Industries* 1997:16). Later in the decision, the court enunciated the motif that is key to the present chapter: "We live in an age of international commerce," the judge wrote, "where decisions reached in a corner of the world can reverberate around the globe in less time than it takes to tell the tale." Then he added: "Thus a ruling in NPI's favor would create perverse incentives for those who would use nefarious measures to influence markets in the United States, rewarding them by erecting as many firewalls as possible between cause and effect" (*United States v. Nippon Paper Industries* 1997: 26; see also Everett *et al.* 2000).

The major white-collar crime scandal in Japan following World War II involved not only that country but thrust into the limelight the common worldwide practice of bribing key people in order to secure lucrative contracts. Often the amounts of the bribe are written into the total cost of the product so that those being bribed are being paid by funds derived from their own people.

In Japan, the scandal involved the purchase of 21 L1011 Tri-Star Lockheed airplanes by the government-run All-Nippon Airways. Kakeui Tanaka, Japan's prime minister, was the major political figure embroiled in the bribery. Tanaka had been head of a faction of the Liberal Democrat Party that governed Japan from 1955 until 1973 except for a brief interregnum period. He was elected to the Diet, the Japanese parliament, for 16 terms stretching over a period of 43 years. He had been found guilty in 1948 of accepting bribes from the Fukoaka mining interest to vote against a measure that sought to nationalize the industry. In 1974, Tanaka again was implicated in a scandal, this time one in which he used a geisha he had purchased from her house (a not unusual practice among prominent Japanese men) in order to camouflage his investment in shady land transactions (Hunziker and Kaminura 1996: 16; see also Babb 2000).

The Lockheed scandal broke upon Japan in early February of 1956 when a United States Senate subcommittee reported the testimony of a former president of Lockheed, the largest defense contractor in the Western world, that his company had arranged for Japanese government and corporate officials to be paid bribes to facilitate the purchase of Lockheed planes. Tanaka had been approached by the head of a Japanese firm that, among other matters, handled Lockheed's business in Japan. The intermediary testified that during his 5-minute meeting with Tanaka, the prime minister said only, "Daijobu, daijobu" – okay, okay. When the sale of the Tri-Star Aircraft to Nippon Airlines was completed, Tanaka received at least $1.7 million (Boulton 1967; Fisher 1980; Rice and Leo 1994).

The prime minister's criminal trial for bribery and violation of the Foreign Exchange Control Act ended in a conviction after stretching out for more than seven years. Tanaka received a fine and a sentence of four years in prison. The punishment was on appeal to the Supreme Court when Tanaka died in 1993. Before his death, Tanaka had been re-elected to the Diet in 1983 with an unprecedented landslide victory which saw him obtain the largest majority of any of the hundreds of candidates seeking a seat in that body.

The Lockheed scandal was the forerunner of admissions by more than 400 American corporations who, after being given immunity from prosecution, admitted that they had paid bribes to overseas officials. Chiquita Brands, for instance, admitted that it had paid a bribe to the president of Honduras to persuade him to lower the taxes it had to pay for its business in his country. To try to put an end to the practice, in 1997 Congress enacted the Foreign Corrupt Practices Act (Brown and Chilton 2007). But the problem remained that if an American competitor or a non-American business employed bribery in a foreign country it could put the honest corporation at a considerable disadvantage.

Criminologist Marshall Clinard and his co-authors in their study of corporate crime summarized overseas bribery in the following terms:

> The investigation of the foreign payment of bribes, perhaps more than anything else, reveals the ingenuity and deviousness of large corporations in violating business ethics and often laws. In nearly all cases examined, efforts to conceal payments were so elaborate and cunning that even a casual examination would clearly indicate that the behavior of the corporations involved was potentially illegal and unethical and, at least, highly embarrassing.
>
> (Clinard *et al.* 1980: 171)

The African connection

Oil-rich Nigeria is the eighth most populous country in the world and the most populated nation in Africa. It has become known to a considerable number of residents of the rest of the world for notorious e-mail scams in which persons are told that they are the beneficiary of millions of dollars and need only contact the sender in Nigeria to obtain their money (Baines 2001; see also Smith 2008). If people fall for this con game (and apparently enough do to make it worthwhile, see e.g., Eichenwald 2000) – they will be gulled out of additional funds said to be necessary to complete a transaction that never will be culminated.

Nigeria also was part of another major global white-collar crime. In 2011, the US Supreme Court was asked to decide whether Royal Dutch Shell could be sued in a US court for alleged human rights violations committed in Nigeria. The issue gained worldwide attention in 1995 when the Nigerian military regime executed author Ken Saro-Wiwa and eight other political activists. Saro-Wiwa had led protests against the 37-year long extraction of crude oil and the dumping of waste by Shell that caused extreme environmental damage to the segment of the

Niger Delta occupied by his Ogoni people (Okonta and Douglas 2003). The company's subsidiary, Shell Petroleum Development Company, had been responsible for 40 percent of the oil drilled in Nigeria, operating more than 80 pump stations.

Saro-Wiwa's words, when he was sentenced by a military tribunal to be hanged, encapsulate the worldwide implications of white-collar crime:

> I repeat that we all stand before history. Shell is here on trial. Its day will surely come for there is no doubt in my mind that the ecological war that the Company has waged here in the Delta will be called to question sooner rather than later and the crime of that war will be duly punished
>
> (Wiwa 2000:143; see also Saro-Wiwa 1992)

Shell had paid out $15 million to settle one lawsuit but there were further claims that its subsidiaries had enlisted the assistance of the Nigerian government to suppress local activists. Those seeking money from Shell relied on the Alien Tort Claims Act, enacted in 1789 by the first American Congress (Koebele 2009; see generally Steinhardt and D'Amato 1999). Appellate courts were divided over whether corporations could be held liable under international law (*Wiwa v. Royal Dutch Petroleum* 2001; 2004).

South Africa

Organ transplants became a relatively common medical procedure beginning in the 1980s following the appearance of cyclosporine, an immunodepressant drug that counteracts a recipient's possible rejection of a transplanted heart, liver, or kidney (Kahan 1987). The ability to perform such operations led to a global industry in which persons from a third-world country would be induced to undergo the removal of a body part that would be sold in the country where the procedure had occurred or shipped overseas to a lucrative market. Those seeking transplants were desperate. Estimates at the beginning of 2012 were that there were 90,000 people worldwide needing kidney replacements. The World Health Organization estimates about one in ten organ transplants are done illegally (Satel 2008; 2011).

The most notorious program of this type was uncovered in South Africa. Half a dozen persons, including a senior nephrologist, carried out 109 kidney transplants between June 2001 and November 2003 in St. Augustine's Hospital in the city of Durban. Naím (2005:106) points out that "the hubs for illicit donor centers are ones that contain high-quality hospital facilities with lax or negligible oversight." St. Augustine's advertises itself on the Internet as "a world class facility with state-of-the-art medical equipment and technology that offers a full range of medical disciplines."

The kidneys transplanted at St. Augustine's typically came from poor Brazilians who had been flown to South Africa. They generally were given to recipients from Israel where the number of donated body parts available from deceased persons is particularly low because many Israelis adhere to a Hebrew doctrine that mandates that every part of the body must be buried (Sinclair 2003: 244). St. Augustine's program violated South Africa's Human Tissues Act of 1983 that forbad the sale of organs for transplantation and required the certification of a social relationship between the donor and the recipient before the transfer could be carried out. The Brazilians had fraudulently signed papers signifying such relationships. The law later was strengthened, now forbidding the payment for body parts for transplantation and stipulating that only a blood relative (but not a husband or wife) could legally donate a body part; otherwise, the harvested organ would become government property and would be used in a program that promised to ensure its equitable distribution (Watson 2006).

The European connection

Germany

The pharmaceutical marketplace offer many illustrations of the global reach of commercial white-collar crime. The situation is well illustrated by the ill-fated geographical trajectory of thalidomide. About 12,000 children in 48 countries suffered severe physical defects because their mothers had ingested thalidomide during the early months of their pregnancy. The producer of the drug clearly had failed to test its effects adequately, a white-collar crime that had an enormous global impact (Fine 1972).

Thalidomide was developed in 1957 by Dr. Heinrich Mükter in a laboratory in Stolberg in what then was West Germany, the segment of the country occupied by one of the conquering Allied forces. The drug was marketed immediately in West Germany under the trade name Contergan. Mükter was rewarded for his development of thalidomide by a bonus that came to more than twenty times his regular salary.

Given the later and awful history of the drug there is grim irony in the fact that its discoverer had been a member of the Nazi Party during the Second World War and had conducted experiments on Polish war captives in order to try to locate a cure for typhus. In the process, Mükter had killed a number of the Polish prisoners. He had fled to the town of Stolberg in the Rhineland section of Germany to escape from the Polish authorities who, as part of the Soviet Union, operated in the eastern part of the country.

Thalidomide was heralded as a mild soporific that could safely be used as an antidote to a variety of human ailments, especially by pregnant women who sought to cope with distress from morning sickness. By 1959, an estimated one million Germans were using thalidomide on a daily basis. For children, the drug had become, as an eminent American doctor observed, "West Germany's baby sitter" (Taussig 1962: 1109), and in some German states it was sold without a prescription. An advertisement by the company selling the drug stated:

> In pregnancy and during the lactation period, the female organism is under great stress. Sleeplessness, unrest and tension are constant complaints. The administration of a sedative and hypnotic that will hurt neither the mother or the child is often necessary.
>
> (Teff and Munro 1976: 1)

In response to an inquiry, the manufacturer specified that the drug was perfectly safe for child-bearing women because experiments had indicated that it would not pass through the wall of the placenta. This turned out to be woefully incorrect, and soon reports indicated that if the drug were taken during the first three months of pregnancy there was a strong likelihood of the birth of a physically-deformed child. The scientific term was that the newborns suffered from teratogenic conditions. These included, in addition to stillborns, children with no arms but with their hands attached to their shoulders. The absence of arms or legs in their newborns also was a common consequence of thalidomide use by pregnant women. Deafness or impaired hearing was another result, as was blindness, as well as damage to the kidneys, heart, uterus, or other organs.

The distribution of thalidomide was halted in November 1961 as the roster of its victims grew. Many women continued to use supplies of the drug they had on hand with disastrous results because notification of its dangers and its withdrawal from the market were not adequately circulated.

In 1967, the West German government filed criminal indictments against 18 defendants who had been involved in the production or marketing of thalidomide. They were charged with

involuntary manslaughter: the specific allegations were that they had failed to test the drug properly or to heed warnings of its danger and instead had sought to suppress damaging information that was brought to their attention. The trial dragged on for three years – the longest court proceeding in the country's history – with the panel of judges hearing 120 witnesses, including 60 experts on drugs. No decision was forthcoming. Rather the court reached the odd conclusion that the proceeding should be halted because there no longer was any public interest in the issue and the manufacturer had agreed to establish a pension fund to compensate 2,966 victims of its product (Teff and Munro 1976).

Sweden

Among the Scandinavian countries, Swedes took the hardest hit from thalidomide. There were 17 cases in Norway, 8 in Finland, 20 in Denmark, and 107 (other estimates go as high as 120) in Sweden. In 1965, Sweden was the first country to seek a court judgment against the Astra Company, which had been licensed to sell thalidomide in Sweden. After four years of litigation, the prosecutor won a judgment guaranteeing a pension to children born with defects traceable to thalidomide. This was supplemented in 2001 by a one-time payment from the government of 55,000 euros to each of the more than 100 thalidomide survivors.

Corruption

An annual report entitled the Corruptions Perception Index (CPI) is published by the German company Transparency International (TI) in Berlin. TI was found in 1993 and has almost one hundred branches. It conducts a yearly survey that it labels as a survey of surveys in the sense that its ultimate report rests upon a composite of information gathered from numerous persons regarded as experts on the extent of corruption in their country. The CPI provides information by means of which citizens can ascertain how their homeland stands amidst the rest of the world in regard to corruption and, because it is conducted annually, it offers information on whether a national jurisdiction is progressing or regressing in regard to the Index.

Most notable in the CPI results is the presence of the Scandinavian counties high among the least corrupt nations. They are marked by socialist politics, although on occasion Labor will lose out to a somewhat more conservative party that cuts back on what it regards as the more extreme welfare measures (see e.g., Ervastii et al. 2008). New Zealand, ranked as having the second least corruption, is also known for its liberal social policies (Oliver and Geis 2001). Perhaps corruption is less likely in countries where there is not severe competition for status and where most citizens feel satisfied with conditions, but that is a hypothesis that requires empirical scrutiny. Certainly the presence of Singapore in the second place raises interesting questions. Singapore is a nation known for its strict control over aberrance, its authoritarian government, and its restriction of freedom in matters large and small – no spitting on sidewalks, no hanging of clothes where they can be publicly seen, and not having a free press (Mauzy and Milne 2002).

This is not to say that the countries at the top of the list are squeaky clean in regard to corruption. In New Zealand, in the early years of the current century, for instance, Taito Phillip Field, a one-time member of parliament, was found guilty of easing the immigration requirement for Samoans and then having them work on his property without any or at reduced pay. He received a six-year prison sentence, four for corruption and two for obstruction of justice (Surhone et al. 2011).

Notable is the bundling of African countries on or near the bottom of the list, where they stand as the most corrupt nations in the world. The two mideastern countries with which the

Americans and token forces from other nations have been at war – Iraq and Afghanistan – stand out as among the most corrupt sites in the world. It is arguable that this would have been true without the external military involvement that engendered and took part in a range of corrupt practices.

Interpreting the world-leading level of corruption in Somalia, located on the border of the Gulf of Aden and the Indian Ocean, usually begins with an examination of the absence of conditions and forces that might be able to deal with corruption: a strong government, a free press, and a peaceful population. The Iranian government and Somali have none of these, but they are characterized by other elements that promote disarray. It is a conflict-ridden, war-torn country ruled by disparate groups that plunder each other. Clans, warlords, merchants, and religious sects each field their own military forces. Iran and expatriate Somalis pour money into Somalia to support insurgency and unrest and the country has gained international notoriety for acts of maritime piracy. Sparse African Union troops offer some semblance of oversight in Somalia. The state of life in Mogadishu, Somalia's capital, is captured in a media paragraph following a bombing attack by a rebel group in October 2011 that targeted students waiting for exam results:

> Witnesses reported horrific scenes of burning bodies, twisted in agony, strewn across the streets. African Union officials said that at least 50 people had been killed and possibly as many as 100. Floods of wounded people stumbled into the city's dilapidated hospitals, which were already full of victims of the country's widening famine.
>
> (Ibrahim and Gettleman 2011; see also Marchal 2011)

The hospital is described as having cracked windows, broken ceiling fans, and hallways smelling of human excrement. Diesel oil is the only thing the volunteer nurses have to wash the floors. Days later it was learned that one of the suicide bombers was Abdisalan Hussein Ali. He had been born in Somalia and had migrated to Seattle via a Kenya refugee camp in 2000. The family, including 12 children, then moved to Minneapolis. The suicide bomber had been a pre-med student at the University of Minnesota before he determined that he ought to sacrifice his life on behalf of the radical Muslim cause in the country of his birth.

Somalia's dismal position on the CPI can be taken to demonstrate that disorder and conflict typically set the stage for corruption and a range of white-collar crime. What can be done? In an inquiry into elite corruption in Uganda, an African country very low on the CPI, Tangri and Mwenda note, among other things, that it is estimated that "ghosts" may constitute up to one-third of the alleged soldiers serving in the military, and that payments to these non-existent persons cost the government approximately $25 million each year (Tangri and Mwenda 2006: 108). A report observes that the solution in Uganda "cannot be separated from the nature of the polity" and that the problem is part of "that polity's interaction with international donors" (ibid.: 105).

The Great Economic Meltdown

The Great Economic Meltdown that began to plague the world late in the first decade of the new century is generally tied to unconscionable white-collar crime in the sale of homes in the United States through the use of so-called subprime loans. House prices had risen during the previous years at astonishing rates. Salespersons told prospective buyers that they need no longer comply with the traditional standard of 10 percent down and a 30-year mortgage, nor did they have to meet the typical requirements to obtain a house loan. The tantalizing lure was

that they could afford a house that normally was well beyond their financial reach because its value would increase so dramatically and so rapidly that they could refinance it and meet the payment requirements by cashing in on the increased value of their property.

The white-collar crime initially was involved in knowingly faking the income of buyers, offering tantalizing low down payments, and peddling mortgages that carried stunningly low interest rates that (though the buyers often were not aware of this) would increase many-fold after three, five, or seven years to a point where the homeowner could in no way afford to meet the escalated monthly charge.

The situation was compounded when banks in the United States that had put up the money to back such dangerous loans unloaded them as rapidly as possible onto Wall Street investment firms who often wrapped them into huge packages and marketed them to foreign financial companies. The overseas marks (to employ the term con men use to designate gullible and greedy suckers) jumped at what on the surface appeared to be lucrative deals. They were beguiled by the fact that the rating agencies in the United States had given top scores to the funds and that the regulatory agencies, such as the Securities and Exchange Commission, had seen nothing amiss. Neither had the auditing firms that examined the books of companies such as Bear Stearns and the American International Group (AIG) (Geis 2012), companies that soon would almost go belly up until the government used billions of taxpayer funds to rescue them.

Rather than detailing the economic fallout in a variety of nations, we now scrutinize developments in Iceland, an isolated and relatively insignificant island of 300,000 people that became the poster child of the global trajectory of the meltdown. The country's dramatic financial resurrection indicates the importance in the arena of global white-collar crime for attention to be paid by all nations to experiences elsewhere that offer models that can be adopted in general and can be tailored to special local circumstances.

Between 2003 and 2008, the price of stocks in Iceland's largest companies increased by 700 percent, while the assets of the country's three largest banks grew eightfold. Those who cashed in on the bubble sought to diversify their portfolios by investing in foreign stocks. They would come to realize that there was no safe haven when economies crashed like pins in a bowling alley, one being knocked down and taking others with it (Aliber and Zoega 2011). William Black, a lawyer with a PhD in criminology, who had prosecuted Charles Keating for his role in the savings and loan scandals (Binstein and Bowden 1993), gave a series of lectures in Iceland in which, among other things, he commended the government for its thorough inquiry into the country's financial debacle, but castigated its report for its weasel-like unwillingness to level criminal accusations against the main malefactors: rather the report, Black indicated, tended to find "bad luck" to be a prominent cause of the severe meltdown. In a talk entitled "The best way to rob an Icelandic bank is to own one," Black listed four lethal conditions that led to the collapse of the country's financial system: (1) its economy had been growing like crazy; (2) bank loans were providing extraordinary temporary profits while ignoring self-evident risks. The profits resulted in huge bonuses for bank officials; (3) the banks resorted to extraordinary leverage tactics, using toxic assets to justify further risk-ridden investment; and (4) the banks failed to make certain that they had enough reserves to carry them through a severe downturn in the worldwide economies (Black 2010). Roger Boyes (2009), a staff writer for the *Financial Times*, reports that Iceland's financial world was brought to its knees because of avarice, incompetence, lying, and revenge-seeking, all behaviors typical of white-collar crime.

Iceland's recovery from the meltdown involved a sizeable loan from the International Monetary Fund which offered a one-year moratorium before imperative remedial measures had to be taken. Iceland devalued its currency, a move that aided sales of its major exports, aluminum and fish. Its left-wing government raised taxes but refused to cut social welfare programs. It

allowed its three major banks to go into bankruptcy and placed them under appointed administrators. Icelanders who had deposits in the banks were given equity shares in their ownership, but some 400,000 foreign depositors – mostly Dutch and British – had to rely on their own governments to bail them out. Homeowners whose mortgages were more than 110 percent of the market value of their residences were excused as much as half of the amount of their outstanding loans. Foreigners who held what were called "glacier bonds" were not allowed to sell them. These bonds, which involved a very large amount of money, had been purchased by persons living outside Iceland that were redeemable in Icelandic krona. In addition, restrictions were placed on money leaving the country. Two hundred persons were listed for criminal investigation, including the former prime minister, and early on a handful were convicted and sentenced to prison terms (Legrain 2010).

A brief and pungent summary of implications to be drawn from the Iceland experiment and the worldwide meltdown has been offered by Nobel Prize-winning economist Paul Krugman. He believes that the villain was unfettered capitalism – the uninhibited and unchecked raw pursuit of wealth:

> Recent events were a devastating refutation of free-market orthodoxy that has ruled American politics these last three decades. Above all, the long crusade against financial regulation, the successful effort to unravel the prudential rules established after the great Depression on the grounds that they were unnecessary ended up demonstrating – at immense cost to the nation – that these rules were necessary after all.
>
> (Krugman 2011: A22)

Future research

Global white-collar crime offers extraordinary challenges for people intent upon carrying out sophisticated research. For one thing, and a very important consideration, to comprehend the fundamental issues involved often requires expertise or at least workable familiarity with a considerable range of subject areas: criminology, foreign affairs, economics, law – criminal, civil, and regulatory – political science, sociology, psychology, and finance. Then there is the matter of language, although English speakers have increasingly gained the advantage of seeing their language dominate the scientific and business worlds.

There also is the problem of access. It is one thing to interview juvenile delinquents on the street or in a penal facility but quite another to penetrate the world of the powerful, who often are protected by a battery of aides and some of the most talented lawyers available. It may be easier to become a member of a terrorist organization than to infiltrate a group engaged in transnational white-collar crime. There is no smoking gun, but usually a paper trail that can be virtually impenetrable or incomprehensible to an outsider.

For researchers several sources of information on global white-collar crime often can prove helpful. First, one or more of the perpetrators can be turned by the authorities to tattle about those most responsible for the crimes in return for lenient treatment for themselves. Second, governments often appoint special committees to investigate the more important offenses or that task may be taken on by a legislative body. These sources can be enormously helpful if the official investigators are diligent and unbiased, two requirements not always present. And, of course, the interviewers often fail to ask the kinds of questions that a criminologist would like to see posed. Another source that can prove profitable is to seek out persons who have retired from a suspect organization and no longer feel inhibited about providing accurate information about what nefarious activities took place while they worked for the company. Researchers

also should take advantage of the opportunities to attend public criminal trials that provide an excellent source of contacts and information.

This said, what kinds of work should have a priority in future research? There remains the need for additional fully-fleshed investigations of particularly heinous global white-collar crime. The results of these reports need to be analyzed to determine what generalizations can be drawn from them as a collectivity. There is a strong need for penetrating interviews with individuals who committed white-collar crimes with global repercussions to obtain their insights – beyond self-serving exculpations – about what went wrong and what might be done to prevent similar things from happening. The need for such work is great; the prospects that it might be carried out seem less promising for academic scholars who might have to forfeit the subject to investigative journalists and those working in think tanks who are not distracted by teaching demands.

International policy implications

The need for uniform and universal transparency in regard to global transactions stands as a top priority for any effort to understand and control global white-collar crime. The United States tends to be a formidable barrier to the development of such regulations. In regard to the UN protocol on children's rights, for example, only the United States and Somalia, strange bedfellows, have failed to ratify the Conventions (Akada *et al.* 2012). Conservative forces in the United States stir fear that a coordinated worldwide effort to foster an effective and fair system of global justice will unduly imperil American citizens who are persuaded, wrongfully, that their justice system is the very best of all possible ways of doing things. Thus, the United States remains aloof from membership in the International Court of Justice (Hagan 2009) and has refused to sign the Kyoto Protocol to take measures to deal with global warming (Victor 2001).

A particularly valuable examination of the economic crisis that includes remedial recommendations has been issued by the Committee on Capital Markets Regulation (CCMR), a 32-member group made up of persons from finance, law, accounting, academia, and representatives of the investment community. The Committee is co-chaired by the Dean of the Columbia University Business School and the chair of the Brookings Institution. In 2009, the group issued a 219-page report on the global economic crisis with suggested remedies. The report maintained that there was no need for further regulatory measures but rather the necessity that those regulations that exist be enforced more rigorously. Critics would find this an arguable proposition, noting, for instance, in classical American jargon that "there oughta be a law" to keep brokers from knowingly seducing investors into funds that they know are toxic, among many other loopholes in the enforcement armament. In regard to the global market, the following observation was offered in the CCMR report:

> The Committee believes that in all areas of reform dealt with in this Report it is essential to have a coordinated international approach . . . The framework for handling failed institutions needs to take into account their multinational structure and clearinghouses and exchanges for derivatives need to handle internationally trade derivatives, which may be subject to different requirements in different countries. Securitized debt markets are global and thus standards for origination and disclosure, as well as the regulation of CRAs [Credit Risk Assessments], require global coordination. Additionally, there obviously needs to be coordination and convergence between US Generally Accepted Accounting Principles and International Reporting Standards as we contemplate a single standard. While the world is not ready for a global regulator, the time has come to insure greater global coordination.
>
> (Hubbard *et al.* 2009: 4)

Neal Shover and Andy Hochstetler have summarized the nature of the difficulties that have arisen as the world becomes more of a global village:

> Global oversight develops in dozens of forms and a complex array of institutions. It relies on criminal prosecution primarily in nations where crimes originate. These nations, however, are reluctant to grant other nations and international bodies the right to define and pursue global oversight on their soils
>
> (2006: 108)

Supplementing this observation is a comment by Michael Gilbert and Steve Russell that international cooperation has tended to focus on war crimes and organized crime syndicates: "All the while avoidable harms (often of equivalent or greater magnitude) by transnational corporations are ignored" (Gilbert and Russell 2002: 233).

In regard to the thalidomide tragedy, it is evident that there should be an international testing center that would operate at the highest level of scientific competence and political neutrality. If this is not feasible, there must be a center that collects information from worldwide sources and avoids the delays, dangers, and death that marked the thalidomide calamities.

Even when nations agree on remedial global measures the results often prove to be far from panaceas. Rulings of the World Trade Organization (WTO), for instance, often seem to be more in the nature of a symbolic verbal exercise than an effective judgment. It has been observed that "a problem with the implementation of WTO dispute settlement recommendations and rules is a lack of guidance over what exactly a losing party must do to comply. The tendency has been for the losing party to take minimal steps and to declare itself in full conformity. The winning party often disagrees" (Matsushita *et al.* 2004: 30).

Conclusion

The global reach of white-collar crime is well indicated by the fact that the ten largest law firms in the world locate more than half of their attorneys at sites other than their home country (Terry 2004: 539). Problems associated with coming to grips with the precise details of global white-collar crime, some of them noted above, were enunciated by a news report on the Dexia scandal that involved a worldwide banking system with headquarters in Brussels. The abysmal maladministration of the bank resulted in a Belgian government takeover (van der Woestyne and van Caloen 2009). The Dexia default induced two writers to offer the following analysis:

> Given the global and interconnected nature of the financial system, institutions around the world have . . . indirect risks to European debt problems. But the scope of these ties is not fully known, because the exposure is hidden by complex transactions that do not have to be reported in detail.
>
> (Morgenson and Story 2011: 2)

The need for trust and goodwill among nations remains paramount if there is to be an effective attack on global white-collar crime. A strong first step would be to convene a high-level conclave that would hammer out definitions of global white-collar crime that would be applicable to all countries and thereby could both enunciate and coordinate what will constitute an understanding of the nature of transnational white-collar crime and what needs to be done about it.

Discussion questions

1   What, if any, similarities exist in the disparate types of cases presented in the chapter which may offer common themes among global white-collar crimes and criminals?
2   What difficulties do law enforcement agencies face when investigating transnational white-collar crime? Explain how jurisdictional issues may hinder our ability to curb such schemes?
3   Why do many experts believe that bribery cases involving public officials are more likely to undermine public trust compared to other types of white-collar crime?
4   What are the primary lessons to be learned from the Ivar Kreuger scandal?
5   Ultimately, who is responsible for the harm caused to women and children by a dangerous drug such as thalidomide? Who shares the most responsibility for the injuries: the pharmaceutical company, the drug developer, marketing companies, or doctors?

Websites

ABC-CLIO White-Collar and Corporate Crime: A Documentary and Reference Guide: http://www.abc-clio.com/product.aspx?isbn=9780313380549.
Marquet International's White Collar Rogues Gallery: http://www.marquetinternational.com/rogues.htm.
Forbes: The World's Most Wanted White-Collar Fugitives: http://www.forbes.com/2008/08/27/legal-crime-fbi-biz-cz_nv_0827fugitives.html.
Frontline PBS Black Money: http://www.pbs.org/wgbh/pages/frontline/blackmoney/view/.

References

Ahamed, L. (2009) *Lords of Finance: The Bankers Who Broke the World*, New York: Penguin Press.
Akada, M., Pontell, H. N. and Geis, G. (2012) "The Failure of the United States to Ratify the UN Convention on the Rights of Children," *Whittier Journal of Child and Family Advocacy*, forthcoming.
Aliber, R. Z. and Zoega, G. (eds.) (2011) *Preludes to the Icelandic Financial Crisis*, Basingstoke: Palgrave Macmillan.
Allen, T. (1932) *Ivar Kreuger, Match King: Croesus and Crook*, London: J. Long.
Babb, J. (2000) *Tanaka: The Making of Modern Japan*, New York: Longman.
Baines, H. (2001) *The Nigerian Scam Masters: An Exposé of a Modern International Gang*, Huntington, NY: Kroshka Books.
Baker, Jr., J. S. (2004) "Reforming Corporations Through Federal Prosecution," *Cornell Law Review*, 89: 310–355.
Bank of England Board of Banking Supervision (1995) *Report of the Inquiry into the Circumstances of the Collapse of Barings*, London: Her Majesty's Stationery Office.
Bessel, R. (2009) *Germany 1945: From War to Peace*, New York: HarperCollins.
Binstein, M. and Bowden, C. (1993) *Trust Me: Charles Keating and the Missing Billions*, New York: Random House.
Black, W. (2010) "The Best Way to Rob an Icelandic Bank Is to Own One," *The Exile*, 6 May, pp. 1–4.
Boulton, D. (1967) *The Lockheed Papers*, London: Jonathan Cape.
Boyes, R. (2009) *Meltdown Iceland: How the Global Financial Crisis Bankrupted an Entire Country*, London: Bloomsbury.
Brown, A. D. (2005) "Making Sense of the Collapse of Barings Bank," *Human Relations*, 28: 1579–1604.
Brown, S. A. and Chilton, B. S. (2007) *Foreign Corrupt Practices Act*, Washington, DC: National Legal Center for the Public Interest.
Caldwell, R. G. (1958) "A Reexamination of the Concept of White-Collar Crime," *Federal Probation*, 22: 30–36.
Clinard, M. B., Yeager, P. C. and Clinard, R. B. (1980) *Corporate Crime*, New York: Free Press.
Creaton, S. and O'Cleary, C. (2002) *Panic at the Bank: How John Rusnak Lost AIB $691,000,000*, Dublin: Gill and Macmillan.
Drummond, H. (2008) *The Dynamics of Organizational Collapse: The Case of Barings Bank*, New York: Routledge.

Edelhertz, H. (1970) *The Nature, Impact, and Prosecution of White-Collar Crime*, Washington, DC: National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, Department of Justice.

Eichenwald, K. (2000) *The Informant: A True Story*, New York: Broadway Books.

Ervastii, H., Fridberg, T., Hjem, M., Kangas, O. and Ringdal, K. (eds.) (2008) *Nordic Social Attitudes in a European Perspective*, Cheltenham: Edward Elgar.

Everett, S., Lehmann, A. and Steil, B. (2000) *Antitrust Goes Global: What Future for Transatlantic Cooperation?* London: Royal Institute of International Affairs.

Fay, S. (1997) *The Collapse of Barings*, New York: W. W. Norton.

Fine, R. A. (1972) *Great Drug Deception: The Shocking Story of MER/29 and the Folks who Gave You Thalidomide*, New York: Stein and Day.

Fisher, L. W. (1980) "The Lockheed Affair: A Phenomenon of Japanese Politics," PhD dissertation, Department of Political Science, University of Colorado, Boulder.

Friedman, M. and Schwartz, A. J. (2008) *The Great Contraction, 1928–1933*, Princeton, NJ: Princeton University Press.

Galbraith, J. K. (1960) "Introduction," in R. Shaplen, *Kreuger, Genius and Swindler*, New York: Knopf.

Gapper, J. and Denton, N. (1997) *All That Glitters: The Fall of Barings*, New York: Penguin Books.

Garnsey, P. (1988) *Famine and Food Supply in the Graeco-Roman World: Responses to Risk and Crisis*, Cambridge: Cambridge University Press.

Garraty, J. A. (1987) *Great Depression: An Inquiry into the Cause, Course, and, Consequences of the Worldwide Depression of the Nineteen Thirties, as Seen by Contemporaries and in the Light of History*, New York: Anchor Press/Doubleday.

Garside, W. R. (ed.) (1995) *Capitalism in Crisis: International Responses to the Great Depression*, New York: St. Martin's Press.

Geis, G. (2012) "Unaccountable External Auditors, and Their Roles in the Economic Meltdown," in S. Wells and S. Handelman (eds.) *How They Got Away with It: White-Collar Crime and the Financial Meltdown*, New York: Columbia University Press.

Gerber, J., Jensen, E. L. and Kuhena, J. L. (2007) *An Encyclopedia of White-Collar Crime*, Westport, CT: Greenwood.

Gilbert, M. J. and Russell, S. (2002) "Globalization of Criminal Justice in the Corporate Context," *Crime, Law and Social Change*, 38: 211–238.

Green, S. P. (2006) *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime*, New York: Oxford University Press.

Haas, M. (1989) *George W. Bush, War Criminal? The Bush Administration's Liability for 269 War Crimes*, Westport, CT: Praeger.

Hagan, J. (2003) *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, Chicago: University of Chicago Press.

Hall, M. J. B. (1998) *Financial Reform in Japan: Causes and Consequences*, Cheltenham: Edward Elgar.

Hubbard, R. G., Thornton, J. L. and Scott, H. (2009) *The Global Financial Crisis: A Plan for Regulatory Reform*, Cambridge, MA: Committee on Capital Markets Regulation.

Hunt, L. and Heinrich, K. (1996) *Barings Lost: Nick Leeson and the Collapse of Barings Plc*, Singapore: Butterworth–Heinemann Asia.

Hunziker, S. and Kaminura, I. (1996) *Kakuei Tanaka: A Political Biography of Modern Japan*, Singapore: Times Edition.

Ibrahim, M. and Gettleman, J. (2011) "Truck Bomb Kills Dozens in Somalia's Capital as Signs Return of Militant Group," *New York Times*, October 5, A9.

Instefjord, N., Jackson, P., Perraudin, W., Pagona, M. and Röell, A. (1998) "Securities Fraud," *Economic Policy*, 13: 586–623.

Jackson, J. (1985) *The Politics of Depression in France, 1932–1936*, New York: Cambridge University Press.

Johnson D. T. and Leo, R. A. (1993) "The Yale White-Collar Crime Project: A Review and Critique," *Law and Social Inquiry*, 18: 63–99.

Kahan, B. D. (ed.) (1987) *Cyclosporine*, Orlando, FL: Grune & Stratton.

Koebele, M. (2009) *Corporate Responsibility under the Alien Tort Statute: Enforcement of International Law through US Tort Law*, Boston: Martinus Nijhoff.

Kouzmin, A. and Haynes, A. (eds.) (1999) *Essays in Economic Globalization, Transnational Policies, and Vulnerability,* Washington, DC: IOS Press.

Krugman, P. (2011) "Rabbit Hole Economics," *New York Times*, October 13, A22.

Leeson, N. L. and Whitely, E. (1996) *Rogue Trader: How I Brought Down Barings Bank and Shook the Financial World*, Boston: Little, Brown.

Legrain, P. (2010) *Aftershock: Reshaping the World Economy After the Crisis*, London: Little, Brown.

Liebl, H. and Liebl, K. (1985) *International Bibliography of Economic Crime/Internationale Bibliographie zur Wirtschaftskriminalität*, Pfaffenweiler, Germany: Centaurus-Verlagsgesellschaft.

Marchal, R. (2011) "Peace Operations and International Crime: The Case of Somalia," in M. Matsushita, T. Schoenbaum and P. C. Mavroidis (eds.) *The World Trade Organization: Law, Practice, and Policy*, Oxford: Oxford University Press.

Mauzy, A. K. and Milne, R. S. (2002) *Singapore Politics Under the People's Action Party*, New York: Routledge.

Milhaupt, C. J. (2001) "Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance," *University of Pennsylvania Law Review*, 149: 2083–2129.

Ministry for Finance (1995) *Barings Futures (Singapore) Pte Ltd: The Report of the Inspectors Appointed by the Minister Of Finance*, Singapore: Author.

Morgenson, G. and Story, L. (2011) "Bank Collapse in Europe Points to Global Challenge," *New York Times*, October 23, 1, 2.

Morris, W. (1967) *North Toward Home*, Boston: Houghton Mifflin.

Naím, M. (2005) *Illicit: How Smugglers, Traffickers, and Copycats Are Hijacking the Global Economy*, New York: Anchor Books.

O'Connor, D. E. (2002) *Demystifying the Global Economy: A Guide for Students*, Westport, CT: Greenwood.

Okonta, I. and Douglas, O. (2003) *Where Vultures Feast: Shell, Human Rights and Oil in the Niger Delta*, San Francisco, CA: Sierra Club Books.

Oliver, C. and Geis, G. (2001) "New Zealand," in D. Chu and G. Newman (eds.) *Crime and Punishment Around the World: Asia/Pacific*, Santa Barbara, CA: ABC-Clio, pp. 327–337.

Partnoy, F. (2010) *The Match King: Ivar Kreuger, the Financial Genius Behind a Century of Wall Street Scandal*, New York: Public Affairs.

Pecora, F. (1939) *Wall Street Under Oath: The Story of Our Modern Money Changers*, New York: Simon & Schuster.

Perino, M. A. (2010) *The Hellhound of Wall Street: How Ferdinand Pecora's Investigation of the Great Crash Forever Changed American Finance*, New York: Penguin Press.

Pontell, H. N. (1984) *A Capacity to Punish: The Ecology of Crime and Punishment*, Bloomington, IN: Indiana University Press.

Posner, R. A. (2009) *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression*, Cambridge, MA: Harvard University Press.

Rawnsley, J. H. (1995) *Total Risk: Nick Leeson and the Fall of the Barings Bank*, New York: Harper Business.

Rice, B. R. and Leo, J. (1994) *Skunk Works: A Personal Memoir of My Years at Lockheed*, Boston: Little, Brown.

Salinger, L. (ed.) (2005) *Encyclopedia of White-Collar & Corporate Crime*, Thousand Oaks, CA: Sage.

Saro-Wiwa, K. (1992) *Genocide in Nigeria: The Ogoni Tragedy*, London: Soros International Publishers.

Satel, S. (ed.) (2008) *When Altruism Isn't Enough: The Case for Compensating Kidney Donors*, Washington, DC: AEI.

Satel, S. (2011) "The Market for Kidneys, Livers and Lungs," *Wall Street Journal:* November 8, A17.

Sellin, J. T. (1938) *Culture, Conflict and Crime*, New York: Social Science Research Council.

Shaplen, R. (1960) *Kreuger, Genius and Swindler*, New York: Knopf.

Shover, N. and Hochstetler, A. (2006) *Choosing White-Collar Crime*, New York: Cambridge University Press.

Sinclair, D. B. (ed.) (2003) *Jewish Biomedical Law: Legal and Extralegal Dimensions*, New York: Oxford University Press.

Smith, D. J. (2008) *A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria*, Princeton, NJ: Princeton University Press.

Stachura, P. D. (ed.) (1986) *Unemployment and the Great Depression in Weimar Germany*, New York: St. Martin's Press.

Steinhardt, R. G. and D'Amato, A. (eds.) (1999) *Alien Torts Claim Act: An Analytical Anthology*, Ardsley, NY: Transnational Publishers.

Stewart, J. B. (2011) *Tangled Webs: How False Statements are Undermining America from Martha Stewart to Bernie Madoff*, New York: Penguin.

Stoneham, W. H. (1932) *The Life and Death of Ivar Kreuger*, Indianapolis, IN: Bobbs-Merrill.

Surhone, L. M., Tennoe, M. T. and Henssonow, S. F. (2011) *Taito Phillip Field*, Saabrucken, Germany: VDM Verlag.

Sutherland, E. H. (1940) "White-Collar Criminality," *American Sociological Review*, 5: 1–12.

Sutherland, E. H. (1945) "Is 'White-Collar Crime' Crime?" *American Sociological Review*, 10: 132–139.

Sutherland, E. H. (1949) *White Collar Crime*, New York: Dryden.

Sutherland, E. H. (1983) *White Collar Crime: The Uncut Version*, New Haven, CT: Yale University Press.

Tangri, R. and Mwenda, A. M. (2006) "Politics, Donors and the Ineffectiveness of Anti-Corruption Institutions in Uganda," *Journal of Modern African Studies*, 44: 101–124.

Tappan, P. W. (1947) "Who Is the Criminal?" *American Sociological Review*, 12: 96–102.

Taussig, H. B. (1962) "A Study of the German Outbreak of Phocomelia: The Thalidomide Syndrome," *Journal of the American Medical Association*, 180: 106–114.

Teff, H. and Munro, C. R. (1976) *Thalidomide: The Legal Aftermath*, Farnborough: Saxon House.

Terry, L. S. (2004) "Global Legal Practice Forum: Foreword," *Penn State International Law Review*, 22: 527–539.

Van die Woestyne, F. and van Caloen, A. (2009) *Fortis, Dexia: Le Séisme*, Brussels, Belgium: Luc Pire.

Victor, D. (2001) *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming*, Princeton, NJ: Princeton University Press.

Watson, C. (2006) "The Organised Crime of Organ Trafficking," Magister Legume thesis, Department of Criminal and Medical Law, University of the Free State, Bloemfontein, South Africa.

Weisburd, D., Wheeler, S., Waring, E. and Bode, N. (1991) *Crimes of the Middle Classes: White-Collar Offenders in the Federal Courts*, New Haven, CT: Yale University Press.

Wheeler, S. (1993) "The Prospects for Large-Scale Collaborative Research: Revisiting the Yale White-Collar Crime Research Program," *Law and Social Inquiry*, 18: 101–113.

Wiwa, K. (2000) *The Shadow of a Saint: A Son's Journey to Understand His Father's Legacy*, New York: Doubleday.

Ziegler, P. (1988) *The Sixth Great Power: A History of One of the Greatest of All Banking Families, the House of Barings, 1762–1929*, New York: Knopf.

Cases cited

United States v. Nippon Paper Industries (1997) 109 F. 3d 1 (1st Circuit).

Wiwa v. Royal Dutch Petroleum (2001) 226 F.3d 88 (2nd Circuit).

Wiwa v. Royal Dutch Petroleum (2004) 392 F. 3d 812 (5th Circuit).

A suitable amount of street crime and a suitable amount of white-collar crime

Inconvenient truths about inequality, crime and criminal justice

Paul Leighton and Jeffrey Reiman

Christie's book, *A Suitable Amount of Crime*, notes that "crime does not exist as a stable entity":

> It is like a sponge. The term can absorb a lot of acts – and people – when external circumstances make that useful. But it can also be brought to reduce its content, whenever suitable for those with a hand on the sponge.
>
> (2004: ix–x)

Acts that can be potentially criminalized are "an unlimited natural resource," although Christie believes that many crimes are genuinely harmful acts that are rightfully defined as crimes (ibid.: 10). The context thus is not moral relativism, but an interest in the volume of acts that become criminalized: "what is the suitable number of officially stigmatized sinners?" And, "is it possible to establish upper, and eventually lower, limits to the amount of punishment that ought to be applied in a modern society?" (ibid.: 101).

The criminalization of drug use is one of many concerns raised in this regard. Oxford's *Crime and Public Policy* notes that there is not moral consensus about whether recreational drug use should be a crime, so "the creation and enforcement of drug laws are seen more as policy decisions rather than as imperatives" (Lynch and Pridemore 2010: 38). The United States chose not just to criminalize recreational drug use but to launch a "war on drugs," which is a substantial source of its prison population. Christie notes that Swedish plans during the 1970s to lower their prison population from 4,000 to 500 were sidetracked when severe punishments became tools in the Swedish war on drugs (2004: 38). Russia seemed to be embracing a drug war as well, so "the lost war against drugs in the West is now dangerously close to being repeated in the East, with predictable results" (ibid.: 110).

The drug wars, in part because of their failure, keep the criminal justice systems of many nations busy with street criminals. Indeed, beyond the drug war, Christie observes that "if I had the urge to construct a situation for the promotion of crime, then I would have shaped

our societies in a form very close to what we find in a great number of modern states" (ibid.: 51). Social and economic policies "encourage unwanted forms of behavior" (ibid.) and again keep the criminal justice systems of many nations busy with lower-class street criminals. The poor, whose behavior has been defined as criminal, become the raw materials of the criminal justice industry (Christie 2000). An increasing number of countries have a prison- or criminal justice-industrial complex, reminiscent of the military-industrial complex that former US President Eisenhower warned about. It is composed of politicians, government bureaucrats, and all the companies who see criminal justice as a lucrative market rather than a burden on taxpayers (Selman and Leighton 2010). With the advent of private prisons – for-profit companies building and/or managing prisons for government – criminals are increasingly "bodies destined for profitable punishment" (quoted in Leighton and Selman 2012).

Thus, we might say that the poor are the object of conspicuous consumption by the criminal justice system. But the wealthy are not consumed. For example, even in the midst of a full-blown drug war in the USA, wealthy college drug dealers are the "anti-targets" of criminal justice agents; they are repelled from entering the system even when they seem to be "deliberately trying to draw attention to themselves or test[ing] social and legal boundaries" (Mohamed and Fritsvold 2010: 11–12). This is not just the "get-out-of-jail-free" card familiar to players of the *Monopoly™* board game, but a "never-go-to-jail-in-the-first-place" card (ibid.: 132). Further, while those with their hand on the criminal justice sponge suck up shoplifters and vandals, they have decided not to pursue those responsible for the global financial crisis of 2008:

> *Nobody goes to jail.* This is the mantra of the financial-crisis era, one that saw virtually every major bank and financial company on Wall Street embroiled in obscene criminal scandals that impoverished millions and collectively destroyed hundreds of billions, in fact, trillions of dollars of the world's wealth – and nobody went to jail.
>
> (Taibbi 2011, emphasis in original)

While the poor are conspicuously consumed by the criminal justice system, one might be tempted to say the wealthy are conspicuously not consumed because it is well known that prisons are full of poor people. But the class bias in consumption is hidden when the criminal law does not translate the many harms done by the wealthy and by corporations into crimes. And, criminal justice data neither captures information on class (to help assess bias when rich and poor commit the same crime), nor does it report on the prevalence and cost of white-collar crime (even based on the current inadequate level of criminalization of these harms).

The question about a suitable amount of crime, criminalization and penal control, thus needs to be answered not in the aggregate for a society, but asked separately: what is a suitable amount of crime in the street, and what is a suitable amount of crime in the suites? Such an analysis is consistent with Christie's criminological consciousness, and he explicitly notes that class is relevant to an evaluation of criminal justice systems. He believes that "penal systems carry deep meanings" (2004: 101) and a clue to read their meaning is

> the question of *the nature of the receivers* of the intended pain, particularly how representative they are of the population in general with regard to age, gender, race, class, etc. An extremely biased prison population might indicate severe defects somewhere in that system.
>
> (2004: 102, emphasis in original)

Christie's concerns warrant further analysis, especially as applied to neglected issues about economic class, which is among the most important sociological variables. So, our project in

this chapter is to start an analysis of the overconsumption of poor people by the criminal justice system, the under-consumption of the rich, and the defects of systems that exhibit such bias. This inquiry is important not just because of the relative neglect of class analysis in criminal justice, but also because many nations have high degrees of economic inequality and "the simple fact is that a criminal justice system cannot be any more just than the society it protects" (Reiman 2001: 17). Further, as Braithwaite (1992: 83) notes, inequality is linked to both the crimes of the poor (by creating unfulfilled needs, either absolute or based on "advertising and dramatization of bourgeois lifestyles") and crimes of the rich (by making them unaccountable and undermining their respect for the dominion (self-determination) of others.

But Christie raises another concern that is not frequently examined: that society is structured to promote street crime – a point Currie also notes in describing America's "pro-crime" policies (1985: 226) – which adds to the consumption of the poor by the criminal justice system. Critical theory and conflict theory generally argue that the function of criminal justice is to control the "dangerous classes," but fail to consider ideological benefits from "crime" being associated with the poor.

Further, while Christie appreciates the role of harm in selecting appropriate conduct of the poor to criminalize, he fails to apply the same analysis to acts of the wealthy, where death, injury and fraud cause real harm but are not criminalized. This largely mirrors the dominant criminological discussion about whether behavior such as drug use and prostitution are "victimless" crimes and thus should be decriminalized, but does not consider that acts of the wealthy also have victims and should be criminalized. Even if the current reality is a global deregulatory race to the bottom, the criminal justice system still should protect people from the worst threats to their lives, health and property, and do so regardless of whether those threats are from the rich or poor. On another level, reflection on harmful conduct and the prohibitions of criminal law is important because crime is defined by a political system. Thus, philosophical reflection on the concept of crime is necessary for criminology to establish its "intellectual independence of the state, which to my mind is equivalent to declaring its status as a social science rather than an agency of social control, as critical rather than servile, as illumination rather than propaganda" (Reiman 2013: 243).

In the first section that follows, "Class, ideology and the failures of criminal justice," we discuss the foundation for this analysis, *The Rich Get Richer and the Poor Get Prison: Ideology, Class and Criminal Justice*, now in its tenth edition (Reiman and Leighton 2013). While the book is a critique of the American criminal justice system, the concerns it raises apply, to varying degrees, to many developed nations. We argue that the criminal justice system was responsible for only a modest amount of the decline in crime in the USA, and question why anti-crime policy does not target a number of sources of crime (like inequality) as well as better fund research-based crime prevention programs. The book also argues that many harmful acts of businesses and corporations should be criminalized because they are done knowingly, recklessly or negligently. Further, it argues that there is class bias in the system when rich and poor commit the same crime. Finally, the book tries to explore how a criminal justice system that neither protects society nor achieves justice is allowed to continue.

The second section, "No wealth of data . . .," provides a brief overview of data about inequality, including how corporate "persons" factor in. It also critiques the state of criminal justice data about both the class of criminal offenders and white-collar crime. The third section, "Research directions that give justice more class," highlights several strategies to highlight inequality and class that do not depend on changing government policy about data collection. The fourth section, "Policy implications of the inconvenient truths about wealth," reviews recommendations about better criminal justice data before elaborating on the link between

inequality and crime. That higher levels of crimes in the suites and crimes on the streets are both linked to higher levels of inequality means that redistribution can reduce all types of crime. The conclusion considers the ideological benefits that accrue to the wealthy and powerful from a system that fails to remedy sources of crime, fails to criminalize harmful acts of the wealthy and that fails to track both class bias and crimes of the wealthy.

Class, ideology and the failures of criminal justice

The Rich Get Richer (Reiman and Leighton 2013) invites the reader to entertain the idea that the goal of the criminal justice system is not to eliminate crime or to achieve justice, but to project to the American public a credible image of the threat of crime as a threat from the poor. To accomplish this, the justice system must engage in a publicly visible struggle against a sizable population of poor criminals. To do that, it must fail to significantly reduce the level of crimes that poor people commit. Crime may, of course, occasionally decline – but largely because of factors other than criminal justice policies, and never to such an extent that street crime ceases to be a spectacle in the public's consciousness.

This upside-down idea of criminal justice originated 40 years ago in one of Reiman's seminars. The class discussed many systemic problems of the system: arbitrariness in sentencing and treatment in prison; deprivation of dignity, physical violence, and the lack of meaningful rehabilitation or vocational training within prison; the inescapability of the "ex-con" stigma, and the lack of legitimate opportunities for the ex-prisoner. The class kept confronting

> [the] irrationality of a society that builds prisons to prevent crime knowing full well that they do not, and one that does not seriously try to rid its prisons and post-release practices of those features that guarantee a high rate of recidivism, the return to crime by prison alumni.
>
> (Reiman and Leighton 2013: 2–3)

Near the end of the semester, Reiman asked students to design a criminal justice system that would maintain a stable and visible "class" of criminals. He describes the response as "electrifying": "when asked to design a system that would maintain and encourage the existence of a stable and visible 'class of criminals,' the students 'constructed' the American criminal justice system!" (ibid.: 3). Obviously crime is a complex social practice, so there will be areas of improvement and occasional effective programs, but they will be the exceptions and not the beginning of a trend. Indeed, four decades after this seminar, the problem is still recognizable to American students, to Christie, and probably to people in many nations.

The Rich Get Richer notes that the criminal justice system was the cause of *some* of America's dramatic decline in crime. A nation that locks up enough people, and grants police greater power to interfere with liberty and privacy, will prevent some crime. But the cost of criminal justice intervention compared to its effect makes it inefficient at best. For all the hundreds of billions of dollars the USA put into incarceration over the last decades, Zimring suggests that a "best guess of the impact" of incarceration on crime rates "would range from 10% of the decline at the low end to 27% of the decline at the high end" (2007: 131, 55). The effect is modest because prisons have criminogenic (crime-producing) qualities that offset the effects of incarceration. Prisons brutalize the individuals in them rather than rehabilitate and reintegrate them; they also harm the community by undermining the formation of families, having negative effects on the children of incarcerated parents, and eroding informal community social control systems.

To the extent that prisons are criminogenic, they are *sources* of crime that society chooses not to fix. This is part of the first failure of criminal justice, which is the failure to fight crime in ways that can meaningfully reduce it. Other sources of crime – like the easy availability of guns – are unique to the USA. But many nations criminalize drugs and favor incarceration over treatment. And, as is most relevant here, many nations have high levels of inequality and social exclusion that are part of the normal operations of society, not a temporary or abnormal feature (Mooney 2008).

Because policy does not seek to change sources of crime and allows criminogenic environments and practices to persist, it is appropriate to ask readers to look at criminal justice "through the looking glass." This means reversing expectations about criminal justice and inquiring about the benefits of the current system. We call this way of looking at criminal justice policy the *Pyrrhic defeat* theory. A "Pyrrhic victory" is a military victory purchased at such a cost in troops and treasure that it amounts to a defeat. The Pyrrhic defeat theory argues that the failure of the criminal justice system yields such benefits to those in positions of power that it amounts to a victory.

The Pyrrhic defeat theory draws on Erikson's (1966) *Wayward Puritans*, which builds on Durkheim, who "suggested that crime (and by extension other forms of deviation) may actually perform a needed service to society by drawing people together in a common posture of anger and indignation" (quoted in Reiman and Leighton 2013: 43). If deviance and crime promote social solidarity, Erikson wondered whether

> [we can] then assume that [social institutions] are organized in such a way as to promote this resource? Can we assume, in other words, that forces operate in the social structure to recruit offenders and to commit them to long periods of service in the deviant ranks?
>
> (ibid.)

He answers in the affirmative and notes that

> prisons have done a conspicuously poor job of reforming the convicts placed in their custody; but the very consistency of this failure may have a peculiar logic of its own. Perhaps we find it difficult to change the worst of our penal practices because we expect the prison to harden the inmate's commitment to deviant forms of behavior and draw him more deeply into the deviant ranks.
>
> (ibid.)

Both Durkheim and Erikson endorse the general proposition that the failure to eliminate deviance promotes social solidarity, and then jump to a specific conclusion: that the form this failure takes in a particular society is explained by the contribution it makes to promoting consensus on shared beliefs and thus feelings of social solidarity. This jump leaves out the important question of how a society forms its particular consensus around one set of shared beliefs (say, fraud by financial institutions) rather than another (say, drug use). Durkheim and Erikson imply that a consensus already exists and social institutions reflect beliefs already in people's heads. But consensus is created, not just reflected, by social institutions – and the failure to stamp out deviance creates a very particular value-laden consensus. The Pyrrhic defeat theory reveals how the failure of criminal justice works to create and reinforce a specific set of beliefs

> about what is dangerous and what is not, and about who is a threat and who is not. This does not merely shore up general feelings of social solidarity; it allows those feelings to be

attached to a social order characterized by striking disparities of wealth, power, and privilege, and by considerable injustice.

<div align="right">(Reiman and Leighton 2013: 49)</div>

This analysis has some similarities with Foucault's work, who also suggests that the failure of prisons serves a function for society. *Discipline and Punish* notes that complaints about the failure of prisons to prevent crime and their tendency to promote recidivism have accompanied the prison throughout its history – so much so that Foucault asks, "Is not the supposed failure part of the functioning of the prison?" (1977: 271). The prison "has succeeded extremely well . . . in producing delinquents, in an apparently marginal, but in fact centrally supervised milieu; in producing the delinquent as a pathologized subject" (ibid.: 277). That is, lawbreakers are transformed into a delinquent in need of correction and treatment, which in turn licenses a permanent policing of the poor "dangerous class." Foucault suggests that the new prison regime was a response to a "new threat" posed by peasants and workers against the "new system of the legal exploitation of labour" (ibid.: 274), by which he means capitalism. This is a class-based explanation of the new prison regime, in which criminality gets identified "almost exclusively" with "the bottom rank of the social order" (ibid.: 275).

In the next section, we note how social theory has become "de-classed," and this phenomenon applies to Foucault's larger theory of modern society – how prison spreads out into a "carceral archipelago" and becomes a whole system of institutions and practices (including disciplines such as psychology and medicine) aimed at "normalization" (ibid.: 296–297). Power in the form of surveillance and self-discipline is everywhere, exercised by everyone on him or herself and on everyone else. But the class-based analysis of power about the origins of the prison system vanishes and Foucault mystifies the exercise of power because "rather than operating along a class axis that might be eliminated, and to serve interests that might be identified and critiqued, power now seems its own goal, a universal fact of modern life" (Reiman and Leighton 2013: 50). Also absent from Foucault's analysis is attention to the difference between those forms of discipline that are necessary for the freedom of each to coexist peacefully with the freedom of the rest and those forms of discipline that simply serve the interests of the rich and powerful.

The second failure of the criminal justice system discussed in *The Rich Get Richer* is to adequately criminalize harms done by the wealthy and thus protect people from serious threats to their lives, health and property. This failure to protect people from the harmful acts of the rich also helps to shape the ideological message that it is (only) the poor who commit crimes and thus should be the focus of criminal justice control. As Quinney argues, crime has a "social reality" rather than an objective reality because crime is "created" by decisions of lawmakers, police, prosecutors, judges and juries. But as Christie notes, rape and murder are acts appropriately called crimes, so the question is whether the label of crime is applied appropriately. We argue that

> the label is applied appropriately when it is used to identify all, or at least the worst, acts that are harmful to society. The label is applied inappropriately when it is attached to harmless acts or when it is not attached to seriously harmful intentional acts.

<div align="right">(Reiman and Leighton 2013: 74)</div>

Calling crime created points to human actors rather than objective dangers as determining the shape that the reality of crime takes in our society. If the label "crime" is applied consistently to the most dangerous or harmful acts, then it is misleading to highlight the role of human decision-makers in creating reality because "crime" mirrors a reality that already exists. On the

other hand, if the label is not applied appropriately, then criminal law is more like a carnival mirror that throws back a distorted image. The image cast back is false because

> large becomes small, and small large; grave becomes minor, and minor grave. Like a carnival mirror, although nothing is reflected that does not exist in the world, the image is more a creation of the mirror [i.e., the legislators and criminal justice system] than a picture of the world.
>
> (ibid.: 72)

Because our normal intuition about which acts should be crimes is itself shaped by the criminal law,

> criminology must look at crime while staying open to the idea that the legal definitions and, just as crucially, all the righteous beliefs that normally surround the legal enterprise are less than the whole truth, and perhaps even misleading or ideological.
>
> (Reiman 2013: 247)

Rather than having its central concept – crime – defined by the state, criminology must "seek its own understanding of what crime is" (ibid.) through philosophical reflection about harm and "a moral theory about what human beings owe to their fellows in the way of conduct" (ibid.: 248).

The Rich Get Richer follows up this concern by imagining a conversation with a Defender of the Present Legal Order about the limitations of what is currently defined as crime and the model of interpersonal victimization behind it. While a full review of that argument is beyond the scope of this chapter, we should emphasize that the failure to properly criminalize the harmful acts of the wealthy and corporations do not just make "crime" look like the activity of the poor. More importantly, the failure to criminalize knowing, reckless and negligent acts of corporations means that the criminal justice system fails to protect people from certain losses of life and property, as well as violations of their bodily autonomy. The regulatory system has an important role in trying to prevent these harms, but the criminal law and criminal justice system are necessary to punish and deter serious harm.

The third failure discussed by *The Rich Get Richer* is the failure to remedy class bias in the processing of those who violate the existing criminal law. At each step, from arresting to sentencing, the likelihood of being ignored, released or treated lightly by the system is greater for the wealthy than poor. The US government does not collect data that would verify this claim, and over successive editions of *The Rich Get Richer* the number of studies on class has declined markedly. Nor does the government publish data about the cost and prevalence of white-collar and corporate crime. As we show below, the crime reports of other developed countries do not do this either, with a few minor and woefully incomplete exceptions. First, though, we review the distributions of wealth in several developed nations to remind readers of the significant amount of inequality and the significance of class, which highlights how "the general marginalization of class in much of the social sciences literature is astonishing" (Mooney 2008: 68).

No wealth of data . . .

Mooney notes that while "class remains a primary determinant of social life," most public "discourses about modern society have been largely de-classed" (2008: 68). The neglect of class occurs in a context where "the scale of this inequality is almost beyond comprehension, perhaps

not surprisingly as much of it remains hidden from view" (ibid.: 64). In contrast, this section provides an overview of the key concepts used to examine inequality, which usually exclude corporations. The second part of this section reviews the deplorable state of government-published data on class related to criminal offending.

No wealth of data about wealth

Class is less frequently analyzed than race or gender, but it provides an important view of economic inequality and thus social justice. While class can be conceptualized in different ways (Barak *et al.* 2010: 73), we believe primary attention should be placed on income and wealth, because they allow a clear view of inequality in the distribution of economic power and resources. Income is the most straightforward indicator of class. It represents sources of individual revenue such as salary, interest, and the type of items that should be reported on income tax forms. By contrast, wealth is about assets like bank accounts, retirement accounts, houses, cars, and the ownership of stocks, bonds, and businesses; it also takes into account debts such as car loans, student loans, mortgages, and credit card balances. Wealth is what we accumulate over our lives and is about economic security and power. While income is unequally distributed, wealth is more unequal and this inequality is more important.

In the USA, data about household wealth comes from the Survey of Consumer Finances that is completed every three years. The results are reported by staff of the Federal Reserve, the semi-independent US central bank. The latest survey is from 2010 and the main report does not include data about the share of wealth held by certain percentile groups (Bricker *et al.* 2012) – the data that provide direct insight into inequality by revealing the share of wealth controlled by the richest 1 percent, 10 percent, etc. At this point in 2012, the latest available official data is from a 2007 working paper, which reveals that the bottom 50 percent in the USA owned 2.5 percent of the wealth while the top 1 percent owned 33.8 percent of the wealth (Kennickell 2009: 35). Such data is not available in a readily accessible form from the government, such as on the Department of Census website or in the widely used *Statistical Abstract of the United States*.

The United Kingdom publishes statistics on wealth on the website of Her Majesty's Revenue and Customs, which has a page for the "Distribution of Personal Wealth." The data are based on certain identified estates – those requiring a grant of representation to appoint an executor or transfer the estate to probate – and subjected to statistical procedures to make them more representative (see generally HMRC 2011). The data is reported in terms of ownership by decile, in contrast to the USA, where the poor have so little wealth that the ownership of the bottom five deciles is reported in aggregate, and where the rich have so much that the top decile is broken down into three categories (90th–95th percentile, 95th–99th and 99th–100th). Combining data for each country into common categories produces the results in Table 14.1.

Table 14.1 Share of net wealth owned by percentile groups in the USA and the UK, 2007

USA (share owned by percentile group)	Percentile group	UK (share owned by percentile group)
2.5	Bottom 50	13
26.0	50 to 90	42
71.5	Top 10	44

Source: Calculated from Kennickell (2009: 35) and HMRC (2011: Table 13.8). UK numbers are based on data from 2005 to 2007.

The USA exhibits the highest degree inequality among the developed nations, a situation made worse by the lack of national health care and some of the social supports that exist in European and the Scandinavian countries. Two economists from the US Federal Reserve note that the lowest levels of inequality "are found in, among others, Australia, Italy, Japan, and Sweden, and intermediate values in Canada, France, and the United Kingdom" (Cagetti and De Nardi 2008: 291). Table 14.2 provides data for (low inequality) Australia and (intermediate inequality) Canada. The report on wealth in Australia is notable for being relatively easy to read, with a section for definitions and the data on share of wealth by percentile group presented early in the report (Australian Bureau of Statistics 2011).

Whether or not law engages in the legal fiction that corporations are "persons," corporations are key players in people's lives as employers, community members, and providers of necessary goods and services. Corporations need to be included in the analysis of economic resources in order to have a full understanding of how inequality relates to crime, justice and equality under a rule of law. The intense concentration of wealth in corporations generates considerable political power, makes accountability increasingly difficult, and increases inequality in a way that is largely invisible to criminological theory.

Using available data on corporate assets and liabilities results in numbers that are not comparable to household wealth, the best comparison is between household income and corporate revenue. In 2010, in the USA, the median *household* income was $49,445 (DeNavas-Walt *et al.* 2011: 5). The smallest company in the Fortune 500 (Seaboard) in 2010 had revenue of $4.3 billion (*Fortune* 2011). If the median household income is represented by the median height in the US, 5'7", then Seaboard would be more than 90 miles tall. The biggest company in the Fortune 500 (Wal–Mart) has revenue of $421.8 billion – which would be over 9,000 miles tall.

Another way to problematize the size of corporate personhood is to compare the revenue of a corporation against the gross domestic product (GDP) of a country. (GDP is a measure of the value of all goods and services produced by a country.) This process results in a list of the largest economies in the world and is presented in Table 14.3. That 34 corporations are in the top 100 largest economies highlights some of the problems that governments can have holding big corporations accountable. Corporations can effectively dominate the social control apparatus of many nations – including many developed nations (Alvesalo *et al.* 2006). Given that corporations hold massive economic resources, it would be surprising if there were no class-based dynamic to Foucault's analysis of surveillance and disciplinary power.

No wealth of data about class and criminal justice

Official government data is important in shaping the perception of the "crime problem" by news media, the public, and policy-makers, not to mention criminology books and academic

Table 14.2 Share of net worth by quintile, Canada and Australia

Australia 2009–10		Canada 2005
0.9	Lowest quintile (bottom 20%)	0.1
5.4	Second quintile	2.3
11.9	Third quintile	8.4
20.0	Fourth quintile	20.2
61.8	Highest quintile (top 20%)	69.2

Source: Statistics Canada (2005: 9) and Australian Bureau of Statistics (2011: 31)

Table 14.3 World's largest economies GDP and Fortune 500 revenue, 2010

Overall rank	Country rank	Company rank	Country/Company	GDP/Revenue (in billions of US$)
1	1		United States	15,064.8
2	2		China	6,988.5
3	3		Japan	5,855.4
7	7		United Kingdom	2,481.0
11	11		Canada	1,758.7
15	15		Australia	1,507.4
21	21		Saudi Arabia	560.3
29	29		South Africa	422.0
30		1	Wal-Mart Stores	421.8
31	30		United Arab Emirates	358.1
32		2	Exxon Mobil	354.6
50	48		Pakistan	204.1
51		3	Chevron	196.3
52	49		Romania	185.3
53		4	ConocoPhillips	184.9
57	53		Kuwait	171.1
61		5	Fannie Mae	153.8
62		6	General Electric	151.6
63	57		Hungary	147.9
64		7	Berkshire Hathaway	136.1
65		8	General Motors	135.6
66		9	Bank of America Corp.	134.2
67		10	Ford Motor	128.9
68		11	Hewlett-Packard	126.0
69		12	AT&T	124.6
70	58		Vietnam	121.6
71		13	J.P. Morgan Chase & Co.	115.5
72	59		Bangladesh	115.0
73		14	Citigroup	111.1
75	60		Iraq	108.6
76		16	Verizon Communications	106.5
77		17	AIG	104.4
78	61		Morocco	101.8
79		18	IBM	99.8
82		20	Freddie Mac	98.4
83	63		Slovak Republic	97.2
84		21	CVS Caremark	96.4
85		22	United Health Group	94.2
86		23	Wells Fargo	93.2
89		26	Procter & Gamble	79.7
91		28	Costco Wholesale	77.9
92	64		Azerbaijan	68.5
93		29	Marathon Oil	68.4
94		30	Home Depot	68.0
95		31	Pfizer	67.8
96		32	Walgreen	67.4
97		33	Target	67.4
100	66		Ecuador	65.3
101		35	Apple	65.2

Source: Fortune 500 from http://money.cnn.com/magazines/fortune/fortune500/2011/full_list International Monetary Fund, World Economic Outlook Database, September 2011. Gross domestic product is expressed in current (2011) US dollars. http://www.imf.org/external/pubs/ft/weo/2011/02/weodata/index.aspx.

research. To the extent that government data about crime is "de-classed," then readers of that data will not develop a consciousness about the relationships between class, criminal behavior and social control. Our aim, then, is to explore two issues related to class and criminal justice data. First, to what extent do nations provide data on class, income or wealth, as they do with gender and race? Government data on gender and race do not answer all questions about bias in criminal justice processing, but their existence reminds people that the variables are important and facilitates accountability by allowing researchers to start probing problematic decision points to help uncover injustice. Second, nations have one or two regular seminal reports on crime and victimization, and to what extent do those contain reporting on white-collar and corporate crime?

Developed nations share a commitment to a rule of law that includes equality before the law, so similar cases should not have different outcomes merely because one defendant is poor and another is rich. While nations that (rightly or wrongly) believe themselves to be homo-geneous may not publish criminal justice statistics about race or ethnicity, developed nations have significant levels of inequality (as reviewed earlier). To ensure that the criminal justice system does not reflect and recreate excessive levels of inequality, governments should publish data about the class of criminal offenders and their movement through – or their removal from – the criminal justice system. Without data, accountability for class bias becomes substantially more challenging and there is a risk that criminal justice becomes "de-classed" at a time when it is providing law and order for a morally unjust economic system.

Developed nations have a victimization survey, but it is not well suited to identifying the income or wealth level of perpetrators, so our focus will be on publications reporting crimes known to the police. We do note, however, that some developed countries are willing to ask victims about their level of income, suggesting an awareness that class is important to under-standing and responding to victimization. But even those nations do not ask offenders the same question.

Because the USA has the highest crime rates of any developed nation, it has more detailed reporting of crime than other developed nations. Both the National Crime Victimization Survey (NCVS) and reports on crimes known to the police (Federal Bureau of Investigation 2011) do include important information on gender and race/ethnicity, but the NCVS has only one table about the income of victims. Until 2004, the victimization survey reported on violent and property victimizations by income, but only the data on property crime victimization remains (Barak *et al.* 2010: 161–162). The most likely reason for the disappearance of this data is budget cuts that have reduced the sample size and thus made estimates of violent crime unstable because they occur less frequently than property crime. Still, officials made a conscious decision that retaining this limited data about class was not important enough to justify the expense. Developed nations have the resources, but choose not to collect data about the inconvenient truth of class bias, which leads to larger discussions about the inconvenient truth of inequality.

Australia reports on adult detainees' education level (Australian Institute of Criminology 2012a: 85) and *source of income* (full- or part-time job, welfare, friends/family, savings, sex work, drug dealing, shoplifting, other crime) (ibid.: 86–7). But there is no data about actual income or assets. The sections on criminal courts and corrections also contain nothing about income or wealth, in contrast with the numerous figures about age and gender. (Indigenous status is occasionally reported in this publication.) Given the detailed, thoughtful and systematic presentation of wealth data in Australia (Australian Bureau of Statistics 2011), it is disappointing that criminal justice data on class is absent.

British crime and victimization data are based on both the Crime Survey for England and Wales (CSEW) and crimes known to the police, neither of which contains data about class,

race or gender. The survey reports on the number of offenses, but not the characteristics of victims or offenders, with the exception of a section on crime experienced by children aged 10–15 (Office for National Statistics 2012a). For some offenses, especially fraud, data is supplemented with other reports, but still do not cover the victim's or offender's race, citizenship, class or gender. The report on crimes known to the police focuses on whether a known crime is "detected" or "cleared-up" by the identification of a suspect, and whether there is a sanction (which can range from a warning to being charged) (Home Office 2012). The tables break down the percentage of outcomes for various crimes and the changes over time. But the data do not allow for an analysis of, say, whether class influences the decisions about which drug offenders get a warning and which are charged.

In Canada, the report on crimes known to police mostly breaks down the level of known offenses by geography (province/territory and city) and by year, with a few tables on the "characteristics of accused persons" containing gender and age (Statistics Canada 2012a). Data from the General Social Survey reports only limited information on the income levels of those experiencing property and violent victimization (Statistics Canada 2010: 22–3, 26), without a similar interest in the income of the offender. The publication *Adult Criminal Court Statistics in Canada* describes the volume of different crimes, age, sex, geography, outcome, and time-to-disposition of the case – but does not provide information on wealth or income (Statistics Canada 2012b).

The second important issue is whether the main reports on crime include crime in the suites as well as crime on the streets. A national report supposedly summarizing "crime" that does not include white-collar and corporate crime sends the message that street crime is "real" crime; it trivializes the serious harm done by the wealthy even as it presents great detail on even the minor wrongdoing of the lower classes. The point is not to have a report on "crime" and a separate one on white-collar and corporate crime, but to integrate the violations of law by rich and poor into a report that is a useful tool because it presents comprehensive information about criminal harms and the threats citizens face.

The NCVS in the USA does not have any questions about white-collar crime, even though the National White Collar Crime Center completed large-scale surveys in 1999 and 2005 – and found that half of the households were aware of experiencing a white-collar victimization (Friedrichs 2010: 47). The Federal Bureau of Investigation (FBI) publishes data about offenses known to local police departments, which do not tend to be involved with white-collar crimes. The section on property crime includes the offenses of burglary, larceny-theft, motor vehicle theft, and arson. Larceny-theft excludes embezzlement, con games and fraud. The FBI does note that in 2010 there were about 78,000 arrests for forgery and counterfeiting, 188,000 for fraud, and almost 17,000 for embezzlement (Federal Bureau of Investigation 2011: Table 29). While many of these arrests are for small-scale scams and cons that are not central to the study of white-collar crime, the exclusion of these categories from the main body of a report on crime removes white-collar crimes from the public consciousness. As a result, during the collapse of Enron and other companies in 2001 – when accounting fraud cost investors 70–90 percent of their money and top officials of those companies "were getting immensely, extraordinarily, obscenely wealthy" (in Reiman and Leighton 2013: 146) – the Department of Justice reported that "property crimes had continued their downward trend and fallen to an all-time low" (cited in Barak 2012: 73).

Following the corporate scandals that began with Enron (Reiman and Leighton 2013: 146), then-President Bush launched the Corporate Fraud Task Force. They issued reports on corporate fraud in 2003 and 2004, but they were lists of cases and settlements, with no effort to summarize

data, discuss larger problems, make policy recommendations, etc. After 2004, the task force did not issue another report until early 2008, which included a substantial number of cases from the 2003 and 2004 reports. Although this report was issued right before the financial crisis, it did not detect or note any patterns that forewarned an imminent global crisis. There were no reports after the financial crisis and the website address for the task force contains the word "archive" (Corporate Fraud Task Force [no date]), implying – in the face of massive evidence to the contrary (Barak 2012) – that the time for a focus on corporate fraud has passed.

The Australian Capital Territory passed an industrial manslaughter act in 2003 to facilitate the prosecution of corporate bodies responsible for employee deaths, but the rest of the country follows the *Criminal Code Act* of 1995 that clarified how the overall criminal code applies to corporations. Australian crime statistics (Australian Institute of Criminology 2012a) do not indicate how frequently these provisions are applied, if ever. A detailed look at homicide does not address whether "employer" could be a victim–offender relationship or whether "workplace" contains any health and safety crimes (Australian Institute of Criminology 2008).

Australian reports on fraud do include fraudulent trade practices, in addition to the expected acts of forgery, counterfeiting, credit card fraud and other deceptive practices (Australian Institute of Criminology 2012a: 36). They also present minimal information on cybercrime, including malware (malicious software), compromised web sites, and scams (ibid.: 58), many of which are considered white-collar crime. The victimization survey does not ask about fraud, however, the Australasian Consumer Fraud Task Force conducts a yearly consumer fraud survey to assess the prevalence of consumer scams, which they define as attempts "designed to obtain someone's personal information or money or otherwise to obtain a financial benefit by deceptive means" (Australian Institute of Criminology 2012b: 1). Although this definition could include acts by businesses and financial institutions, reporting is limited to scams involving notices about advance fee scams, alleged lottery winnings, inheritance, financial advice, work from home, phishing (attempts to get personal information for activities like identity theft), dating, etc. The median 2010 loss was $700, and respondents also reported emotional trauma, loss of confidence in people and/or marital or relationship problems because of the victimization. Thus, these incidents are more serious than a range of acts frequently reported in regular crime statistics, like petty theft and most vandalism.

The British victimization survey (CSEW) contains information on offense types like "wounding" – and changes have increased the reporting of violent crimes without injuries (Office for National Statistics 2012a) – but wounding by defective consumer products or criminal health and safety violations are not asked about. Theft includes "bicycle theft and shoplifting" and "pick-pocketing" among the common forms of the offense (ibid.: 4, 42) as well as "opportunistic" incidents like the "theft of garden furniture" outside the house (ibid.: 43). But it neglects more serious crimes because "unauthorized taking" offenses do not apply to the behavior of financial institutions or business that try to impose inappropriate fees, penalties or charges to people's accounts.

According to the report, fraud is "often targeted at organisations rather than individuals" (ibid.: 56), but fraud targeted at individuals by institutions is not mentioned. Fraud data is supplemented by "non-National Statistics" from the National Fraud Intelligence Bureau about some white-collar crimes and scams involving charities, corporate employees, computer misuse, investment, insurance-related, advance fee, corporate procurement, telecommunications industry, banking/payment, and business trading (ibid.: 58). However, business trading is only about ("illegitimate") businesses set up to commit scams, not the scams of "legitimate" businesses. Telecommunications industry fraud refers to mobile phone fraud by individuals directed at

telecom companies, not the behavior of the companies or telemarketing firms. The banking and payment fraud largely involves check/cheque fraud and (credit and debit) "plastic card" fraud, which means unauthorized purchases rather than financial institutions' wrongdoing. The corporate employee fraud refers to "an employee making a fraudulent claim for travel or subsistence" (Office for National Statistics 2012b: 35) rather than the behavior of executives perpetrating frauds on their employees, shareholders, customers, or the government. In these cases, police work with powerful institutions (e.g., the UK Cards Association) to prevent losses perpetrated by individuals, with no effort even to recognize that individuals are victimized by institutions. The British are starting a survey about the victimization of business establishments that will be incorporated into future releases of the regular CSEW survey reports (Office for National Statistics 2012a: 79), but there is no consideration of expanding the survey to include more victimizations of consumers, employees and communities by business establishments.

The British report on crimes known to the police helpfully includes under the "theft" category: "fraud by a company director" (207 offenses in 2010/11 and 45 in 2011/12), false accounting (108 offenses in 2010/11 and 75 in 2011/12) and fraud by abuse of position (1,033 offenses in 2010/11 and 1,170 in 2011/12) (Home Office 2012: 19). Further, homicide does include acts charged under the Corporate Manslaughter and Corporate Homicide Act 2007, under which an organization is guilty "if the way in which its activities are managed or organised causes a death and amounts to a gross breach of a relevant duty of care to the deceased" (Ministry of Justice 2008).The detailed table for violent crime reports that, in 2010/11, there was one such offense with no sanctions, and in 2011/12, there were two offenses and two sanctions (Home Office 2012: 16). Observers can then ask whether that level is too high, too low or seems consistent with the prevalence of the harm.

Every five years in Canada the General Social Survey collects information on a limited range of criminal offenses: "sexual assault, robbery, physical assault, break and enter, motor vehicle/parts theft, theft of household property, vandalism and theft of personal property" (Statistics Canada 2010: 6). Theft does not include consumer fraud, scams or white-collar financial fraud – harms that are typically more serious than vandalism. Violent victimization also excludes consumer products and workplace safety issues. The perceptions of personal safety asks about acts like walking alone or using public transportation after dark (ibid.: 18, 30), but not the behavior of corporations.

The section on property crimes known to Canadian police is part of a write-up on non-violent crime that is two pages long, mostly about breaking and entering and motor vehicle theft (Statistics Canada 2012a: 17–18). It provides no detail about fraud, which occurs at a similar rate to auto theft. Property crime does include fraud and identity theft, but it seems not to include frauds by financial institutions, especially those preying on the general public (ibid.: 30–31). Consumer fraud and fraudulent trade practices also are not considered.

In 2004, Bill C-45 modernized Canada's criminal code to clarify how it applied to increasingly complex organizations (Department of Justice (Canada) 2012). However, any crime reported under this law is not counted in a way that would allow the reader to see how frequently it is applied. Indeed, the first time criminal negligence was applied to a corporation was after four workers died from falling 13 stories when scaffolding collapsed on Christmas Eve in 2009. Thus, charges are unusual, but it is unclear if even these figures are reflected in the homicide reports, which include manslaughter (Statistics Canada 2011: 17) and thus ought to cover negligence. But data breakdowns on method (number of "other" offenses) (ibid.: 27) and relationship ("business relationship (legal)") (ibid.: 31) do not seem to include these four deaths for either 2009 or 2010.

Research directions that give justice more class

We suggest two avenues to help "re-class" data: one about general inequality in developed nations, and the other about white-collar and corporate crime. (The collection of data about an offender's income is important, but that is a policy issue requiring government action rather than being an existing research strategy.) The first avenue collects people's beliefs about the ideal distribution of wealth and their knowledge of current actual distributions. The results can start a conversation about the injustice of current distributions and provide insight into the effects of ideology. The second avenue works around omission of white-collar and corporate crime in official data by advocating that researchers use additional existing data sources to compile alternative or shadow statistics that paint a more realistic picture of crime. But data is still scarce where corporations victimize – sometimes on a mass scale – workers, consumers or communities, and this category of wrongdoing especially needs more original research on behalf of the public interest.

In his classic theory of justice, Rawls suggests evaluating society based on the preferences people would have if choosing from behind a veil of ignorance: decide what society should look like without knowledge of race, sex, class, religion, disability, etc. Norton and Ariely (2011) tried a simplified version of this by asking 5,500 adults to choose from three distributions, which, unknown to the subject, represented the distribution in Sweden, the USA and an equal distribution. Americans overwhelmingly chose Sweden, with very low levels of inequality.

In Rawls' writing, the veil of ignorance exercise includes specified information and thus constraints on what can be rationally agreed to. This yields the principle that justice requires the least inequality necessary to maximize the share of the worst off. We believe that inequality in the USA clearly is far greater than what would be necessary to increase the well-being of those at the bottom of the spectrum (Reiman and Leighton 2013: 205, n. 60). Subjects in Norton and Ariely's (2011) survey did not have the full information available in Rawls' exercise, but chose distributions of wealth far more equal than what exists in reality. The researchers did not just compare this "ideal" to the actual distribution of wealth, but they asked people what they believed the distribution of wealth to be. The full results are available in Table 14.4, which indicates that Americans believed the top 20 percent owned 59 percent of the wealth, when it was really 84 percent and people believe it should be 32 percent. This has profound implications for the amount of wealth distributed at the bottom: the ideal distribution for the poorest 60 percent would involve them owning about 45 percent of the wealth, compared to a perceived ownership of 20 percent of the wealth and an actual ownership of less than 5 percent.

People collectively underestimate inequality by a substantial amount, and mistakes about economic facts support the unequal status quo. When ideas – whether intentionally or not – "distort reality in a way that justifies the prevailing distribution of power and wealth, hides society's injustices, and thus secures uncritical allegiance to the existing social order, we have what Marx called ideology" (Reiman and Leighton 2013: 195). Those with little far outnumber

Table 14.4 Actual, perceived, and ideal distributions of wealth in the United States

Wealth of poorest 60% as a percentage		Wealth of richest 20% as a percentage
5	Actual amount of wealth	84
20	Perceived amount of wealth	59
45	Ideal amount of wealth	32

Source: Calculated from Norton and Ariely (2011).

the top few percentage who have plenty. Thus, "the have-nots and the have-littles could have more if they decided to take it from the have-plenties. This, in turn, means that the have-plenties need the cooperation of the have-nots and the have-littles" (ibid.: 196). This cooperation must be voluntary, and so "the have-nots and the have-littles must believe it would not be right or reasonable to take away what the have-plenties have" (ibid.) – that the system is legitimate.

Replicating Norton and Ariely's work (2011) in other developed nations would help develop data on questions about social justice and ideology. Evidence that the existing society violates citizens' expectations for fairness is a powerful tool to motivate deeper investigation about what social arrangements should look like – and how to advocate for change. Also, the discrepancy between the actual distribution of wealth and what people believe it to be is important data for the study of ideology. Random error would be evenly distributed in a way that was equally likely to over- and under-estimate inequality, with the average being close to the correct value. But error that consistently underestimates inequality is the result of systematic forces and constitutes evidence of the effect of ideology, which refers to what is necessarily deceptive. Some writers use ideology to refer to a "belief system" or "worldview." But this "moral neutralization of the concept of 'ideology' dulls an instrument that thinkers such as Marx and others have sharpened into an effective tool for cutting through the illusions that dog our political life" (Reiman and Leighton 2013: 196).

"Systematic forces" does not mean that ideology is conscious deception. Marx wrote that "the ideas of the ruling class are in every epoch the ruling ideas . . . The class which has the means of material production at its disposal, has control at the same time over the means of mental production" (in Reiman and Leighton 2013: 194). Those who have economic power own newspapers, endow universities, finance the publication of books and journals, and control television, radio and other electronic media. The controllers of the "means of mental production" broadcast a picture of reality that they believe to be accurate, and which will be largely the picture of reality that fills the heads of the readers and viewers of the mass media. What people take to be "common sense" or conventional wisdom is nevertheless based on a distorted consensus. And an important question this research helps us understand is how distorted people's pictures of reality are, and whether nations with higher levels of inequality have more distortion.

The second research direction involves putting class back into data about crime so it includes white-collar and corporate crime. Even though the existing law needs to further criminalize white-collar and corporate crime to mirror the harmful acts, crime reports should reflect all the threats to people's lives, health and property as currently defined by law, not merely compile data on the wrongdoing of the poor. Broader inclusion of data on white-collar and corporate crime in government reports requires policy changes, but researchers can still compile data from alternative sources to create de-classed crime reports (e.g. ibid.: 95). The goal would be to include fraud by a company director and corporate manslaughter (as the British do) or fraudulent trade practices (as Australia does). These alternative, or shadow, government statistics are explicit about their methodology, assumptions, and data sources – just like any transparent and useful data source.

However, this strategy has some important limitations because data increasingly comes from industries that study their own losses and victimization, usually by the poor and middle class. But there's little data – and little money to study – victimization perpetrated by corporations and industries. The discussion above noted that Britain worked with the trade association for credit and debit cards to gather more information on fraud – fraud against financial institutions, which pay for charges on lost and stolen cards. To the extent that abuses of consumers by card issuers are criminalized, no one collects data on the types of crimes, their frequency or aggregate cost to the public. A publication by the British National Fraud Authority (NFA) – an executive

agency within the Home Office – has estimates of fraud *against* insurance companies and mortgage lenders (National Fraud Authority 2012: 17), but not corresponding estimates of fraud done *by* these industries against the public to boost profits. For example, in the USA – and most likely Britain too – "paying out less to victims of catastrophes has helped produce record profits," according to Bloomberg News (Dietz and Preston 2007). The investigative report did not put a total dollar amount on such losses, but noted:

> The insurance companies routinely refuse to pay market prices for homes and replacement contents, they use computer programs to cut payouts, they change policy coverage with no clear explanation, they ignore or alter engineering reports, and they sometimes ask their adjusters to lie to customers, court records and interviews with former employees and state regulators show.

Discussions of problems like fraud contain language that obscures the very existence of crimes by financial institutions. The NFA's discussion of fraud against individuals included "mass marketing fraud," which means unsolicited communications for money (National Fraud Authority 2012: 8–9) rather than false advertising or deceptive trade practices. "Insider-enabled fraud" is "staff fraud" and "employee fraud" (ibid.: 24), but not control fraud, which is perpetrated by executive-level insiders. Executives who control a company create fictitious profits to turn corporate assets into personal assets (through stock bonuses, etc.) and ultimately defraud a variety of people, like shareholders. Businesses "report sensational profits, followed by catastrophic failure" (in Barak 2012: 73) – a pattern that should be immediately recognizable to the British and citizens of every developed nation. Yet an Australian government report on fraud noted:

> Fraud affects all sectors of the community, extending from individuals who have responded to online offers to make 'quick money', to large companies and government departments that have suffered fraud at the hands of their employees or members of the public.
>
> (Australian Institute of Criminology 2012c: ix)

Certainly businesses and corporations in Australia have enough of a history of perpetrating fraud that they should be included as part of the basic description of the fraud problem.

In general, the missing data are about the crimes of the powerful that protect and advance the accumulation of capital (Barak *et al.* 2010: 11). Crime reports can retain data on minor theft, but they also need to recognize that

> the most consequential white-collar crimes – in terms of their scope, impact and cost in dollars – appear to require for their commission, that their perpetrators operate in an environment that provides access to both money and the organization through which money moves.
>
> (Braithwaite 1992: 86)

Financial and corporate interests make sure that acquisitive activities they perpetrate against people are not criminalized, and if criminalized, not prosecuted, counted or conceived of as "real" crime. Instead, wealthy industries produce data about their own victimization, including white-collar crimes like fraud by middle managers and card fraud. But the key to future research is to examine the direction of the victimization and explore the areas where the wealthiest and most powerful are the perpetrators, because those are the uncounted harms – and if left uncounted, the harms they represent will disappear from consciousness.

Policy implications of the inconvenient truths about wealth

The problem of inequality is the primary policy implication, but several smaller policy issues are worth noting briefly. First, the development of better data is necessary where a criminal justice system produces minimal data on class and is thus not accountable for bias. In the USA, for-profit probation companies are growing rapidly – with a debt collection business model and "onerous 'user fees'" (Bronner 2012) – so collection of data about income and wealth needs to be done in a way that does not lead to criminal justice becoming (more) complicit in legal extortion for private gain.

Second, policies need to promote the systematic collection and regular dissemination of data about white-collar and corporate harm, preferably in existing reports on the nation's crime problem. The inclusiveness of German crime data makes it a possible model in terms of what should be presented. For example, it includes economic crime, which captures criminal violations of the patent, trademark and copyright acts; the Act Against Unfair Competition, Act on the Financial Statements of Certain Enterprises and Groups, Insurance Industry Supervision Act, Securities Trading Act, and Economic Offenses Act of 1954; and, among others, criminal offenses according to the Wine Act and food products legislation (Bundeskriminalamt 2011: 8).

Third, existing laws regulating the conduct of the poor need to be applied equally to corporations or repealed for all. For example, the British crime data reports 2.7 million Antisocial Behavior Orders (ASBOs) (Office for National Statistics 2012a: 70). An ASBO is recorded using three simplified categories. As relevant here, *nuisance* includes "where an act, condition, thing or person causes trouble, annoyance, irritation, inconvenience, offence or suffering to the local community in general rather than to individual victims." And, *environmental* "captures incidents where individuals and groups have an impact on their surroundings, including natural, built and social environments" (ibid.: 71). ASBOs are described over a number of pages in the crime report that details noisy neighbors, drunk or rowdy behavior, litter, drug use/dealing, teenagers loitering, vandalism/graffiti, and abandoned/burnt-out cars (ibid.). But neither the law nor the concept applies to corporations, even though economic theory and legal structures drive it to focus narrowly on self-interest, thus maximizing the likelihood of inconsiderate behavior that damages others. Corporate behavior may not fit this law as it was written, but the question remains why nuisance behaviors of individuals are worth sanctioning and counting (and studying), but the nuisance behaviors of corporations are not. If the ASBO has merit – a debatable proposition (Prior 2009) – then it should also apply to "nuisance" and "environmental" impacts of corporate behavior that pollutes communities, economically exploits workers, cuts corners with workers' health and safety, commits unfair trade practices, produces dangerous products, defrauds consumers, etc. Some of these behaviors are already against the law, but an ASBO could fill in where the behavior is a nuisance that needs to be officially recognized but other systems do not have the resources for a full investigation and prosecution.

Attending to the recommendations above and other concerns raised by this chapter requires policies to combat inequality. Braithwaite nicely summarizes the problem by explaining that inequality "worsens both crimes of poverty motivated by *need* for goods for use and crimes of wealth motivated by *greed* enabled by goods for exchange" (1992: 81). For Braithwaite, "need" is culturally constructed and based on community norms, expectations and advertising. In general, then, "the more unequal the class structure, the more scarce national wealth is devoted to gratifying greed among people whose needs are satisfied, the less is devoted to satisfying unmet needs" (ibid.: 83). As suggested by opportunity theory, where legitimate means to achieving such needs are blocked, illegitimate and criminal means for satisfying needs become more likely.

Even when the rich have their needs met, additional dollars still have value to them and they pursue additional wealth "to signify their worth by conspicuous consumption, to prove success to themselves, to build an empire, to leave an inheritance" (ibid.: 84). If legitimate means are blocked, the rich can pursue existing illegitimate means – or create new types of illegitimate means. The limitation on traditional opportunity theory is that it is not applied to the wealthy, and, notes Braithwaite, "if they are powerful enough, criminals can actively constitute illegitimate opportunities" (ibid.: 86). Further, these novel illegitimate strategies "excel because they cannot be contemplated by those who are not wealthy" (ibid.: 88), and at times they cannot be contemplated even by regulatory agencies.

One of the greatest advantages of the wealthy and corporations is to prevent their actions from becoming criminal in the first place. They can also use their resources to frustrate regulation and thus remain unaccountable for their wrongdoing and the harm they have caused to others. Braithwaite notes: "power corrupts and unaccountable power corrupts with impunity" (ibid.: 89). This analysis dovetails with Christie's concern about weak states, which is supported by a quote from Bauman: "weak, quasi-states can be easily reduced to the (useful) role of legal police precincts, securing a modicum of order required for the conduct of business, but need not be feared as effective brakes on the global companies' freedom" (Christie 2004: 36). Even though the USA is the largest global economy, Ritholtz – the CEO of a financial research firm and author of *Bailout Nation* – believes that the Securities and Exchange Commission is "defective by design" (in Reiman and Leighton 2013: 159). Meanwhile, the "janitors of the suitably weakened states" need to prove their worth, so fighting street crime "becomes indispensable in creating legitimacy" (Christie 2004: 37).

Inequality thus extends crime through the power of the wealthy and undermines the effectiveness of guardians who should protect the vulnerable from motivated offenders (Alvesalo *et al.* 2006). Braithwaite further argues that inequality reduces the respect the powerful have for the dominion of others, especially the poorest.

> [Dominion] includes the sphere of control citizens properly enjoy over their persons, their property and the province. To enjoy dominion, a citizen must live in a social world where other citizens respect his or her liberty and where mutual respect is socially assured and generally recognized.
>
> (Braithwaite 1992: 80)

The idea that greater levels of inequality lead to crime via contempt for the citizenship rights of the weak is an important complement to concerns that inequality and social exclusion lead the poor to commit crimes because they have little respect for the law (Reiman and Leighton 2013: 33, 186).

Further, inequality plays a role in violent crime as well. Braithwaite draws on Katz and others who have developed theories about the role of humiliation, which can turn into righteous rage and violent acts. While Katz focused on the immediate transformation of emotions and denied the relevance of background and material factors, Braithwaite integrates it:

> *[I]negalitarian societies are structurally humiliating.* When parents cannot supply the most basic needs to their children, when they are assailed by the ostentatious consumption of the affluent, this is structurally humiliating for the poor. Where inequality is great, the rich humiliate the poor through conspicuous consumption and the poor are humiliated as failures for being poor. Both sides of this equation are important. The propensity to feel powerless

and exploited among the poor and the propensity of the rich to see exploiting as legitimate, both . . . enable crime.

<div align="right">(1992: 94, emphasis in original)</div>

Currie's analysis is similar and emphasizes not just poverty or "the simple absence of material goods, but rather the deeper attitudes of hopelessness and alienation produced by inequalities that are unjust" (1985: 162). Simply put, "violence results 'not so much from lack of advantages as from being taken advantage of'" (ibid.).

Redressing inequality – and especially the alienation, exclusion and hopelessness – is important for social justice and crime prevention. This conclusion is not new, although it is an(other) inconvenient truth about inequality. As Braithwaite summarizes:

> If crime in the suites arises from the fact that certain people have great wealth and power, and if crime in the streets arises from the fact certain other people have very little wealth or power, then policies to redistribute wealth and power may simultaneously relieve both types of crime problems.

<div align="right">(1992: 90)</div>

Currie fills out this prescription by adding that "we must build a society that is less unequal, less depriving, less insecure, less disruptive of family and community ties, less corrosive of cooperative values" (1985: 225).

Conclusion

An issue raised in this chapter's Introduction was Christie's observation that prison populations biased in terms of the identity of the receivers of the intended pain can "indicate severe defects somewhere in that system" (2004: 102). In our view, there is bias, with the poor being (conspicuously) over-consumed by the criminal justice system and the rich being (inconspicuously) under-consumed. Based on *The Rich Get Richer and the Poor Get Prison*, we suggest that three separate defects contribute to this phenomenon. First, society does not deal with root causes of crime – especially inequality – and may enact policies that promote criminogenic conditions for the poor. Second, legislatures do not adequately criminalize real harms of business that create real victims of workers, consumers, investors and communities. Third, the criminal justice system operates with class bias, although it is hidden by both not collecting income data on criminal offenders and not including white-collar crimes in annual government reports on "crime."

This analysis has important implications because the moral legitimacy of a legal system hinges on whether coercion is being used in the interests of all equally, or whether it promotes some people's interests at the expense of others. Criminals and occupying troops use force to subject some people to the interests of others, while legal systems claim moral superiority because they are supposed to use force to protect equally the interests and rights of all and to punish equally all who endanger these interests or who violate these rights. This adds up to something that should be obvious but is not: A criminal justice system is criminal to the extent that it is not truly a system of justice (Reiman and Leighton 2013: 207).

Because the system protects certain interests does not mean that it is the result of a conspiracy. The focus on one-on-one (rather than corporate) harm reflects the main ways in which people harmed each other in the days before large-scale industrialization. The Pyrrhic defeat theory suggests that current failed criminal justice policies persist because they fail in a way that does

not give rise to an effective demand for change. First, this failing system provides benefits for those with the power to make changes, while it imposes costs on those without such power. The wealthy experience low rates of victimization from street crime, generally profit from the opportunity to expose workers or consumers to extra risk, and benefit from class bias in processing offenders. Second, because the criminal justice system shapes the public's conception of what is dangerous, it creates the impression that the harms it is fighting are the real threats to society. Thus, even when people continue to experience "fear of crime," they only demand a continuation or escalation of the same policies: more police, more prisons, longer prison sentences, and so on.

Consider first the benefits that the system provides for those with wealth and power. The failure of criminal justice policy diverts attention from the harmful noncriminal acts of the well-off and focuses people's attention on a real threat of theft and violence on the street, and a large and visible population of poor criminals in the courts and prisons. This conveys a vivid image – supported by the crime reports that lack white-collar and corporate crime data – that the real threat to people's lives and limbs is from the poor. The media, criminal justice textbooks and public policy reports amplify this message by reproducing the statistics and dramatizing the interpersonal acts in the crime reports. This image of crime provides benefits to the rich and powerful through an ideological message that the threat to law-abiding Middle America comes from below them on the economic ladder, not above them. It creates (or reinforces) fear of, and hostility toward, the poor. It leads people to ignore the ways in which they are injured and robbed by the acts of the affluent, and thus it points toward a *conservative* defense of society's disparities of wealth, power, and opportunity – and leads them away from a *progressive* demand for equality and a more equitable distribution of wealth and power (Reiman and Leighton 2013: 180).

Discussion questions

1   If you live in one of the countries whose distribution of wealth ownership appeared in this chapter, were you surprised at the level of inequality? Why or why not? If you live in another country, how do you think the distribution of wealth ownership would look – and can you find data about it?
2   What are three of the most important ways that inequality and class are linked to crime or criminal justice?
3   Do you think there is a suitable amount of street crime and white-collar crime in your country? On what basis could you argue that the amount of crime is "suitable"?
4   What happens when there is not a suitable amount of crime – that too much behavior is criminalized, or too little? Please answer this question with respect to both street and white-collar crime.
5   What is ideology? Why is it important when examining wealth as well as the criminal justice system?

Websites

Companion website for *The Rich Get Richer*: http://www.paulsjusticepage.com/reiman.htm.
Crime Talk: http://www.crimetalk.org.uk/.
Critical Criminology: http://critcrim.org/.
Matt Taibbi's Taibblog: http://www.rollingstone.com/politics/blogs/taibblog.
Tombs and Whyte, "A crisis of enforcement: The decriminalization of death and injury at work": http://www.crimeandjustice.org.uk/opus685/crisisenforcementweb.pdf.

References

Alvesalo, A., Tombs, S., Virta, E. and Whyte, D. (2006) "Re-Imagining Crime Prevention: Controlling Corporate Crime?" *Crime, Law and Social Change*, 45: 1–25.

Australian Bureau of Statistics (2011) *Household Wealth and Wealth Distribution, 2009–10*, Canberra: Australian Bureau of Statistics, available at: http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/51342DFD54324472CA257928001107B4/$File/65540_2009-10.pdf (accessed 27 August 2012).

Australian Institute of Criminology (2008) *Homicide in Australia: 2006–07 National Homicide Monitoring Program Annual Report*, Canberra: Australian Institute of Criminology, available at: http://www.aic.gov.au/documents/F/F/B/%7BFFFB9E49F-160F-43FC-B98D-6BC510DC2AFD%7Dmr01.pdf (accessed 27 August 2012).

Australian Institute of Criminology (2012a) *Australian Crime: Facts and Figures 2011*, Canberra: Australian Institute of Criminology, available at: http://www.aic.gov.au/documents/0/B/6/%7B0B619F44-B18B-47B4-9B59-F87BA643CBAA%7Dfacts11.pdf (accessed 27 August 2012).

Australian Institute of Criminology (2012b) *Australasian Consumer Fraud Taskforce: Results of the 2010 and 2011 Online Consumer Fraud Surveys*, Canberra: Australian Institute of Criminology, available at: http://www.aic.gov.au/documents/7/C/F/%7B7CF8C691-F02E-41EA-8DB4-74922AEEDDAF%7Dtbp50.pdf (accessed 27 August 2012).

Australian Institute of Criminology (2012c) *Fraud against the Commonwealth 2009–10 Annual Report to Government*, Canberra: Australian Institute of Criminology, available at: http://www.aic.gov.au/documents/B/5/1/%7BB514C8BC-4578-4D7F-A9C8-475FF1269004%7DMR18.pdf (accessed 27 August 2012).

Barak, G. (2012) *Theft of a Nation: Wall Street Looting and Federal Regulatory Colluding*, Lanham, MD: Rowman and Littlefield.

Barak, G., Leighton, P. and Flavin, J. (2010) *Class, Race, Gender and Crime*, 3rd edn, Lanham, MD: Rowman and Littlefield.

Braithwaite, J. (1992) "Poverty, Power, and White-Collar Crime," in K. Schlegel and D. Weisburd (eds.) *White-Collar Crime Reconsidered*, Boston: Northeastern University Press.

Bricker, J., Kennickell, A., Moore, K. and Sabelhaus, J. (2012) "Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances," *Federal Reserve Bulletin*, 98(2): 1–80, available at: http://www.federalreserve.gov/pubs/bulletin/2012/pdf/scf12.pdf (accessed 27 August 2012).

Bronner, E. (2012) "Poor Land in Jail as Companies Add Huge Fees for Probation," *New York Times*, 2 July, available at: http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html (accessed 27 August 2012).

Bucks, B., Kennickell, A., Mach, T. and Moore, K. (2009) "Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances," *Federal Reserve Bulletin*, 95: A1–A55, available at: http://www.federalreserve.gov/econresdata/scf/files/2007_scf09.pdf (accessed 27 August 2012).

Bundeskriminalamt (2011) *Police Crime Statistics, 2010*, Wiesbaden: Federal Criminal Police Office, available at: http://www.bka.de/nn_194552/EN/Publications/PoliceCrimeStatistics/policeCrimeStatistics_node.html?_nnn=true (accessed 27 August 2012).

Cagetti, M. and De Nardi, M. (2008) "Wealth Inequality: Data and Models," *Macroeconomic Dynamics*, 12 (Supplement 2): 285–313.

Christie, N. (2000) *Crime Control as Industry*, 3rd edn, London: Routledge.

Christie, N. (2004) *A Suitable Amount of Crime*, London: Routledge.

Corporate Fraud Task Force (n.d.) "The President's Corporate Fraud Task Force," Washington, DC: Department of Justice, available at: http://www.justice.gov/archive/dag/cftf/ (accessed 27 August 2012).

Currie, E. (1985) *Confronting Crime*, New York: Pantheon.

DeNavas-Walt, C., Proctor, B. and Smith, J. (2011) *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, U.S. Census Bureau, Current Population Reports, P60-239. U.S. Washington, DC: Government Printing Office, available at: http://www.census.gov/prod/2011pubs/p60-239.pdf (accessed 27 August 2012).

Department of Justice (Canada) (2012) *A Plain Language Guide Bill C-45 - Amendments to the Criminal Code Affecting the Criminal Liability of Organizations*, Ottawa: Department of Justice, available at: http://www.justice.gc.ca/eng/dept-min/pub/c45/p02.html#sec2 (accessed 27 August 2012).

Dietz, D. and Preston, D. (2007) "Home Insurers' Secret Tactics Cheat Fire Victims, Hike Profits," *Bloomberg News*, August 3, available at: http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aIOpZROwhvNI.

Erikson, K. (1966) *Wayward Puritans*, New York: Macmillan.

Federal Bureau of Investigation (2011) *Crime in the U.S., 2010*, available at: http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010 (accessed 27 August 2012).

Foucault, M. (1977) *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan, London: Allen Lane.

Friedrichs, D. (2010) *Trusted Criminals*, Belmont, CA: Wadsworth/Cengage.

HMRC (Her Majesty's Revenue and Customs) (2011) "Table 13.8 Identified personal wealth," *Personal Wealth Statistics, 2001 to 03 and 2005 to 07*, available at: http://www.hmrc.gov.uk/stats/personal_wealth/intro-personal-wealth.pdf (accessed 27 August 2012).

Home Office (2012) *Crimes Detected in England and Wales 2011/12*, London: Home Office, available at: http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/hosb0812/hosb0812?view=Binary (accessed 27 August 2012).

Kennickell, A. (2009) "Ponds and Streams: Wealth and Income in the U.S., 1989 to 2007," Federal Reserve Board, available at: http://www.federalreserve.gov/pubs/feds/2009/200913/200913pap.pdf (accessed 27 August 2012).

Leighton, P. and Selman, D. (2012) "Private Prisons, the Criminal Justice-Industrial Complex and Bodies Destined for Profitable Punishment," in W. DeKeserdy and M. Dragiewicz (eds) *Routledge Handbook of Critical Criminology*, New York: Routledge.

Lynch, J. and Pridemore, W. (2010) "Crime in International Perspective," in J. Q. Wilson and J. Petersilia (eds.) *Crime and Public Policy*, Oxford: Oxford University Press.

Ministry of Justice (2008) "Corporate Manslaughter and Corporate Homicide Act 2007," available at: http://www.justice.gov.uk/downloads/legislation/bills-acts/circulars/moj/corporate-manslaughter-act-2007-circular-9-feb-08.pdf (accessed 27 August 2012).

Mohamed, A. R. and Fritsvold, E. (2010) *Dorm Room Dealers*, Boulder, CO: Lynne Rienner.

Mooney, G. (2008) "Explaining Poverty, Social Exclusion and Inequality," in T. Ridge and S. Wright (eds.) *Understanding Inequality, Poverty and Wealth*, Bristol: Policy Press.

National Fraud Authority (2012) *Annual Fraud Indicator*, London: Home Office, available at: http://www.homeoffice.gov.uk/publications/agencies-public-bodies/nfa/annual-fraud-indicator/annual-fraud-indicator-2012?view=Binary (accessed 27 August 2012).

Norton, M. and Ariely, D. (2011) "Building a Better America – One Wealth Quintile at a Time," *Perspectives on Psychological Science*, 6(1): 9–12.

Office for National Statistics (2012a) *Crime in England and Wales, Quarterly First Release to March 2012*, London: Office of National Statistics, available at: http://www.ons.gov.uk/ons/dcp171778_273169.pdf (accessed 27 August 2012).

Office for National Statistics (2012b) *User Guide to Crime Statistics for England and Wales*, London: Office of National Statistics, available at: http://www.ons.gov.uk/ons/guide-method/method-quality/specific/crime-statistics-methodology/user-guide-to-crime-statistics.pdf (accessed 27 August 2012).

Prior, D. (2009) "The 'Problem' Of Anti-Social Behaviour And The Policy Knowledge Base," *Critical Social Policy* 29(1): 5–23.

Reiman, J. (2001) "Criminal Justice Ethics," in P. Leighton and J. Reiman (eds.) *Criminal Justice Ethics*, Upper Saddle River, NJ: Prentice Hall.

Reiman, J. (2013) Appendix II: "Between Philosophy and Criminology," in J. Reiman and P. Leighton *The Rich Get Richer and the Poor Get Prison*, 10th edn, Boston: Allyn & Bacon/Pearson.

Reiman, J. and Leighton, P. (2013) *The Rich Get Richer and the Poor Get Prison*, 10th edn, Boston: Allyn & Bacon/Pearson.

Selman, D. and Leighton, P. (2010) *Punishment for Sale*, Lanham, MD: Rowman and Littlefield.

Statistics Canada (2005) *The Wealth of Canadians*, Ottawa: Statistics Canada, available at: http://www.statcan.gc.ca/pub/13f0026m/13f0026m2006001-eng.pdf (accessed 27 August 2012).

Statistics Canada (2010) *Criminal Victimization in Canada, 2009*, Ottawa: Statistics Canada, available at: http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11340-eng.pdf (accessed 27 August 2012).

Statistics Canada (2011) *Homicide in Canada, 2010*, Ottawa: Statistics Canada, available at: http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11561-eng.pdf (accessed 27 August 2012).

Statistics Canada (2012a) *Police-Reported Crime Statistics in Canada, 2011*, Ottawa: Statistics Canada, available at: http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11692-eng.pdf (accessed 27 August 2012).

Statistics Canada (2012b) *Adult Criminal Court Statistics in Canada, 2010/2011*, Ottawa: Statistics Canada, available at: http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11646-eng.pdf (accessed 27 August 2012).

Taibbi, M. (2011) "Why Isn't Wall Street in jail?" *Rolling Stone*, 3 March, available at: http://www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216 (accessed 27 August 2012).

Zimring, F. (2007) *The Great American Crime Decline*, New York: Oxford University Press.

Part VI

Global technologies

From the surveillance of humans to the management of situations

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15

Current and emerging technologies employed to abate crime and to promote security

Rick Sarre, David Brooks, Clifton Smith and Rick Draper

Introduction

On a daily basis, vast numbers of citizens around the world are being observed through the surveillance activities of others. Police, intelligence agencies, corporations, employers, media and property owners, many by using their privately contracted security personnel and service providers, are all now capable of observing, filming and monitoring the activities of others, including listening in to their conversations. Increasingly, they are accessing their data, too, for marketing purposes at the lower end of the scale (Andrejevic 2012), and for intelligence analysis at the higher end (Prunckun 2010). "On-selling" of electronic information and consumer databases is now part of global commerce (Dearne 2001), too. For the most part, the law does not discourage such intrusive activities, certainly in so far as they relate to public agencies and, increasingly, as they relate to the investigative undertakings carried out by the private sector as well.

Surveillance is not a new phenomenon:

> From time immemorial, detailed records have been accumulated on the health, morality, cognitive development, motivations, sexualities, incomes, work activities and whereabouts of certain populations ... [what *has* changed is the] significant intensification and diversification of technologically facilitated surveillance mechanisms.
>
> (Smith 2012: 1)

Despite the ubiquity of surveillance, our knowledge of it and its purposes is in relatively short supply. Hence, the aim of this chapter is not only to review the surveillance technologies themselves, but to attempt a glimpse into the future regarding their deployment, use and regulation.

The not-for-profit, UK-based organization Privacy International conducts an annual survey of the state of privacy in the world. Their most recent survey was in 2007, covering 47 countries (Privacy International 2007). The survey indicated that, compared to the previous year, there had been an increase in surveillance globally, and a decline in the safeguarding of privacy. Eight countries were rated as being "endemic surveillance societies." China, Malaysia and Russia scored

lowest (meaning that they had the most surveillance and the poorest protections of privacy), followed jointly by Singapore and the United Kingdom, then (jointly) by Taiwan, Thailand and the United States. The best ranking was given to Greece, which was judged to have adequate privacy safeguards in place.

Given that surveillance is on the increase, should it be a matter of concern? To some, the constant creep of what could be referred to as a "culture of control" presents an insidious danger: "As we begin to accept increasingly greater and greater restrictions on our civil liberties, the technology to further abridge these liberties continues to expand and leads the way to even greater abridgements" (Cohen 2010).

According to the American Civil Liberties Union (ACLU), too,

> The reality is we are fast approaching a genuine surveillance society in the United States – a dark future where our every move, our every transaction, our every communication is recorded, compiled, and stored away, ready to be examined and used against us by the authorities whenever they want.
>
> (ACLU 2007)

To others, however, the trend is of little consequence. Indeed, they say, it is simply a by-product of the desire of the whole world for security in the aftermath of the attacks on the World Trade Center and the Pentagon on September 11, 2001, and other terrorist attacks before and since. A poll taken in the United States a year after the 2001 attacks indicated that 86 percent of Americans supported the wider use of facial recognition systems, 81 percent wanted closer monitoring of banking transactions, and 68 percent favored a national identification card (Marcella and Stucki 2003: xix). Former Trade Commissioner Robert Pitofsky stated, at the time, that "[t]errorists swim in a society in which their privacy is protected. If some invasions of privacy are necessary to bring them out into the open, most people are going to say, O.K., go ahead" (cited in Curran 2001).

Have these attitudes changed since that time? Are they changing and, if so, where and why? These are questions which are not easily answered. On the one hand, people appear to be less concerned about incursions into their private lives, especially as they add material day after day into their social media sites such as Facebook, or use retailers' loyalty cards which are electronically linked to their private banking details. Indeed, the growth of these links is evidence of a global love affair between citizens and the available technologies, and a seemingly insatiable desire to embrace them. For example, the Apple Corporation revealed that, in 2012 when it launched its new iOS 6 operating system, 100 million devices were updated within the first three days of its release (Apple 2012).

On the other hand, recent revelations that exposed the Murdoch global media organization's extensive use of private investigators to hack into the phone messages of celebrities, politicians, and victims of crime and their relatives in the United Kingdom was met with widespread public outrage. It caused the self-imposed closing down of the *News of the World* tabloid after 168 years of publication.

The *News of the World* scandal, however, has not been the only driver for what appears to be a renewed focus on privacy. There have also been a number of computer "hacking" attacks around the world that have compromised vast public and private databases and critical infrastructure. For example, an Australian man was recently charged with numerous offenses related to the alleged hacking of one of the major service providers to the Australian National Broadband Network (SBS 2012). In another example from Australia, hundreds of staff from the government social welfare agency Centrelink were caught inappropriately searching the

electronic records of friends and ex-lovers while at work (privacy breaches that were uncovered using specifically designed "spyware" software). Nineteen staff were dismissed and nearly a hundred resigned when confronted with the allegations (ABC News 2006).

Moreover, in May 2011, Sony's PlayStation data network was breached by hackers and the private data files, including banking details, of almost 70 million people were stolen (BBC 2011). Other privacy breaches caused by "hacking" in the last twelve months include the release of the service details of 260,000 AAPT customers, the personal details of 734,000 Telstra Corporation customers (in this case, names, phone numbers, birth dates, credit card numbers and driver license details), and the names and locations of thousands of Australia Post customers to whom parcels had been sent (*Advertiser* 2012: 15).

There are mixed messages here. People around the world have embraced global surveillance technologies and the databases that they create, yet we are wary of their reach. Pleasingly, the debate over privacy vis-à-vis the ubiquity of surveillance has enjoyed something of a renaissance in public discourse in recent times (Lyon *et al*. 2012). Such discourse has spread to Australia, where the national government is currently considering strengthening its privacy laws to give victims of serious breaches of privacy, for example, the right to sue for damages. Such a right was a key recommendation of the 2008 Australian Law Reform Commission report, *For Your Information: Australian Privacy Law and Practice* which considered the extent to which the Privacy Act 1988 and related laws provide an effective framework for the protection of privacy in Australia. Nothing has come of this recommendation, however, and the "right" remains unlegislated. Australia's regulatory responses in this field are discussed in a case study later in this chapter.

The changing nature of surveillance

Surveillance is the ability to monitor, observe and record what, where and when someone does something. It could involve the monitoring of any person, place or object to obtain information. It could be designed to control the behavior of the subject of the surveillance. Of great interest today is the rapid growth in technological innovations that make surveillance more accessible, more covert and thus more insidious. These advances in technology have largely legitimated surveillance as a multi-purpose policing "tool" that is not only available to police and regulatory agencies but also to individuals and organizations (Sarre and Prenzler 2009: Chapter 7).

Some of the surveillance instruments and facilities that have been developed in recent years include Global Positioning System (GPS) tracking devices, body scanners, retina scanners, face scanners (Editorial 2001), Geographic Information System (GIS) profiling, "gunshot" location systems (Mazerolle *et al*. 2002) and prisoner electronic monitoring (Black and Smith 2003; Hucklesby 2009; 2011; Nellis *et al*. 2012). Well entrenched in the electronic service industry suite of services is data-mining (Wahlstrom *et al*. 2009) which includes "predictive analytics," that is, building a database on the strength of online behaviors and conversations (Andrejevic 2011), and "neuromarketing," which deploys monitoring and surveillance instruments that capture a consumer's respiration, skin conductance, facial expressions and pupil dilation (Andrejevic 2012: 198).

Furthermore, the world has seen the development of Radio Frequency Identification (RFID), internet cache "cookies," electronic-commerce technological tracing (Foreshew 2000), mobile devices, smart phones, loyalty cards and robot devices, each of which is able to keep track of human movement and the commercial transactions of millions of customers. Our technological wizardry now also allows us to store and retrieve huge amounts of electronically-based information, including web-based justice records (Hickman 2000).

The gathering of data is one thing; we are now in a position to gather information from that data. For example, social media data collection and search engine capabilities allow us to search for people by how they look rather than by what they do or own:

> Facebook announced in June [2011] that it was implementing face-recognition technology that scans all the photos in its database and automatically suggests identifying tags that match images of a user's friends with their names . . . With the help of this kind of photo tagging, law enforcement officials could post on Facebook a photo of, say, an anonymous antiwar protester and identify him.
>
> (Rosen 2011)

In 2008, Andrew McLaughlin, then the head of public policy at Google, said he expected that, within a few years, public agencies and private companies would be asking Google to post live feeds from public and private surveillance cameras. If the feeds were linked and archived, anyone with a web browser would be able to click on anyone pictured by any camera on a monitored street and follow his or her movements. Such a tool, combined with data matching, facial recognition and GPS could be a powerful tool for government and, increasingly, the private sector. If hacked, it could be accessed by the criminal element as well.

The question remains: are our societies better off (for example, in terms of crime reduction or safety or knowledge) by the deployment of tools of surveillance? If so, are these benefits worth the financial costs, the opportunity costs, and in the loss of privacy occasioned thereby? At the end of the day, how does a society find an appropriate balance between the rights of its citizens to enjoy some degree of privacy away from the prying eyes of others, and the legitimate interests that some might have in observing, filming, data-mining and monitoring their fellow citizens? How do we ensure that the balance that we strike does not privilege some sectors of society vis-à-vis others? (Schwartz and Milovanovic 1996). The answers are difficult to gauge.

The first section of this chapter will attempt an assessment of where we are headed in the world of surveillance. We review the range of new technologies currently available, ranging from closed circuit television (CCTV), through biometrics, to what have come to be known as "intelligent" buildings. The second section reviews how these technologies may affect us, and examines whether this should be a matter of concern.

We end this section of the chapter by surmising that the ubiquity of modern surveillance technology presents as a two-edged sword:

> As society becomes more dependent on technology, there will inevitably be those who seek to exploit such apparatus for less legitimate purposes. The increases in electronic crime, from counterfeit credit cards to terrorists using the internet are an example of how illegal activities are changing in line with the new opportunities this technology creates
>
> (Norris and Wilson 2005: 409)

What Norris and Wilson are saying is that surveillance technology is developing in ways that we may not necessary expect. We now have massive amounts of data stored by both public and private agencies, but we cannot guarantee who has access to it, nor do we know how safely the information is stored. We may never be fully aware of who owns and operates the diverse range of surveillance platforms. This issue becomes increasingly important if we consider the rapid rise of the private sector and its armory of surveillance technology. It is to that sector that we briefly turn now.

The rise of private sector security services

The private sector is a relatively new player in the security and surveillance field. As Michel Foucault alluded to a quarter century ago, surveillance power is now not only wielded by the state and its agencies, but is exercised by a variety of non-government actors who regularly observe and monitor the activities of others (Foucault 1977). Increasingly, the infringements upon individual privacy in the twenty-first century are less likely to emanate from the governmental sector, as George Orwell depicted "Big Brother" in his book *1984*, than in the technology available to thousands of "little brothers" as they exchange information between themselves in a drive for information about the market (Whitaker 1999; Garfinkel 2001). Orwell, in fact, suggested that we were only able to achieve privacy "in the dark," but even this idea has been overtaken by technology: new technological innovations such as infrared and thermal cameras have removed even darkness as a barrier.

Surveillance activities by agents in the public sector, principally police officers, usually require a warrant or some other form of independent authorization before they can proceed with the surveillance. The private sector, in contrast, is less regulated, and many of these types of activities continue unregulated. What legal restrictions *may* apply still allow a fair degree of latitude to those who wish to monitor and store records of the activities of other persons. True, there is some evidence of a recent change of consciousness among private investigators in terms of a greater respect for privacy principles, although there is good reason to suspect that this change was driven by the heightened probability of their being exposed and sanctioned for breaching privacy laws. The fact remains, however, that private agents are no strangers to the invasions of the privacy of others (Prenzler *et al.* 1997; Prenzler and King 2002: 4–6) and are largely driven by their clients' interests first and foremost.

It is also indisputable that the private security sector and investigation industries today are expanding at a rapid rate. Part of the reason is the private sector's investment in, and access to, sophisticated surveillance tools. Private security trends indicate a significant growth in electronic surveillance and electronic monitoring that shows no signs of abating (Sarre and Prenzler 2011: 31).

The private sector came to prominence in the late 1960s and early 1970s and has grown ever since. Reports today indicate that security personnel now outnumber police by two-or-more to one in many countries, including the United States, China, India and South Africa (van Steden and Sarre 2007a; CoESS 2011; Small Arms Survey 2011). Elsewhere, such as in Europe, private security numbers have generally remained below those of police, although the trends analysis indicates strong growth in the private sector (van Steden and Sarre 2007b). A 2011 survey across 70 countries estimated there were some 19.5 million people employed in private security (Small Arms Survey 2011: 101–106). The entire industry was valued in 2011 at US$100 billion–US$165 billion per annum, with an annual growth rate of 7–8 percent. Across the 70 countries surveyed, private security personnel were estimated to outnumber police by a ratio of 1.8:1. In Australia, the most recent study of the size of the industry estimated that, in the years 2006–2008, there were on average 45,000 police and 112,000 licensed security providers operating in the marketplace – although many of these security providers were part-time (Prenzler *et al.* 2009).

Growth in private security has been attributed to a wide variety of factors (Shearing and Stenning 1983; Jones and Newburn 1998; 2006). The main factor appears to be market demand, driven by the large increases in crime from the 1960s through to the turn of the century. The current downward trend in crime, especially property crime, is also closely correlated with the uptake of security and growth in the sector (van Dijk 2012).

Notwithstanding, such reductions in crime have not appeared to sate the appetite of those who continue to harbor risk-averse attitudes to crime (Brooks 2011; 2012). In other words, private security will continue to grow in size and reach (including its surveillance reach) regardless of the pleasing trends in crime statistics. This has as much to do with the availability of the technology as it does with the wider global culture of fear and distrust which have proved significant in legitimating (or "naturalizing") surveillance as an unexceptional and unproblematic tool of social order (Marks 2012). Moreover, private security personnel will still rely heavily upon the tools of surveillance which have become their stock-in-trade (Helgesson 2011). It is to that armory of surveillance tools that we now turn our attention.

Surveillance technologies

Surveillance technologies range from the visual to the audible and digital. It is the ability to monitor, observe and record an individual that is present in all three. In the past, there was limited ability to achieve such surveillance, unless one used an investigator to provide the tracking platform. Today, and increasingly into the future, the type of platforms that are used to support surveillance are expanding (Smith 1996; 2006; Smith and Brooks 2013). Many of these platforms are benign or installed to fulfil another purpose, but by their technological nature they become a surveillance device (Brooks 2012). We will now look at each of these in turn.

CCTV

The most pervasive of electronic instruments is the video surveillance camera, linked to a closed circuit television (CCTV) system. These cameras are now widespread throughout the world (Neyland 2006). The CCTV User Group estimated in 2008 that there were around 420,000 such cameras in London alone, and perhaps 1.5 million cameras in the United Kingdom (CCTV 2008). CCTV can accommodate overt and covert cameras, traffic flow cameras, speed infringement cameras and red light intersection cameras. Casinos, department stores, convenience and fuel shops, streets and car parks, reserves and nature parks, railway and bus stations, universities and sports arenas are all likely candidates for CCTV surveillance. These cameras can be and have been deployed by national, regional and local governments in "public" areas and by the private sector on and around private property. The vast majority are operated and are monitored by private security personnel to whom such responsibilities have been outsourced by public or private contractual arrangements.

The main application of CCTV is the monitoring and reviewing of recorded scenes, principally as a crime prevention tool. In retail shops and market precincts, CCTV has become seemingly indispensable, with widespread business support for their potential value as a means of crime reduction (Prenzler and Sarre 2012a; 2012b). Another innovation is the ability of cameras, loaded with "search" software, to allow police, building owners, retail proprietors and so forth to count people moving past a certain point. Such systems can track children, or people wearing certain distinctive clothing, which is very helpful in search and rescue situations, or in following up matters pertaining to the commission of a crime. It is even possible that a person's walking down an open street and past a particular camera, could trigger, in the future, an invitation to that person, by her pager, to pause to look into a window where certain name-brand goods are on display.

Very few people question the value of having CCTV systems in shopping centers and public areas, despite their limitations and costs. It is clear that CCTV footage played an enormously important role, for example, in the investigation of the abduction and murder of James Patrick

Bulger in 1993. The albeit small and somewhat blurry images of Robert Thompson and Jon Venables leading "Jamie" Bulger out of the New Strand Shopping Centre, combined with footage of them stealing items that would be found at the murder scene, clearly demonstrates the value of CCTV as investigative tool in high profile cases. Indeed, just having accurate time and date stamps on video can contribute significantly to supporting a police investigation.

In the not-too-distant past, the number of CCTV systems was almost self-regulating. To a large extent, the market was limited by the size of the investment required to install and use the technology. The high cost of cameras, housings, switching and control equipment, video recorders, and the physical infrastructure and cabling required to support the operation of the CCTV system were frequently just too great for a user to justify choosing CCTV above other available security options.

Over the past decade, however, advances in camera technology have been truly phenomenal. There is now a massive capacity to store and process video. This growth has occurred in parallel with a greatly improved and converging communications infrastructure, and significant reductions in the costs of the technology. CCTV systems no longer need to be purchased from specialty security contractors. Sophisticated systems can now be purchased from many retail outlets, such as hardware stores, and the price is significantly lower than it was a generation ago.

There has been some academic interest in the potential for abuse of CCTV, principally by virtue of the public intrusiveness exercised by those who operate and monitor the cameras (Prenzler and King 2002; Prenzler 2004) and the potential misuse of the images collected and stored by CCTV hardware. In days gone by this was not a problem; access to recorded video was relatively easy to control due to inherent technical limitations in CCTV systems, and the fact that very few people knew how to install and monitor them. However, these technical limitations no longer apply. YouTube, Vimeo, Instagram, Twitter, Facebook, and other social media platforms now provide mechanisms for the almost immediate world-wide distribution of recorded video and images. These advances bring with them opportunities to use images and video in innovative ways to manage and respond effectively to crises and crime risks, but they always raise privacy concerns. The Reef Casino (Channel 9 2011), for example, was exposed in 2011 as an employer that allowed its security staff to collect and copy CCTV footage of patrons and other staff for their own prurient interests and in clear defiance of privacy courtesies (if not rights) and company policy.

As the following two short case studies show, CCTV technologies have a usefulness in post-crime legal proceedings, both criminal and civil.

The report card on the efficiency and crime reductive effectiveness of CCTV, however, is mixed (Winge and Knutsson 2001; Wilson and Sutton 2003; Wilson 2005; Sarre and Prenzler 2009: para. 7: 235–237, 250). The research also consistently reports that CCTV has no effect on violent crime, and that better street lighting can be more effective than CCTV in reducing overall crime (Welsh and Farrington 2002; 2004).

Drones

Some very modern technology, causing something of a stir worldwide, is the unmanned airborne vehicle (UAV) or unmanned ground vehicle (UGV) referred to in common parlance as a "drone." Originally aircraft or vehicle-sized and designed for military purposes, smaller versions are now available to the public (Maiolo 2012) for about US$10,000. Today, one can purchase a "toy" UAV from under US$200. These are used for a range of tasks such as aerial photography, fire control, and search and rescue. Inside what appears to be a model aircraft is a sophisticated

Case Study 15.1

A small stand-alone CCTV system operated in a convenience store. One would expect that the system was originally installed with five general intentions or expectations: as a deterrent to theft by staff, to allow the owner of the store to review the actions of staff, as a deterrent to shop stealing by customers, as a deterrent to robbery, and to provide evidence to support a prosecution in the event of a theft or robbery.

The system included four color cameras and two microphones, with the recorder located in a stock room. The cameras allowed a broad view of two parking bays and the main entrance, a broad view of the retail space and the main entrance in the background of the field of view, a view behind the service counter with a view of the cash register, and a view of the stock room and rear staff entrance door. The system provided both video images and audio sound.

When a robbery occurred at this convenience store, the approach of the offender, his entry into the store, the approach to the counter and the threats of the assailant with a knife in his hand were all recorded on the CCTV system. But so was the reaction of the shop assistant who produced a weapon from under the counter. The video then showed the two men fighting and the offender eventually leaving without any cash. Almost immediately the offender was arrested and, with the video evidence having been secured by police, he pleaded guilty. Some years later the shop assistant pursued a civil law suit against his employer, for failing to provide a safe workplace. The shop assistant claimed to have sustained physical and psychological injuries from the robbery. Fortunately for him, a copy of the video recording was still available, and it contained the all-important interaction between the offender and the shop assistant. Even though it was a poor copy, the court was satisfied of the veracity of the plaintiff's claim against his employer for damages.

Case Study 15.2

It is quite common for nightclubs to have CCTV systems installed as a condition of liquor licensing. Unfortunately the capacity for licensing inspectors to enforce these requirements and to ensure both the operation and quality of video remains limited. There is often little that an inspector can do to determine if the specified performance requirements of the CCTV system are being met. More often than not the staff at the nightclub will claim not to know how to access the video, and, with the plethora of systems in existence, it is not unexpected for the inspector to be unfamiliar with a system and/or lack the technical skills needed to match system performance to specified requirements.

Following an altercation in a nightclub where a patron was seriously injured, police obtained a copy of the video footage of the incident from several cameras in this nightclub. In due course the offender was arrested and was prosecuted for assault. The police did not introduce the video in evidence due (they said) to its poor quality.

However, to the surprise of observers, the defense *did* introduce the video the police had decided not to produce. The defense argued that the video did not support the accusations against their client, although the poor quality of the video made it difficult to discern *any* detail around the incident. In the end, a jury found that there was reasonable doubt about the veracity of the prosecution's case, and the accused was acquitted.

camera, along with a computer that drives the motor and tracking systems. The safety and privacy concerns arising out of this new technology have yet to be addressed and assessed in Australia (Australian Law Reform Commission 2008; ABC Background Briefing 2012) although legislation is currently before the US Congress to set out the ground rules for their use.

Global positioning system (GPS)

Miltitary developments continue to release a constant source of technological wizardry into the commercial surveillance market. Notably, the global positioning system (GPS), which was once restricted to military application, now has application in common devices such as those found on car dashboards and mobile phones. GPS, for a price, provides remote alarm assessment, access control and access to CCTV. This type of functionality operates in real time and allows continuous communication to monitor both visual CCTV and alarm data. However, such technology could increasingly be used to track and monitor individuals by anyone who can legitimately or illegitimately have access to the data.

Robotic devices

A robot is a mechanical device that has some level of virtual intelligence which allows it to perform tasks, such as surveillance tasks, according to programmed instructions or remote control. Robots are being increasingly deployed for security and surveillance tasks such as perimeter patrolling, explosives neutralizing, airport baggage examination, virtual management of major defense strategies, and intelligent imaging of people for visual recognition. So-called "intelligent" mechanical devices become a platform that allows integration of a range of surveillance devices.

Whole of spectrum detection

The advanced exterior sensor (AES) system allows the three sensor technologies of thermal infrared imaging, visible light imaging, and microwave radar to be integrated into one surveillance system (Ashby and Pritchard 2004). These sensing technologies which apply across the whole of spectrum detection (including an extended range of electromagnetic frequencies and acoustic frequencies) allow the user to track individuals at whim. The AES scans a full rotation in about a second, and provides images of each sensor technology after each rotation. In the near-to-long-term, such whole–of–spectrum detectors will become integrated solid state devices making them smaller, cheaper and more commercially available. Because this system uses different combinations of sensor frequencies, it has the capability to be applied on airport runways and other locations where there are large open areas such as city centers and parks.

Laser scanning systems

Laser scanning systems can be employed to detect an individual's reflected radiation. The scanner can provide location, speed and direction of movement of the person, and an analysis of the fabric being worn by the person. It can also detect the presence of any metals being carried by the person. Scanners can even provide information regarding skin toning (Venkataraayan *et al.* 2012).

Future "smart" intrusion detection systems will integrate their data with biometric data to detect, recognize, and identify individuals (Jain 2004). Indeed, the banking industry has been quick to adopt these new technologies. In October 2012, the Australian and New Zealand (ANZ)

Bank revealed that it was looking into retina and fingerprint scanning at its automatic teller machines. In the same month, the National Australia Bank announced that it would, from 2013, be introducing voice recognition software to boost security, and to cut waiting times (given that some 40 percent of callers have forgotten their phone banking passwords) (SMH 2012). Thus, systems that are based on imaging and photonics will eventually become indistinguishable from each other.

High frequency security cameras

The recent development of cryogen-free terahertz (THz) security cameras operating at frequencies below 1 THz allows imaging of objects such as weapons that are hidden from view. Such technology has the capacity to "see" through a person's clothing and other material. Previously these cameras required superconducting elements to reduce the electronic thermal "noise" which interferes with high frequency images. Today, they are becoming relatively common in the defense of critical infrastructure facilities.

THz technology will eventually have the ability to determine an object's chemical composition at a distance. THz radiation (emitted by many organic compounds such as explosives and drugs) is absorbed by the sensor and will be able to be detected by THz cameras. When commercially available, these detection sensors will be capable of operating in airports, marine ports and other critical environments.

Acoustic surveillance sensors

Acoustic surveillance technologies are now available for police services and the military to locate and identify sound sources, such as gunfire. Wide area acoustic surveillance is achieved through the positioning of acoustic sensors throughout a coverage area (typically 25 square kilometers). Sensors are matched to audio analysis software that can identify and locate the unique "signature" of sounds in real time. The development of acoustic ID location systems also allows identification of vehicles approaching barriers, and can even provide acoustic surveillance of people moving around secure facilities.

Smart barriers

Smart barriers are usually located at the perimeter as a fence or wall, or located in the interior of a facility as a wall, or door lock, or a safe door and lock. A variety of surveillance technologies can be incorporated into the fabric or materials of the barriers in order to detect if, when and where the barrier is under attack. It is even possible that, in the future, these surveillance tools could predict not only the presence of individuals who are approaching a barrier but their intent, based upon a range of characteristics. For example, the way a person approaches a barrier (whether physical or a line in the sand), the direction they travel, their changing gait and the like, are all factors capable of indicating that a visitor may be approaching with the intention of committing an anti-social act.

Mobile devices, smart phone and texting

Mobile technologies now allow worldwide communications and interconnectivity regardless of the location of the user. They are now being referred to as BYOD (Bring Your Own Device). It is expected that, in the future, wireless will replace existing wired solutions due to their

advantages of network convergence, namely reduced costs, mobility, flexibility and convenience (Cubbage and Brooks 2012: 98–99).

Mobile (cell) phones, with their cameras, apps and tracking devices, are now carried in literally hundreds of millions of pockets and purses across the globe. Mobile phones can even be integrated into a motor vehicle's safety systems. Such integration results, for example, in the phone not answering if one is in busy traffic, or when on the phone, alerting one to outside vehicle threats. In other words, the system will be monitoring the user. It will know where he or she is, and what he or she may be doing.

Millions of texts are sent daily around the globe. Australian government legislation is currently before the Australian parliament (*Cybercrime Legislation Amendment Bill 2011*) to allow Australian Federal Police and foreign law enforcement agencies to seek communications data (text messages and emails) under warrants, in line with the Council of Europe Convention on Cybercrime (Australian Government 2012). When one uses this technology, one's location can be tracked with a certain degree of accuracy. This may of course assist where a person has become lost, or disorientated or kidnapped.

There is a downside, however, to the possibility that phones may be used as tracking devices. The *New York Times* reported recently that,

> Law enforcement tracking of cell phones, once the province mainly of federal agents, has become a powerful and widely used surveillance tool for local police officials, with hundreds of departments, large and small, often using it aggressively with little or no court oversight.
>
> (Atlantic 2012)

Indeed, the "location facility" systems require an agreement between two people to share their location data, thus establishing a trust between them. Although friends within a group can occasionally release their location to others, the issue of "soft-stalking" may arise between individuals. Parents wishing to know the whereabouts of their children (for social and safety reasons) can continually seek location data. While the desire to locate a child in case of an emergency is a valid one, trust could become fragile.

Similarly, within the workplace, location data for individuals by employers could be justified for safety and efficiency reasons. Employees with special responsibilities may need to have their location known to others on a regular basis. However, the tracking of employees could easily cause resentment.

The American Civil Liberties Union (ACLU) has used freedom of information laws to survey police departments nationwide about their use of this tracking technology. Some jurisdictions now require officers to obtain warrants before they can access wireless carriers' customer data (Atlantic 2012). But in many jurisdictions, there is no such requirement. Depending on the type of phone, officers can get GPS data that shows where a customer has been. Armed with this information, the *New York Times* concluded as follows: "Cell [phone] carriers, staffed with special law enforcement liaison teams, [have been known to] charge police departments from a few hundred dollars for locating a phone to more than $2,200 for a full-scale wiretap of a suspect" (Atlantic 2012).

There is currently a proposal, put to the Australian government by its spy agency, the Australian Security Intelligence Organisation (ASIO), that communications companies be forced to store phone and internet data for two years so that records can be searched as required (ABC Background Briefing 2012). Nothing has come of this plan to date.

Security industries will soon be adopting "near field" communications (NFC) whereupon it will be possible to create, apply, and manage secure identification on NFC-enabled smart phones. Such a device provides physical access to the home, a workplace, corporate personal computers and a corporate network. Future functions of NFC smart phones will be "on demand" credential providers for security access, the provision of mobile keys for multiple functions to access secure doors, computers, networks, home and vehicles, and the provision of smart tokens, hence eliminating the need for cash or other transaction cards.

Contactless smart cards

These first appeared in the form of electronic tags for identification of objects. However, these cards now have many applications in finance, electronic ticketing, access control, and electronic purses. The difference between contact and contactless cards is that the user does not need to insert the card into the smart card reader for communication to occur. The communication takes place between the card and the reader by a radio frequency link that allows access to the system as long as appropriate access codes are presented. Contactless technologies can be subjected to several threats to the access control of the system including eavesdropping, interruptions of operations, denial of service and fraud (Smith and Brooks 2013).

Biometrics

Researchers at the Massachusetts Institute of Technology have developed video processing software that identifies tiny changes in a person under surveillance, such as their breathing or blood flow (Franzen 2012). This technology has the capacity to analyze a person's vital functions, and determines whether they are under stress. The technology can also monitor other biometric data such as facial recognition and personal characteristics (Alterman 2003).

Extending from the integration of both the detection of physiological and physical factors, and artificial intelligence decision-making, such systems can attempt to predict a person's intent to commit an act. Current research is being carried out in Europe combining multi-sensor technology with predetermined actions that may allow a response prior to an event occurring.

Personal privacy must be considered when biometric data for an individual is gathered through sensing, capturing an image, measuring, or assessing the biometric trait of interest. The issues concerned with privacy of biometric data can include:

- *unauthorized collection*: Some biometric technology can collect data without the knowledge of the individual.
- *unnecessary collection*: Biometric data can be continually gathered from individuals throughout their daily work period, such as keyboard monitoring.
- *unauthorized use*: The biometric data may be used in an unethical manner within the organization.
- *unauthorized disclosure*: Physical characteristics of an individual may be disclosed to others to the disadvantage of the individual, for example, the personal insurance of the individual.
- *function creep*: The expansion of a biometric ID system could present individual's biometric data to other functions within the organization.

Intelligent buildings

Finally, "intelligent" buildings are now being developed to create a single integrated system that monitors, controls and manages all functional systems within a facility, site or city block.

Nevertheless, such dynamic control introduces the threat of the interception of the telecommunications infrastructure being used (Brooks 2012).

Surveillance: the role of the law

There is little doubt that, in a rapidly changing technological world, the law struggles to keep up. Indeed,

> the old adage that technology outstrips the law's capacity to regulate still remains true: each round of technological innovation poses a new range of social and legal challenges. Surveillance technologies generate concern about unjustified invasions of privacy and property; but there are also new threats to the fair trial, since the use of these technologies potentially circumvents the legal safeguards (such as the privilege against self incrimination) that may otherwise apply.
>
> (Bronitt *et al.* 2009)

Who can carry out surveillance? What if the filming occurs without warning? Should it be any different if there is a demonstrable public interest in such surveillance, for example, to ensure that patrons in casino gaming rooms are not cheating, or to ensure public safety in crowded walkways? What if there is misuse? Are warning signs required by law? These questions are becoming more and more important for policy-makers around the world as surveillance becomes more and more pervasive. The need for regulation is apparent. According to corporate surveys, for example, more than half of Australia's largest companies undertake video surveillance of employees and of visitors to their premises (Catanzariti 1998).

Insurance firms, and their contracted investigator businesses, covertly film and photograph suspected perpetrators of insurance fraud on a daily basis all around the world. Nor is the surveillance always fair. During passive surveillance of personal injury claimants, it is not unknown for investigators to place heavy items near a person's house, and wait with a video camera to film the person as he or she attempts to move them (Hardy and Prenzler 2002). The common law does not prohibit such filming, but the tapes may not be admissible as legal evidence if the person under surveillance can convince a court that there are public policy reasons to disallow such evidence. There may also be difficulties, certainly ethically if not legally, if the placing of the object is shown to have aggravated the purported injury (Prenzler 2002).

An argument could be made that a store's changing and fitting rooms should be under camera surveillance for a legitimate commercial interest, that is, as a deterrent to theft. But since the potential for innocent persons to be embarrassed is great, as is the potential for inappropriate conduct by security employees, cameras in these locations are unlikely to be treated favorably by the courts. Arguably, filming which intrudes upon intimate or private space (such as bathrooms, showers or changing rooms) will most likely be deemed "unconscionable conduct" in the absence of specific and informed permission. In that event, there may be a remedy (in the torts of trespass to person, trespass to land, nuisance or defamation) provided to any person adversely affected by such conduct in circumstances where the elements of the particular tort have been established by the plaintiff. Conversely, where there may have been an affront to dignity that was merely consequential upon a legitimate and legislatively protected interest, for example, the right to have theft or cheating exposed under a clearly authorized policy of police "integrity testing" (Brereton 2002; Homel 2002), there is, arguably, little or no likelihood of a legal remedy for an aggrieved person who may have been caught out.

Thus there is much legal uncertainty for those who suffer by virtue of unauthorized surveillance and who seek to find relief at common law. If aggrieved plaintiffs can link the claimed breach to the tort of trespass or nuisance, particularly where there is a clear case of unconscionable conduct by the person or authority authorizing the surveillance, and the potential damage to a plaintiff is irreparable, the common law *may* assist. But it remains debatable at best.

The criminal law *may* provide some assistance to those confronted by covert monitoring, but only in circumstances where other offenses (such as stalking or criminal trespass) have been committed in placing or monitoring the camera. There may even be charges arising from the general purpose of the activity, for example, if there was an element of indecency about the intent of the person installing the camera.

The work of legislators in Australia is instructive in this regard. Below there are two case studies; one looks at the legislative efforts of two parliaments to guide policy in this respect; the other looks at workplace regulation, again by legislation.

Case Study 15.3 Statutory regulation of surveillance devices in Australia

In most jurisdictions in Australia some aspects of surveillance are now regulated by statute. The national *Surveillance Devices Act 2004* sets out the powers of national law enforcement agencies with respect to surveillance devices. There is also state legislation that limits and guides the powers of state (public and private) agencies. Two of these pieces of legislation are introduced briefly here.

In Western Australia, the *Surveillance Devices Act 1998* (WA) restricts the use of covert cameras generally. It prohibits the use of any optical surveillance device that records a "private activity" or "private conversation." There is no infringement of the legislation if each "principal party" consents to the use of the optical surveillance device, but this exception applies only where the person who uses the device is a party to the conversation. This legislation certainly places a limit upon the time-honored practice of current affairs journalists attaching hidden cameras to themselves or to products in order to catch out unscrupulous tradespersons. Similar in breadth to the Western Australian legislation, the Victorian *Surveillance Devices Act 1999* prohibits, by criminal penalties, the use of an "optical surveillance device," listening device or tracking device, such as a global positioning system (GPS) device, to communicate a private conversation or a "private activity" where the person undertaking the surveillance is not a party to the activity. A "private activity" is broadly defined as "an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves," but it does not include "an activity carried on outside a building or an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else."

In its final report, *Surveillance in Public Places*, tabled in the Victorian Parliament on 12 August 2010, the Victorian Law Reform Commission wrote that Victoria's surveillance laws should be updated due to changes in technology (VLRC 2010a). The Report's 33 recommendations (VLRC 2010b) to modernize the State's surveillance laws and to promote responsible use of surveillance devices in public places included:

- clarifying, modernizing and strengthening the *Surveillance Devices Act 1999*, including a new offense dealing with improper use of a surveillance device;
- prohibiting surveillance in public toilets and changing rooms;
- prohibiting a person recording an activity or conversation which they are part of without the consent of the other parties;
- broadening the role of the Victorian Privacy Commissioner to include regulation of public place surveillance;
- creating two new causes of action relating to serious invasions of privacy.

Case Study 15.4 Workplace surveillance legislation in New South Wales

At common law, employees are, by virtue of their employment contracts, subject to certain powers of their employers; for example, to follow instructions so as not to endanger the safety of their colleagues, to reveal prior convictions if requested during the employment interview, and so forth. However, one could argue that this general power does not extend to engaging in covert surveillance of workers, unless there is an overarching public interest to be served. While this principle has yet to be tested in the courts, an employer could argue, for example, that temporarily installing a covert camera in a tearoom to catch a specific suspected thief or vandal would meet such a "public interest" test. That is, in the absence of specific legislation, or provision in a contract or industrial agreement prohibiting such surveillance, there is nothing at common law to prevent the covert filming of workers. Indeed, researchers have discovered significant employer complacency when it comes to privacy breaches towards "lower-level" employees (McCahill and Norris 1999).

In New South Wales (NSW), however, employees are protected against unwarranted workplace surveillance by the *Workplace Surveillance Act 2005* (NSW). Specifically, it is now unlawful in NSW to engage in covert surveillance unless a magistrate has authorized the activity. The legislation also outlaws gratuitous filming, and certainly where it is designed to embarrass or humiliate the person who has been placed under surveillance.

The *Workplace Surveillance Act 2005* (NSW) is designed to strengthen the prohibitions on employers in relation to employee activities. It regulates camera, computer and tracking surveillance and restricts the use and disclosure of covert surveillance records. Covert surveillance is now prohibited at work except as authorized by a "covert surveillance authority" and only for the purposes of checking on suspected *unlawful* activity. The type of conduct now illegal in New South Wales may include, for example, an employer (or an agent under the employer's direction) filming workers to prove that they are lying about their ill-health or for other reasons (Catanzariti 1998). The Act also regulates any attempt by an employer to block an employee's emails. Employers who breach the Act face a fine. They can escape liability, however, by showing that the covert surveillance was solely for the purpose of ensuring the security of the workplace or the persons in it (Catanzariti 2005).

Policy implications of surveillance technologies

There has been, and continues to be, a massive expansion of overt and covert surveillance internationally, through an ever-expanding technological revolution that has left no part of the globe untouched (Whitaker 1999). Surveillance serves the interests of data-hungry social and commercial institutions. These institutions then apply "analytical formulae and protocols in a bid to classify and sort information, label and categorize abnormalities and identify particular patterns for pre-emptive intervention" (Marks 2012).

For example, Facebook users' use of the *like* button extends how they expose themselves to data-mining. Not only does Facebook build a profile of users, but by using the *like* button to indicate one's interest in pictures, comments or advertisements, one allows a far more detailed picture of him or herself as a consumer to be built. Information about our likes, dislikes, affiliations, purchasing patterns may be extrapolated to populate this profile. For a corporation such as Facebook, such profiling is extremely powerful from a commercial sense. Users of Facebook, LinkedIn or similar sites provide details about themselves and, by inference, their friends and associates (Arnold 2012: 58). This can be a bonus to both retailer and shopper.

None of this should be of any surprise to anyone. Surveillance systems make everyday phenomena identifiable and comprehensible. The data they gather are capable of being cross-referenced regularly to better manage risk and uncertainty (Smith 2012).

Indeed, there is little doubt that the pressures to develop and deploy surveillance technologies are strong. There are ever increasing opportunities for platforms to carry surveillance technology. For example, the relatively low cost associated with fitting local "rangers" with vehicle-mounted cameras that provide CCTV surveillance in real time via mobile connectivity makes this a viable choice for local government. Police officers' increased use of body-mounted cameras to protect themselves in their work provides another example.

There are, however, numerous concerns arising from this expansion of surveillance tools. We need to be wary:

> Surveillance . . . acts as a "companion species", accompanying us on our respective journeys through life. Although surveillance makes social action visible, the relative invisibility of surveillance as a social process has meant that many of the methods and analytical techniques utilized have become "naturalized", relatively unexceptional objects and unproblematic processes in the physical and cultural fabric of everyday living.
>
> (Smith 2012: 1)

Where does this leave the global citizen? Marcella and Stucki put the issues in a series of questions as follows:

> Can we ever feel completely secure? Does giving up my right to privacy ensure my improved safety and security? How can I prove this? Can I see improved safety? How do I know I am secure? I can quantify and tangibly identify when I am asked to provide personal data, or when my privacy may be challenged either directly or indirectly. Scarier, however, is my total lack of knowledge of the times my personal confidential and private data is accessed, reviewed, analysed, cross-referenced and mixed, without my knowledge and/or consent.
>
> (2003: 12)

From the perspective of the private sector, its proponents promote the idea that enhanced surveillance will reduce product theft and employee dishonesty. The public sector, too, sees the possibilities of greater opportunities for them to solve crime and to keep the peace.

By the same token, there are fears associated with the technology; in the case of the public sector, the emboldening of police and other agencies to spy upon the legitimate activities of those whom the authorities deem "undesirable"; in the case of the private sector, the availability of data for sale that pertains to the spending and other patterns of behavior of millions of customers that may compromise their personal integrity. There also remain concerns about the political neutrality of those who would install and monitor the means of surveillance (O'Malley 2008).

Is there a minimum ambit of privacy, to maintain the level of human dignity that a modern form of government should provide (Wood 2010: 10)? To maintain one's dignity, one must be able to control access to him or herself and be protected against unwanted scrutiny and judgement in private or in public. In the following quotation, Larsen is speaking about CCTV specifically, but the parallels with other forms of surveillance are obvious:

> Grounded in this rationale is the entitlement to anonymity, which should ensure that encounters with others in public remain at arm's length and that a person is subjected to only fleeting and impersonal appraisal. Like all privacy-related claims, anonymity is of particular value in fending off the controlling powers of the state
>
> (Larsen 2011: 185)

The fact that scrutiny is virtual does not diminish the intrusive nature of modern prying. It is clearly at odds with the fundamental right to be left alone. The key question here is whether such surveillance is justified by its effects on crime and anti-social conduct. Indeed, the jury is still out on whether CCTV, for example, increases the security of the public. Despite the lack of persuasive evidence of the cost-effectiveness of CCTV, for example, public demand for cameras has shown no sign of wavering (Le Grand and Gosper 2012). The most recent evidence of this was found in a recent case in Melbourne where a woman, journalist Jill Meagher, was attacked and killed at random by a man who approached her in the street late at night. The emergence of CCTV footage (from a private shopfront) showing the victim walking along the street towards her home at 1:40 am and being met by the man (known to police) on the Saturday morning was crucial to solving the case. Prior to then, investigating police were uncertain whether she had attempted the walk home, or whether she had left the bar in other circumstances (ibid.).

Governments install CCTV systems on a political platform and communities generally support such systems; however, as Brooks has stated "CCTV systems occupies a relatively safe and non-adversarial social position . . . but the risk characteristics indicate that there are underlying social concerns" (2005: 19). In the end, the question for all of us is whether the benefits of the spread of surveillance technologies outweigh the costs to the personal freedoms we enjoy. The general consensus appears to be that citizens rate their anonymity far more cheaply today than in the past, and may be far more willing to trade it for promises of security, even if such promises remain unsubstantiated and ephemeral.

On balance, one might conclude that surveillance technologies are more benign than harmful:

> But once the process and surveillance and collection of information is set in motion, and with new methods of electronic processing, facilitating the sorting and identification of people, it only needs the political will to assert the control that the accumulated knowledge allows.
>
> (Larsen 2011: 186)

Moreover, as Russell Hogg points out, this is a case of a crime-fearing subject (Lee 2007) meeting a fearful nation, not incompatible with the drift to a "law and order society," with defensive nationalist anxieties (Hogg 2008). Hogg's observation may be an over-statement. At the very least, however, surveillance goes hand in hand with conservative political outlooks. Whatever one's political persuasions, when it comes to surveillance technologies, vigilance along with sound regulatory regimes are, by necessity, imperative for modern civil societies.

Future research

Where does this leave us in relation to the research imperative? There appear to be three key areas that need attention: (1) the means by which we hold surveillance devices (and their operators) to account on behalf of (especially) local populations for any excesses in the manner in which data are gathered; (2) how much data are stored (and how), and (3) in what ways should we be able to access a notable authority (that is separate from the courts) in the event of a breach of propriety in order to hold the processes to account (Neyland 2006: 173)? Common law developments have not been clearly articulated, and make a not altogether clear distinction between surveillance of private individuals and private businesses. Moreover, legislation appears to have had little effect upon the zeal of people brazen enough to flout it. Whether the preferred answer is a tort of invasion of privacy or a resolve to strengthen existing legislation is a debate still to be had (Sarre 2003). Whatever course of action we pursue, these issues should be a matter of priority for law reform commissions and jurisprudential thinkers the world over.

Conclusion

The growing sophistication of technological surveillance tools cannot guarantee security. The means available to public and private instrumentalities to watch and monitor citizens are becoming more intrusive by the day. The law regulating surveillance indicates that governments and judges are suspicious of intrusions into people's privacy. The common law is weak in this field; however, parliaments have filled the gaps with piecemeal legislation designed to dampen the enthusiasm of would-be sleuths. But the developments in this area have been *ad hoc*, and inconsistent between global and even intra-national jurisdictions. To be clear, there are laws in place to capture criminal offending related to privacy breaches. However, until the last ten years, videotaping of anyone in any circumstances, for example, remained completely unregulated in Australia.

Will the expectation of privacy reduce over time, especially as technologies become even more widespread and accepted? It is difficult to say. On the one hand, there is the strong sense that people indulge in a privacy-benefit trade-off, and calculate that their lives can be enhanced from having databases, say, that allow any doctor or hospital anywhere in the world to access their medical records, or to have a global credit rating available electronically that can be relied upon to allow purchases to proceed without difficulty (Sarre and Prenzler 2009). On the other hand, it may be that individuals will develop a heightened expectation of privacy, given the massive amounts of data that may be cross-matched (Cannataci 2010) and despatched worldwide in a matter of seconds before its veracity can be checked.

One might safely assume that future generations may be less concerned with their individual privacy, driven by ever increasing desire for global connectivity at a relatively minimal cost, and even with a clear understanding of the data footprint that they are leaving behind.

While there are state and federal legislative restrictions on much surveillance activity, surveillance devices continue to appear in workplaces and public spaces. The jury is still out

on whether the law regulating access to private information by the private sector has been effective in achieving its aims.

New technology is emerging and converging that will change our use of surveillance technologies. The sum of these technologies will have a direct effect on surveillance, beyond what has traditionally been considered appropriately visual and audible. Emerging technology will allow us to be far more connected, and have far greater mobility and access to data, while supporting us functionally. However, such changing technology must result in challenges to our privacy. It may also change the way we perceive ourselves.

It is arguable that parliaments are the most appropriate bodies to legislate the extent to which individuals can be subjected to lawful surveillance (Prenzler and Sarre 2008; Button 2012). The courts, too, however, have a role to play in limiting egregious invasions of privacy on a case-by-case basis. Ultimately these bodies will be directed, however, by the wisdom expressed by people themselves. Criminology will be fulfilling its role if it can challenge and provoke perceived public opinion (Loader and Sparks 2010: 132).

Government policy-makers, parliamentarians, and the courts alike are thus challenged to find the required balance between appropriate levels of surveillance and the rights of individuals to be free from the prying eyes of others. But first and foremost, populations at large have the call. What will they say? Where will their opinions take us? We await the future with some trepidation.

Discussion questions

1   What policies regarding the use and accountabilities of surveillance operators should apply generally? Should these policies differentiate between the public and the private sectors?
2   What should policy-makers recommend concerning CCTV operators who deliberately use surveillance footage for their own prurient interests and/or sell it to others? Should it be a criminal offense? If so, what should be the penalty?
3   What makes the internet vulnerable to crime? Whose responsibility should it be to protect those who could become victims of crime on the internet?

Websites

American Civil Liberties Union: http://www.aclu.org/.
Australian Privacy Law and Practice: http://www.alrc.gov.au/publications/report-108.
Internet communication and other technologies: http://www.privacy.gov.au/topics/technologies.
CCTV Users Group: https://www.cctvusergroup.com/.
Electronic Frontier Foundation: https://www.eff.org/issues/mass-surveillance-technologies.
Surveillance equipment providers (OZSPY): http://www.ozspy.com.au/.
The Surveillance & Everyday Life Research Group, University of Sydney, Home page: http://sydney.edu.au/arts/research/surveillance/.

References

ABC (2012) 7.30 Report, October 8, 2012. Australian Broadcasting Corporation, available at: http://www.abc.net.au/7.30/content/2012/s3606364.htm (accessed 11 November 2012).
ABC Background Briefing (2012) "ASIO Wants Powers to Counter Changing Technology," available at: http://www.abc.net.au/news/ (accessed 19 October 2012).
ABC News (2006) "Centrelink Staff Sacked for Privacy Breaches," available at: www.abc.net.au/news/2006-08-23/centrelink-staff-sacked-for-privacy-breaches/1245368 (accessed 11 November 2012).
ACLU (2007) "Surveillance Society Clock," 4 September 2007, available at: http://www.aclu.org/technology-and-liberty/surveillance-society-clock-more (accessed 11 November 2012).

Advertiser (2012) "Post Glitch a Privacy risk," 19 October, p. 15.

Alterman, A. (2003) "A Piece of Yourself: Ethical Issues in Biometric Identification," *Ethics and Information Technology*, 5(3): 139.

Andrejevic, M. (2011) "The Work that Affective Economics Does," *Cultural Studies*, 25(4–5): 604–620.

Andrejevic, M. (2012) "Brain Whisperers: Cutting Through the Clutter with Neuromarketing," *Somatechnics*, 2(2): 198–215.

Apple (2012) "iPhone 5 First Weekend Sales Top Five Million," available at: http://link.amtac.net/tjvn4 (accessed 11 November 2012).

Arnold, B. (2012) "Face off, Agenda," *The Weekend West Newspaper*, 20 October.

Ashby, R. and Pritchard, D.A. (2004) "Sensing Beyond the Perimeter: The Advanced Exterior Sensor (AES)," in *Proceedings of the IEEE 38th Annual 2004 International Carnahan Conference on Security Technology*, Albuquerque, New Mexico, pp. 182–188.

Atlantic (2012) "Total Surveillance Society: Mobile Phones Increasingly Used by Local Police for Tracking," 7 April 2012. Cited in *The Extinction Protocol*, available at: http://www.theextinction protocol.wordpress.com/ (accessed 14 November 2012).

Australian Government (2012) "Amended Cybercrime Bill Passes Senate," AAP, 22 August 2012.

Australian Law Reform Commission (2008) *For Your Information: Australian Privacy Law and Practice*, Report No. 108.

BBC (2011) Available at: http://www.bbc.co.uk/news/business-13636704.

Black, M. and Smith, R. G. (2003) "Electronic Monitoring in the Criminal Justice System," *Trends and Issues in Crime and Criminal Justice*, No. 254. Canberra: AIC.

Brereton, D. (2002) "Monitoring Integrity," in T. Prenzler and J. Ransley (eds.) *Police Reform: Building Integrity*, Sydney: Hawkins Press.

Bronitt, S., Harfield, C. and Michael, K. (eds.) (2009) "Foreword," in *Papers from the Fourth Workshop on the Social Impact of National Security*, April, Canberra: Australian National University.

Brooks, D. J. (2005) "Is CCTV A Social Benefit? A Psychometric Study of Perceived Social Risk," *Security Journal*, 18(2), 19–29.

Brooks, D. J. (2011) "Security Risk Management: A Psychometric Map of Expert Knowledge Structure," *International Journal of Risk Management*, 13(1/2): 17–41.

Brooks, D. J. (2012) "Security Threats and Risks of Intelligent Building Systems: Protecting Facilities from Current and Emerging Vulnerabilities," in C. Laing and A. Badii (eds.) *Securing Critical Infrastructures and Industrial Control Systems: Approaches for Threat Protection*, Hershey, PA: IGI Global.

Button, M. (2012) "Optimizing Security Through Effective Regulation: Lessons from Around the Globe," in T. Prenzler (ed.) *Policing and Security in Practice*, Houndmills: Palgrave Macmillan, pp. 204–220.

Cannataci, J. A. (2010) "Data Protection Vision 2020: Options for Improving European Policy and Legislation during 2010–2020," *Council of Europe Recommendation R(87) 15 & ETS Convention 108*, Strasbourg: Directorate General of Human Rights and Legal Affairs.

Catanzariti, J. (1998) "Staff Monitors Urged To Watch Legal Issues," *Weekend Australian*, 12–13 September.

Catanzariti, J. (2005) "Big Brother Evicted – in the Workplace," CCH Daily Email Alert, 30 May, CCH Australia Ltd.

CCTV (2008) CCTV User Group, website, available at: https://www.cctvusergroup.com/art.php?art=142 (accessed 11 November 2012).

Channel 9 (2011) "A Current Affair, Reef Casino, Cairns, Queensland," 31 August 2011, available at: http://www.youtube.com/watch?v=WRL6fM42UXE.

CoESS (2011) *Private Security Services in Europe, CoESS Facts and Figures 2011*, Wemmel: Confederation of European Security Services.

Cohen, E.D. (2010) "Mass Surveillance and State Control: The Total Information Awareness Project," *Psychology Today*, available at: www.psychologytoday.com 24 October 2010 (accessed 14 November 2012).

Cubbage, C. and Brooks, D. J. (2012) *Corporate Security in the Asia Pacific Region: Crisis, Crime, Fraud and Misconduct*, Boca Raton, FL: Taylor & Francis.

Curran, K. (2001) "War on Terror Worries Privacy Advocates," NewsMax.com (31 October 2001), available at: www.newsmax.com/cgi-bin/printer_friendly.pl.

Dearne, K. (2001) "Prescribing a Privacy Cure," *The Australian IT*, 1 May 2001, p. 43.

Editorial (2001) "Welcome to the Snooper Bowl," *Time* Magazine, 12 February, p. 56.

Foreshew, J. (2000) "Privacy Bill Sets a Low Bar," *The Australian*, 29 August, p. 35.

Foucault, M. (1977) *Discipline and Punish*, Harmondsworth: Penguin.

Franzen, C. (2012) "See like Superman? MIT scientists make it possible," *TRM*, 7 June, accessed 11 June 2012, available at: http://idealab.talkingpointsmemo.com/2012/06/mit-explains-technology-behind-superhero-vision.php?ref=fpb.

Garfinkel, S. (2001) *Database Nation: The Death of Privacy in the 21st Century*, Sebastopol, CA: O'Reilly and Associates.

Hardy, S. and Prenzler, T. (2002) "Legal Control of Private Investigators and Associated Private Agents: Profile And Issues," *Australian Journal of Law and Society*, 16(1): 1–20.

Helgesson, S. (2011) "Public-Private Partners Against Crime," *Surveillance and Society*, 8(4): 472–484.

Hickman, B. (2000) "Virtual Vigilantes," *Weekend Australian*, 6 May, 24.

Hogg, R. (2008) "Resisting a Law and Order Society," in T. Anthony and C. Cunneen (eds.) *The Critical Criminology Companion*, Sydney: Hawkins Press, pp. 278–289.

Homel, R. (2002) "Integrity Testing," in T. Prenzler and J. Ransley (eds.) *Police Reform: Building Integrity*, Sydney: Hawkins Press, available at: http://link.amtac.net/tjvn4 (accessed 11 November 2012).

Hucklesby, A. (2009) "Understanding Offenders' Compliance: A Case Study of Electronically Monitored Curfew Orders," *Journal of Law and Society*, 36(2): 248–271.

Hucklesby, A. (2011) "The Working Life of Electronic Monitoring Officers," *Criminology and Criminal Justice*, 11(1): 59–76.

Jain, A. (2004) *Biometrics: A Grand Challenge*, available at: http://www.biometrics.cse.edu/biometricsgrandchallenge.pdf (accessed 11 November 2012).

Jones, T. and Newburn, T. (1998) *Private Security and Public Policing*, Oxford: Clarendon Press.

Jones, T. and Newburn, T. (2006) "Understanding Plural Policing," in T. Jones and T. Newburn (eds.) *Plural Policing: A Comparative Perspective*, New York: Routledge, pp. 1–11.

Larsen, B. (2011) *Setting the Watch: Privacy and the Ethics of CCTV Surveillance*, Oxford: Hart Publishing.

Lee, M. (2007) *Inventing Fear of Crime: Criminology and the Politics of Anxiety*, Cullompton: Willan.

Le Grand, C. and Gosper, S. (2012) "Meagher's Body Found: Man Charged," *The Australian*, online, 28 September 2012, available at: http://www.theaustralian.com.au/news/nation/meaghers-body-found-man-charged/story-e6frg6nf-1226483028702.

Loader, I. and Sparks, R. (2010) *Public Criminology?* London: Routledge.

Lyon, D., Haggerty, K. and Ball, K. (eds.) (2012) *Routledge Handbook of Surveillance Studies*, London: Routledge.

Maiolo, A. (2012) "Drones to the Rescue," available at: http://www.campusreview.com.au 10–11.

Marcella, A. J. and Stucki, C. (2003) *Privacy Handbook: Guidelines, Exposures, Policy Implementation and International Issues*, Hoboken, NJ: John Wiley & Sons.

Marks, P. (2012) The Surveillance & Everyday Life Research Group, University of Sydney, Home Page Editorial, available at: http://sydney.edu.au/arts/research/surveillance/ (accessed 11 November 2012).

Mazerolle, L., Hurley, D. and Chamlin, M. (2002) "Social Behavior in Public Space: An Analysis of Behavioral Adaptations to CCTV," *Security Journal*, 15(3): 59–75.

McCahill, M. and Norris, C. (1999) "Watching the Workers: Crime, CCTV and the Workplace," in P. Davies, P. Francis, and V. Jupp (eds.) *Invisible Crimes, Their Victims and their Regulation*, London: Macmillan.

Nellis, M., Beyens, K. and Kaminski, D. (eds.) (2012) *Electronically Monitored Punishment: International and Critical Perspectives*, Cullompton: Willan Publishing.

Neyland, D. (2006) *Privacy, Surveillance and Public Trust*, Houndmills: Palgrave Macmillan.

Norris, G. and Wilson, P. (2005) "Crime Prevention and New Technologies: The Special Case of CCTV," in D. Chappell and P. Wilson (eds.) *Issues in Australian Crime and Criminal Justice*, Chatswood, NSW: Butterworths.

O'Malley, P. (2008) "Neo-Liberalism and Risk in Criminology," in T. Anthony and C. Cunneen (eds.) *The Critical Criminology Companion*, Sydney: Hawkins Press, pp. 55–67.

Prenzler, T. (2002) "Private Investigators in Australia: Work, Law, Ethics and Regulation," Report for the Criminology Research Council, available at: www.aic.gov.au/crc/reports/prenzler.html (accessed 1 November 2012).

Prenzler, T. (2004) "The Privatisation of Policing," in R. Sarre and J. Tomaino (eds.) *Key Issues in Criminal Justice*, Adelaide: Australian Humanities Press, pp. 267–296.

Prenzler, T. and King, M. (2002) "The Role of Private Investigators and Commercial Agents in Law Enforcement," *Trends and Issues in Crime and Criminal Justice*, 234.

Prenzler, T. and Sarre, R. (2008) "Developing a Risk Profile and Model Regulatory System for the Security Industry," *Security Journal*, 21(4): 264–277.

Prenzler, T. and Sarre, R. (2012a) "The Evolution of Security Industry Regulation in Australia: A Critique," *International Journal for Crime and Justice*, 1(1): 38–51.

Prenzler, T. and Sarre, R. (2012b) "Public-Private Crime Prevention Partnerships," in T. Prenzler (ed.) *Policing and Security in Practice: Challenges and Achievements*, Houndmills: Palgrave Macmillan, pp. 149–167.

Prenzler, T., Baxter, T. and Draper, R. (1997) "Special Legislation for the Security Industry: A Case Study," *International Journal of Risk, Security and Crime Prevention*, 2(3): 19–31.

Prenzler, T., Earle, K. and Sarre, R. (2009) "Private Security in Australia: Trends and Key Characteristics," *Trends and Issues in Crime and Criminal Justice*, 374: 1–6.

Privacy International (2007) available at: https://www.privacyinternational.org/reports (accessed 14 November 2012).

Prunckun, H. (2010) *Handbook of Scientific Methods of Inquiry for Intelligence Analysis*, Plymouth: Scarecrow.

Rosen, J. (2011) "Protect Our Right to Anonymity," blog on the subject of *US v Jones*, 12 September.

Sarre, R. (2003) "Journalists, Invasion of Privacy and the High Court Decision in *Lenah Game Meats*," *Australian Journalism Review*, 25(1): 115–128.

Sarre, R. and Prenzler, T. (2009) *The Law of Private Security in Australia*, 2nd edn, Pyrmont, NSW: Lawbook Co.

Sarre, R. and Prenzler, T. (2011) *Private Security and Public Interest: Exploring Private Security Trends and Directions for Reform in the New Era of Plural Policing*, Sydney: Australian Security Industry Association Limited.

SBS (2012) available at: http://www.sbs.com.au/news/article/1572977/NBN-service-provider-'hacked'-.

Schwartz, M. and Milovanovic, D. (eds.) (1996) *Race, Gender and Class in Criminology: The Intersection*, New York: Garland Publishing Inc.

Shearing, C. and Stenning, P. (1983) *Private Security and Private Justice: The Challenge of the 80s*, Montreal: Institute for Research on Public Policy.

Small Arms Survey (2011) Small Arms Survey 2011, available at: www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2011.html (accessed 7 July 2011).

SMH (2012) "NAB to Customers: You're the Voice on Security," available at: http://www.smh.com.au/business/biztech/ (accessed 21 November 2012).

Smith, C. L. (1996) "Developments in Security Technology," *Malaysian Safety and Security Journal*, 6: 19–26.

Smith, C. L. (2006) "Trends in the Development of Security Technology," in M. Gill (ed.) *The Handbook of Security*, Houndmills: Palgrave Macmillan, pp. 610–628.

Smith, C. L. and Brooks, D. J. (2013) *Security Science: Theory and Practice of Security*, Waltham, MA: Elsevier, forthcoming.

Smith, G. J. D. (2012) *Constitutional Statement and Manifesto*, The Surveillance & Everyday Life Research Group, available at: http://sydney.edu.au/arts/research/surveillance/about/index.shtml (accessed 11 November 2012).

van Dijk, J. (2012) "Closing the Doors," Stockholm Prizewinners Lecture 2012, paper presented at the Stockholm Criminology Symposium. Stockholm, June.

van Steden, R. and Sarre, R. (2007a) "The Growth of Privatized Policing: Some Cross-National Data and Comparisons," *International Journal of Comparative and Applied Criminal Justice*, 31(1): 51–71.

van Steden, R. and Sarre, R. (2007b) "The Growth of Private Security: Trends in the European Union," *Security Journal*, 20(4): 222–235.

Venkataraayan, K., Askraba, S., Alameh, K. E., and Smith, C. L. (2012) "Multi-Wavelength Laser Sensor for Intruder Detection and Discrimination," *Optics and Lasers in Engineering*, 50: 176–181.

VLRC (2010a) *Surveillance in Public Places: Final Report*, Victorian Law Reform Commission, available at: http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Surveillance+in+Public+Places/LAWREFORM+-+Surveillance+in+Public+Places+-+final+report.

VLRC (2010b) Media Release: Victorian Law Reform Commission, available at: http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Newsroom/Media+Releases/.

Wahlstrom, K., Roddick, J., Sarre, R., Estivill-Castro, V. and de Vries, D. (2009) "Legal and Technical Issues of Privacy Preservation in Data Mining," *Encyclopaedia of Data Warehousing and Mining*, 2nd edn, pp. 1158–1163.

Welsh, B. C. and Farrington, D. P. (2002) "Crime Prevention Effects of Closed Circuit Television: A Systematic Review," *Home Office Research Study 252*, London: Home Office.

Welsh, B. C. and Farrington, D. P. (2004) "Surveillance for Crime Prevention in Public Places: Results and Policy Choices in Britain and America," *Crime and Public Policy*, 3(3): 497–526.

Whitaker, R. (1999) *The End of Privacy: How Total Surveillance Is Becoming a Reality*, New York: New Press.

Wilson, D. (2005) "Behind the Cameras: Monitoring and Open-Street CCTV Surveillance in Australia," *Security Journal*, 18(1): 43–54.

Wilson, D. and Sutton, A. (2003) "Open Street CCTV in Australia," *Trends and Issues in Crime and Criminal Justice*, 271.

Winge, S. and Knutsson, J. (2001) "An Evaluation of the CCTV Scheme at Oslo Central Railway Station," in the *Proceedings of the 6th Annual International CPTED Conference*, Brisbane, September, pp. 130–138.

Wood, G. (2010) "Open Prisons," *Atlantic Monthly*, reproduced in *The Australian Financial Review*, 15 October, pp. 7–10.

16

Technologies of crime control
International developments and contexts
Ronnie Lippens and Patrick Van Calster

Introduction

Crime, one could say, is of all times. Human beings make rules. But it is equally part of the human condition that those rules are broken. Throughout history, attempts have been made, and continue to be made, either to prevent or to punish rule-breaking. Traditionally this is done by introducing more stringent legislation, by increasing the number of law enforcement officers, by securing or protecting goods, by intervening in crime careers, by encouraging people to mind their own safety, and so on. However, recent developments in technology during the second half of the twentieth century have had a very significant impact in all spheres of life, including crime and crime control. In this contribution we shall explore the impact of technological development on crime control, and security practices more broadly. For the purpose of this contribution we shall focus on *newer* technologies only (i.e. those that emerged in the second half of the last century).

One might add here that the meaning of the word 'technology' as such could be stretched, philosophically or otherwise, quite considerably. The police itself, when 'invented' sometime during the late eighteenth and early nineteenth centuries, was always considered to be a 'machine' in its own right (McMullan 1998). And to push this argument in a Heideggerian direction: human being itself is a, indeed *the*, technological condition (on this, by the way, see Prauss 1999). But let us not allow ourselves to explore the meaning of 'technology' in any philosophical detail here, however interesting and tempting such an exercise might be. Let us instead proceed by focusing on 'technological' technologies – *newer* technologies in particular.

The development of 'technological' crime control is usually illustrated by pointing to the increase of possibilities provided by, or in, an emerging digital era (see Yar 2006; Wall 2007; McGuire 2007; Koops 2010). And indeed, digitization has seriously changed social reality. Whereas earlier technological innovations (e.g. the telephone) also had a major impact not just on crime ('phone phreaking' emerged as a new form of crime) and crime control (McGuire 2007: 66–72), with digitization a new, qualitative leap was taken. According to authors such as David Wall (2007), this is because of, for example, the convergence of digitized ICT, their connectivity and inter-functionality, their constant and unrelenting generation of updates and innovation, and their 'function creep'. Such technologies also have a considerable impact on how people experience time and place. At any time anyone can, at least potentially, contact or access anyone else on the globe via social media such as Facebook or Twitter. Digitized technology

has become crucially important in the everyday lives of billions. So much so that it is beginning to look like humans no longer just have a physical body but also, and perhaps more importantly, a virtual one as well. Our physical body perishes of course, but our virtual one remains in the form of clips, blogs, profiles, and so on, on the internet and in databases. At the same time both bodies, the physical one and the virtual one, are of course connected during our lifetimes. Human beings have, in the digitized era, become 'hybrids' (see Latour 1993; Brown 2006) in the sense that their bodies have been extended with all kinds of digitized and mediatized technology (Logan 2010). The idea that humans have become 'cyborgs', more so than they were in the age of traditional technologies, is now no longer considered too far-fetched to contemplate (Haraway 1991). In short, the nature of digitized technologies has changed the very essence of human lives and cultures.

But that is just digitized technology. As we shall see below, there are of course other technological developments as well. They too have had a very significant impact on the use, during the second half of the twentieth century, of technology in crime control. The more technology, the higher the chances that it will be deployed in crime control (not to mention the commission of crime itself). In this chapter we shall, however, attempt to add to this admittedly banal insight by developing two main theses. The first holds that, whereas in an earlier age, technological innovation tended to occur 'elsewhere', i.e., outside the sphere of crime and crime control (e.g., the automobile or the radio were invented outside the sphere of crime and crime control, and *not* as police cars or police communication systems), today the sphere of crime and crime control is beginning to function ever more as one of the locations *par excellence* for technological revolutions to emerge. This statement needs some qualification though: it has become quite difficult to distinguish a separate sphere of 'crime and crime control' from a much broader sphere of 'risk control' or, even more broadly, 'securitization'. Indeed, much in contemporary life and culture is now about the securitization of resources and other life conditions, and about controlling or managing the risk posed by anything that threatens the former. This will to, or this desire for, 'security' have taken centre stage in contemporary life and culture and it is there, in that sphere, that technological innovation tends to be generated. In other words: much in contemporary technology is now likely to have its origins in this sphere of 'securitization'. Let us take the example of the internet itself: this technology actually began its life as a military 'mass destruction'-proof communications system. We shall be revisiting this issue in more detail below, and when we do, we will of course also provide a more nuanced analysis of this trend towards 'securitization'. But before we do that, we need to clarify the second quite fundamental insight which we hope to be able to explore here: the technological revolution within the sphere of 'securitization' was – and continues to be – fully embedded, itself, in very deep cultural transformations, not just in what we used to call Western democracies, but also more globally.

In the remainder of this chapter we shall, then, first provide an all-too-incomplete outline of some of the more recent technological innovations and developments in crime control and security practice. We shall then proceed by analysing the main features of those innovations and developments. This will enable us to subsequently make connections between the innovations and developments, on the one hand, and more general and global cultural transformations, on the other. We shall end with notes for a possible future research agenda.

Technological developments and applications: an overview

How to categorize crime control technologies?

Technological development and innovation are ongoing. It has of course not yet reached its completion, if that were ever possible at all. The likelihood is that the future will see ever rapid

cycles of technological innovation and application. In the section we will make an attempt to provide an overview – an all-too-incomplete overview, we admit – of technological applications in the sphere of crime control and security practice.

One could arrange such technological applications in a variety of ways. Ben Bowling and colleagues, for example, categorize them according to the operational aims to which they are applied (2009: 55):

> communicative (to collect, store and share information within and between criminal justice agencies and with the public), defensive (to create physical barriers and architectural design to defend people and property from crime), surveillance (to observe with a view to providing security and prevent crime and disorder), investigative (to collect, store and analyse information to detect crimes committed [reactive], prevent crimes in prospect [proactive] and secure evidence to prosecute or eliminate a suspect from an inquiry), probative (to convict the guilty and acquit the innocent), coercive (to use force to maintain order and control and to detain suspects and those accused of crime) and punitive (to punish wrong-doers with the purpose of retribution, deterrence, incapacitation or rehabilitation).

This structure follows more or less closely the subsequent stages in the criminal justice system's process, i.e., crime prevention and surveillance, criminal investigation, sentencing, probation, and punishment. But there are other ways of categorizing crime control technologies. One could, for example, arrange them according to the type of technology.

There are biometrical technologies (biometrical information is information that identifies individuals such as the shape and features of ears, hands, iris, face, fingerprints, and so on) (Blackburn *et al.* 2002). Such technologies are often used to regulate access to systems or services. Then there are also bio-technological applications. The bio-chemical structure of DNA, for example, led to the application of bio-technologies in forensic investigations (Broeders and Muller 2008). It can, for example, be deployed in the fight against human trafficking (see http://news. xinhuanet.com/english2010/china/2010-07/28/c_13418442 .htm).

There are of course also the ICT applications. These allow users to execute a great variety of tasks and processes such as data–communication, data–storage, filtering of data. Applications of image and display technology (from CCTV to data–fusion and virtual reality) have also found their way in crime control and security practice.

Then we have electro-technical and electronic developments and applications. Most detection technology is electro-technical in nature. This technology includes simple CCTV technology, burglar alarms (usually based on movement detection technology), GPS, and tracking and tracing technology (see http://www.delta sphere.com/DeltaSphere-3000.htm).

The development of new materials, such as knife–proof materials gives us another type of technology (see, for example, http://www.bolton.ac.uk/News/News-Articles/2012/Mar2012-5.aspx). So does weapons technology (e.g. 'less than lethal' weapons, see http://www. newscientist.com/article/dn9980-introduction-weapons-te chnology.html?full=true), or even mathematical applications (data compression technology, encryption technology, privacy-enhancing technology, and so on), or speech technology (Broeders 2008). The combination of all the above technologies in new applications provides crime control and security operators with a sheer endless pool of possibilities. Developments that are still in their experimental phase such as nanotechnology are waiting in the wings and should soon find their way into crime control applications.

In the remainder of this section we give an overview of crime control technologies based on the type – or perhaps better: the level – of crime or offence.

Serious crime

According to the Dutch Commission on Crime and Technology (Commissie Criminaliteit en Technologie 2005: 5), the control of serious crime (terrorism and organised crime in particular) relies ever more on technologies that enable the protection of social or economic systems and locations, or the detection of illegal products or weapons. Airports, as well as marine ports, so the Commission notices, are often targets for terrorist attacks, but they are also points of transit for smuggled goods. The security of such places, then, is paramount. The control of access to particular locations in such places nowadays very often deploys biometrical ID technology which includes iris scan data. The detection of illegal substances or weapons is often undertaken by X-ray technology, or tetraherz cameras (see http://www.x-rayscreener.com/ ?CategoryID=201 &ArticleID=94&sng=1). In June 2011, the *Atlantic Wire* reported on the 'checkpoints of the future':

> the 'Checkpoint of the Future' looks like an illuminated car wash with three portals. An iris scan matches you to a chip in your passport or identification card and also assigns a security-risk level that determines which of the three portals you'll enter—'known traveler,' normal security, or enhanced security. Depending on your security level, a series of x-rays would then analyze your body and your luggage contents while you walk through a long tunnel. Travelers in the high-risk tunnel would be subject to a more aggressive, full-body scan that checks for explosives and liquids.
>
> (http://www.theatlanticwire.com/technology/2011/06/
> co ming-airport-near-you-iris-scanners/38595)

Sniffer and snuffer technology, and tracer technology, are also available for the detection of chemical compounds. Such technologies are now gradually replacing sniffer dogs (Commissie Criminaliteit en Technologie 2005: 6).

There are other developments and applications as well. Salvatore Catanese, Emilio Ferrara and Giacomo Fiumara (2011: 1) developed *LogAnalysis*,

> a tool to provide visual data representation and filtering, statistical analysis features and the possibility to analyse mobile phone activities. Its adoption may help in unveiling the structure of a criminal network and the roles and dynamics of communications among its components.

A new technology for the detection of bio-chemical materials, such as bio-chemical weapons is *smartdust* (see http://www.technologyreview.com/news/401854/smart-dust-senses-bioweapons/). Smartdusts are silicon-based nano-chips. This technology enables monitoring from a distance. For example, a doctor may keep an eye on you from his home which allows him to intervene whenever the situation asks for it. It makes the surveillance of people much easier. Another application is found in the protection of business areas. When temperature or vibrations deviate from the norm, the chips start to communicate with each other in order to enquire the seriousness of the threat (see http://pc-en-internet.infonu.nl/communicatie/9333-smart-dust-de-slim me-chip-van-de-toekomst.html).

From a preventative perspective we note the availability of so-called smart guns (http://www.wired.com/science/discoveries/news/2004/ 04/63066). When a chip, implanted in a police officer's hand, for example, matches with the smart card of the corresponding gun, the trigger unlocks and the gun is ready to use. This particular technology inhibits the use of guns by unauthorized persons.

Conventional or petty crime, anti-social behaviour and public order maintenance

Conventional or petty crime, for the purpose of this chapter, includes car theft, night life trouble, burglary, and so on. Innovations in electro-technology are important here. This includes CCTV cameras (often operational ones are installed in combination with fake ones; see http://ezinearticles.com/?Fake-CCTV-Cameras-Make-Them-Work-For-You&id=1557703), alarm systems, systems that detect movement and that are able to recognize 'abnormal' patterns in movement, or 'unfamiliar' and 'suspect' faces, and systems that allow users to track and trace (e.g. via radio frequency identification) objects. Object pattern recognition technologies are actually combinations of simple CCTV camera technology, data compression technology, and pattern or facial recognition technology (see http://www.biometrics.gov/ Documents/facerec. pdf).

One of the applications of this technology is sometimes used with ATMs (see http://www. teleeye.com/Eng/a_banking.html). Customers are filmed by cameras. Images are then processed and stored in a database. Individuals who spend an exceptionally long time in the vicinity of the ATM, or whose movements are out of the ordinary, are filtered and separated from the 'normal' ones in the database, and can then form the object of more focused attention (Commissie Criminaliteit en Technologie 2005: 7).

Stolen goods can be tracked and traced via a combination of what is essentially mobile phone and GPS technology with electronic anti-theft labelling technology and sensor-technology. Closely related to tracking and tracing technology is electronic tagging technology (see http://www.idii.com/wp/mgl_rfid_tagging.pdf). This technology enables users to identify and track particular objects (cars, clothes, jewellery, and so on). Some Japanese clothing manu-facturers, for example, already work radio frequency identification chips into school uniforms, albeit that the overall purpose of this is not so much the tracking of stolen fabrics, as, rather, the control of truancy (see http://www.gizmag.com/go/3276/). In tracking and tracing tech-nology something of the old Panopticon idea of surveillance is still alive. With the proliferation of this technology, in combination with the databases that are connected to them, and with our knowledge of their existence, the technological potential for the construction of a very pervasive surveillance society has been established. It remains to be seen whether such a surveillance society still has discipline and normalization as its chief purpose, or whether surveil-lance, in this late modern age of ours, has acquired a new functionality (we'll explore this issue later in this chapter).

Technological innovation of course also leads to the automation of routine, repetitive activities and enforcement. Just to give an example: the routine testing of car drivers for alcohol usually takes up a considerable amount of police time. Technologically it has now become possible to save time by connecting car engines to alcohol detector technology (Commissie Criminaliteit en Technologie 2005: 7). In the Netherlands, for example, car drivers who are caught with 0.013 or more alcohol in their blood are forced to install an alcohol detector in their car. The device will prevent ignition of the car engine when the driver has been drinking (see http:// www.nu.nl/binnenland /2633073/per-december-alcoholslot-zware-drinker.html). However, the decision to deploy such technology in all cars is of course dependent on a lot more variables than just operational expediency. We shall see later that current trends in global consumer culture are such that they could make the universal deployment of such control technology unlikely.

Technology is very often used during public order events as well. More recently public order officials have come to rely in particular on face and pattern recognition technology, often in combination with airborne CCTV or satellite technology for the localization, recognition and

tracking of persons or goods (see http://www.airbornenetworks.co.uk/businesssolutions/cctvsecuritynetworks.html). Geospatial digital information technology, mounted in drones, is also available (see http://www.satimagingcorp.com/svc/geospatial.html).

And, finally, the increasing use of ID documents in an ever-widening variety of situations and services also broadens the scope for identity fraud. Biometrics-based technology which includes or possibly integrates iris scan data, fingerprints, facial recognition data, hand geometry data, and even DNA data, is therefore destined to become more important in future. Since 2009 the fingerprints of all Dutch residents – obtained when applying for a new ID card – are stored in databases, as well as their IDs (see http://www.elsevier.nl/ web/Nieuws/Nederland/346113/Raad-van-State-geen-paspoort-zond er-vingerafdruk.htm?rss=true, as well as: http://www.elsevier.nl/web /Artikel/246418/Voortaan-vingerafdrukken-in-paspoorten.htm).

Main trends and features

The above exploration of a number of current technological developments and applications in crime control was, of course, not complete, let alone exhaustive. As said above, the constant stream of innovations in technology, and the potential for combinations in their application are such that, it seems, only the crime controllers' imagination is the limit of the inventiveness with which new technological avenues for crime prevention, criminal investigation, punishment or control are sought or implemented. In an age such as ours, dominated by high levels of nervous risk awareness, and marked by a seriously strong will to or desire for security in all fields and areas of life and experience, imagination and inventiveness in the development and adoption of technology in all areas of crime control are very considerable indeed. But before we explore this in some depth, let us outline the main features and trends in recent and current technological developments in crime control and security practice.

First, the above overview – however incomplete – suggests that a particular kind of technology, i.e., facial and pattern recognition technology, is becoming crucially important in crime control strategies. This technology permits individuals who behave 'suspiciously' in the vicinity of particular locations to be detected and possibly recognized without the need for very labour-intensive surveillance. Known offenders or suspects can potentially be located by such technology without human intervention. This technology is applicable both in 'high-level' anti-terrorist strategies and in more 'low-level' ones such as anti-hooliganism or anti-social behaviour control strategies. It is also applicable and often deployed during public order maintenance interventions. Elements of this technology can even be applied in strategies aimed at the prevention of identity fraud, or the protection of ATMs or shopping malls, or, even, the detection and recognition of stolen goods.

Facial or object and pattern recognition and processing technology are one example of what could be called, for the purpose of this contribution, *surface* technologies, i.e. technologies for the detection or recognition and subsequent analysis and processing of surfaces (a face, or an object, or a behavioural pattern being a surface). The data which this technology is able to extract from surfaces is then usually digitized and stored in databases where it will be used to generate profiles, and thus fed back into the scanning and detecting element of this technology. Let us hold this thought for a while. The digitized data which is thus gathered and processed actually generates information about *surfaces*. Only exceptionally will this information refer to more substantial data such as motivations, desires, thoughts, opinions, and so on. The bulk of data detected, recognized and processed by the newer technologies is *surface* data, e.g. facial traits and outlines, movements, physical attributes, location in time and space, fingerprints, DNA profiles, and so on (see also Van der Ploeg 2003; McGuire 2007; Wall 2007).

Second, newer crime control technologies, and digital technologies in particular, are only very rarely determined or structured by their location in time and space (e.g. Yar 2006). Neither time nor space could represent insurmountable restrictions for detection, recognition and data processing. A bank statement dating back 20 years is still easily accessible. A face recognized yesterday in Afghanistan can suddenly become acutely important in Germany tomorrow (or vice versa). The link-up of technologies and databases makes such connections possible.

Third, it seems to be a feature of contemporary crime control technology that it requires constant investment and re-investment in innovation. The continuous and unrelenting drive to innovate generates an almost endless flow of technological 'solutions' to 'security' problems. To give an example: in order to protect anonymity on the internet 'Onion routing' or 'Tor' technology has been developed that allows officials to control the internet unnoticed. Such technologies were originally developed for military purposes but were then quickly adopted by cybercriminals as, of course, they too, have lots of uses for anonymity on the internet (Lovet 2009). Crime control or IT security organizations are thus in turn forced to develop and deploy ever more robust or sophisticated technologies in order to be able to control the flow of digital information, or the access to it. The fight against cybercrime (but the same applies to all forms of crime control), then, is beginning to resemble an arms race whereby all parties are forced to produce ever more sophisticated technologies (more on this is to follow later in this contribution).

Fourth, there seems to be a trend in all this towards a more sovereign implementation of newer technologies or, more often than not, their connections and combinations. This means that the development and implementation of new technological forms of crime control are usually practice-led, and tend to follow the exigencies of particular practices in one or more areas of the crime control sphere. There are of course legal or even moral restrictions, or considerations about privacy or other human rights, but these, in many cases, tend to be overruled by the perceived practical necessity of the new technologies or combinations of technologies. The trend seems to be that technologies or combinations of technologies will be implemented regardless of legal or moral constraints, restrictions and objections. When, for example, it becomes possible to use pervasive body-scans in airport security zones, or when, to give another example, the use of tracking and GPS promises interesting results in security and intelligence strategies and practices, then the likelihood of legal or moral restrictions being ignored or, in the case of legal constraints, abolished, is bound to be rather high (for an exploration of this issue with regards to anti-terrorism strategies, see Lippens 2004).

Fifth, one cannot help but notice that the bulk of technological innovations in the sphere of crime control now originate from within the world of crime control, and more broadly, the sphere of security and intelligence, itself. That of course also includes the military. As we have seen, this was always to some extent the case. But in the latter half of the twentieth century, in particular during the past few decades, this has become quite clear. Authors such as Connor O'Reilly (2010) have analysed how both private and official security providers (however broadly defined) often tend to form *symbiotic* (i.e., mutually dependent) partnerships, particularly in war zones and during international operations. Such occasions, and such partnerships, provide multiple opportunities not just for technological know-how to flow flexibly from one of the symbiotic partners to others, but also for strategic and tactical aims in the field of security provision and protection to become widely shared. Such exchanges usually take place during events where a multitude of security providers and operators are involved, e.g. wars and their aftermath of course, or peacekeeping or humanitarian operations, but also 'mega-events' (Olympic Games or other sports events, diplomatic conferences, state visits, and so on). According to Boyle and Haggerty (2009), mega-events in particular are beginning to function as hubs where ideas, strategies, tactical and technological know-how are shared between a variety of security operators and providers

(private operators as well as government departments) and where newly emerging technologies are actually introduced and tested. This process has been going on for decades now, and it has helped crystallize a broad field of what could be called risk and security practices, indeed, the risk and security industry as such, or 'the security complex' as Boyle and Haggerty (2009) call it. We hasten to add here that this emerging field of activity has actually much deeper roots than that. We will explore those in the next section. Here we may suffice by pointing to the fact that this field of activity, assembled as it is out of a vast and often bewildering variety of actors, technologies and operational rationales and 'logics', has, in a way, superseded or engulfed the smaller and earlier field of activities known as 'crime control', including, of course, 'criminal justice'. The actors in that smaller field are of course still around, and their operational logics and rationales – focused largely on operations within the bounds of a legal framework – are still functional. But they are now part of a much broader network; one that not so much operates according to the code 'crime or no crime?', but, rather, according to the one that asks 'risk or no risk?', or 'security or no security?'. And those latter categories potentially include all actions, behaviours, persons, groups or even situations that could or might pose a threat of some kind at some point, and whose *potential* threat level prompts those that are in charge of control to make ever more elaborate attempts at collecting information or at intervening *proactively*, i.e., before any unwelcome event actually happens (more on this later, but see also Zedner (2007), and Bowling *et al.* (2009)).

Actors working within the more traditional field of 'crime control' are now much more prone to come into contact with actors in the broader field of 'risk and security' provision and are now likely to share, with the latter, at least to some extent, ideas about and perspectives on what constitutes a problem, as well as strategic and tactical goals towards the control of such problems, and technologies to make use of when actually dealing with the latter. We have already seen how traditional actors in the field of crime control make ample use of a huge variety of newly emerging technologies. They are then also beginning to work within a broader mindset that is focused on the detection of all kinds of potential 'risk', or 'insecurity', and that is gradually willing and in many cases actively allowing the use of technologies within strategies and tactics that are geared towards the 'sovereign' (that is, without any overly strict adherence to legal or moral restrictions, should those still apply, and have not been abolished already) control of the problems which they perceive.

This brings us to a sixth and final comment. At the heart of this newly crystallized field of 'risk and security' activities one might arguably be able to discern a kernel of what is essentially a military operational 'logic' (see also Haggerty 2004a: 222; 2004b: 494; Boyle and Haggerty 2009: 270). That should not come as a surprise in view of the above. A military operational logic has at least two characteristics. It is, first and foremost, about detecting, recognizing, locating, tracking, and ultimately, neutralizing particular targets (and that of course includes destruction of the target, if necessary, or if so desired and if so allowed). Second, a military logic is only interested in superficial data, i.e., in surfaces. The point is to identify targets using 'superficial' data. Once the target is identified, neutralization may then ensue. The military operator is not interested in the complete psychological, motivational, or social make-up or context of the target. In military situations there would be no point in finding out about such issues if ultimately neutralization or destruction is the purpose of operations. In most cases there would be a complete lack of time to do so anyway. The only thing that needs to be done in a military logic is the identification of a target as either 'friend' or 'foe' so that appropriate action can be taken. The mere collection of superficial data will, in most cases, suffice. When appropriate technology is available, such superficial data can then be stored (in databases), processed (e.g. on monitors or on other information displays) or linked (to other superficial data in other databases). This whole

process essentially produces *distance* between the data collector and processor, on the one hand, and the target, on the other. First, it produces distance in time and space: the moving image on the screen is that of a target 3 miles away, or the biometrical data in a database was taken from targets 5 years ago. But it also produces personal distance, emotional distance, and moral distance: the target on the computer screen is just that, a *target*. It is *not* a person whose biography, whose dreams and hopes, whose aspirations and ambitions, in short whose personality we want to know more about (on the normative and ethical issues involved here, see Van der Ploeg 2003). On the contrary: if we knew about the person's hopes and ambitions, and so on, he or she would cease to be a mere 'target'. He or she would cease to be a mere surface. That would probably make our work within the military 'logic' very hard, if not impossible, to carry out. In late modern security practices, those who are in control are beginning to lose their interest in what is or might be lurking behind the surface. They are only interested in the surface itself, and that, i.e., the surface, is then, as it were, not just *extracted* from subjects, but also *abstracted* from them. Surface data is then no longer considered as personal data, which in practice means that the data can be put to any potential use. During his visit to Canada in 2008, the then-US Homeland Security Secretary Michael Chertoff is quoted to have said that fingerprints, for example, are not even 'personal' information about an individual: 'a fingerprint is hardly personal data because you leave it on glasses and silverware and articles all over the world, they're like footprints. They're not particularly private' (quoted at www.thinkprogress.org). Individuals are thus reduced to prints and other superficial surface data which themselves seem to lose their personal, individual features in the process. The 'personal' or 'individual' dimension behind the data is *abstracted out* of the picture (see also Lyon 2003: 18). There is no longer any interest in this dimension. The 'personal' and the 'individual' have almost become an irrelevance. The 'logic' here is one of detection, recognition, identification, and possibly, neutralization. 'Superficial' data will suffice, but is also necessary. Legal and moral restrictions, or considerations about the target's 'human rights', in so far as they are still current, should not be taken too seriously, since the 'logic' also holds that 'only' non-personal data, non-individual data, i.e. 'only' outwardly readable data, is extracted and used.

It is this military 'logic' of distancing which now seems to be proliferating (at least to a much greater extent, and with greater speed) throughout this vast field of 'risk and security' operations. This 'distancing' logic now even includes the use of drones, not just in military conflicts, but also in anti-terrorist activities and in crime control strategies more broadly (Wall and Monahan 2011). The military 'logic' of detection, tracing and tracking, identification, etc. of surfaces, at a distance, also goes some way to explaining why so much in new crime control and security technologies is based on *vision* and *visibility*. The visual sphere has of course always been crucial in any crime control strategy, even, and perhaps in particular, in disciplinary strategies based on the panoptic principle. Although, as we shall see later, the disciplinary era is now gradually being superseded by the 'control' era, visual technology remains highly important, and if anything, has gained importance considerably, albeit that the deployment of visual technologies today can no longer solely be captured by the word 'Panoptic'. The visual sphere in crime control and security practice has now also acquired 'Synoptic' (i.e. based on mediatized spectacle) dimensions (Mathiesen 1997) and has even become the complex and highly ambiguous location of contextual visual strategies and counter-strategies and resistance (Doyle 2011). The Panoptic centre, it seems, has collapsed or is, at the very least, crumbling.

But let us now focus on the simple example of speed cameras. Speed cameras are usually a combination of three types of technology, i.e., cameras, laser-based speed detectors (much of this technology has military origins) and, in some cases, number plate recognition technology and related databases. Speed enforcement technology such as speed cameras produces distance

between the enforcer and the enforced. The latter emerges, 'superficially', on a display somewhere on a monitor far away. His or her case is then processed with maximum levels of impersonality and with very considerable moral distance. It is well known that many people do not like this technology even if they are at the same time in favour of speed restrictions. Most countries that have introduced speed cameras have witnessed multiple instances of sabotage. According to researchers such as Helen Wells (e.g., Wells 2008), it is precisely this technology's inability to recognize and appreciate the more personal and contextual dimension of their driving behaviour (and speeding) that makes so many people turn against it. Its focus on the merely *superficial*, and its procedure of impersonal *distancing*, many have come to think, are simply 'unfair'.

But having said that, we should now also acknowledge that this military logic of 'superficial' data collection and processing, and of distancing, is only rarely put to use with military end goals (ultimately: destruction) in mind. Very often quite the opposite is the case. It is well known that enhanced security checks at airports, for example, will lead to long queues. In an age that is not only extremely risk aware, but also addicted to speed, flexibility and comfort, such queues are unbearable, indeed counter-productive. This prompted airport authorities such as Schiphol (Amsterdam) and John F. Kennedy (New York) to experiment, some years ago, with new technology that would reduce long queues for Dutch and US 'low risk' passengers. Passengers who were willing to join the 'low risk' scheme were thoroughly screened for risk factors. Those who did not represent a significant risk (according to the profiles used by the airport authorities of course) were then issued a biometrical ID chip with iris scan and fingerprint data that allowed them to (electronically, if you wish) jump queues (more information on this is available from e.g. http://www.expatica.com, 14 January 2005). This 'superficial' data is locked, as it were, in a biometric device (the 'distancing' chip) which enables security personnel to detect, recognize, identify and accordingly process potential 'problems' more efficiently, or so they believe. The actual security work has been done beforehand – one could say, in a somewhat 'distant' time in the past. However, it may not take a long stretch of the imagination to discern potential but obvious flaws in this technology (see also Stalder and Lyon 2003).

Context: cultural transformations in the globalizing West

Will to sovereignty

Immediately after the Second World War a new attitude, or perhaps only a certain mood, emerged in much of what we used to call Western democracies. This mood was one that formed around a clear and quite distinct will to, or desire for, sovereignty. By this is not meant state sovereignty. The will to or desire for sovereignty, here, is of a more generic nature. It is the will to and desire for high and even extreme levels of control over the conditions of life itself. And this attitude, or mood, was not, and is not, restricted to institutions of government and authority. The will to and desire for sovereign control over life conditions were, and are, shared culturally across wide swathes of, first, the West, but soon after, the globe as such; shared, that is, both by those who govern and those who are governed. The manifestations of this will and desire were, and are, quite varied, diverse and very often quite agonistically contradictory. There is no space in this contribution to explore this in more detail (but see Lippens 2011). Suffice to say here that the consequences and impact of this emerging will, and desire, are inextricably intertwined with the other cultural transformations which we shall be discussing in subsequent sections. For the sake of argument though we will, here in this section, focus on this notion of sovereignty only.

Emerging out of the war that saw dozens of millions killed as a consequence of authoritarianism, the mood that we mentioned above was one away from the rule not just of authoritarianism but of authority as such. Immediately after the war it was only a tiny seed, an almost unnoticeable kernel that formed on the ruins of the war. It would take many decades for it to grow and spread – albeit very partially, and unevenly – across the globe, underpinning a wild variety of manifestations. But it did emerge immediately after the war, and its movement – however imperceptible at the time – was one away from law, from rule, and from all kinds of code and coding that suggest hindrance on the road to absolute sovereignty. Now this road to absolute sovereignty is a very paradoxical one: on this road the aspiring sovereign builds his (his or her, of course; henceforth: his) own codes, his own rules, his own law in order to get to his ultimate, but sadly unreachable goal. But the paradox is not the issue here. The issue is that this will to, or this desire for utter, absolute sovereignty (however paradoxical) emerged in the wake of the war. The movement away from law, from code, from the rule of authority, however imperceptible at first, formed part of the drift into what some have called the post-disciplinary society, or control society (more on this below). It never fully crystallized though, and one could say that it was quickly over-coded by the authority embedded in a very pervasive consumer culture whose mode of operation is the provision of *illusions* of sovereignty.

But the will to, and desire for, sovereign control over life conditions remained and remain active underneath all its illusory manifestations. For our purposes it is important to note that sovereignty implies control. Without the capacity to control one's life conditions, one could of course never be sovereign. At the heart then of late modern culture one finds a will to, or a desire for *control*, and that in turn tends to fuel an interest in technology and in technological innovation. Technology is what the aspiring sovereign hopes will allow him to achieve control over his life conditions. This interest in technology is of course not new at all (it is part of the human condition as such, one might say) but the point made here is that if at the heart of a culture one finds sovereign aspiration and a persistent focus on control, then one may expect increased levels of technological innovation. Again we may wish to note here that any such innovation is bound to be paradoxical (from the aspiring sovereign's point of view at least): not only will the sovereign become *dependent* on the new technology (and dependency is not what the sovereign wants), but *other* aspiring sovereigns will tend to take counter-measures and assemble counter-technology in turn. Let us again take the example of speed cameras. It did not take long for campaigners to mobilize sensor-technology that allowed them to locate the cameras in order to avoid them or slow down in their vicinity. Referring to the French philosopher Paul Virilio's ideas on speed and war, Gijs van Oenen (2010) has argued how the field of crime control, and risk and security practice more broadly, is marked by what could be called a technological arms race, with one technological assemblage outwitting or blocking off the other, time and time again, spiralling into ever higher levels of complication and sophistication. Here one could add that some types of technology, precisely *because* they have become highly sophisticated and complicated, represent an additional risk in their own right, i.e., accidents could come almost 'naturally' with their deployment (on this, see Perrow 1984).

But the aspiring sovereign's rush to technological innovation is also paradoxical in another way. Every technological innovation is bound to have consequences (many of those unintended) that will dash the original hopes for absolute control. Again let us take an earlier example. Long queues at security check-points, in a world of aspiring sovereigns, are actually as unacceptable as the original potential dangers themselves. The possible solution (i.e. the provision and distribution of biometric ID-chips to 'non-suspects') has of course its own very serious flaws and it actually opens up new possibilities to be exploited by those who wish to do so. This is the same with all technology. All technology has its flaws, its blind spots. It is just a matter of

time for it to become obsolete, superseded or circumvented by counter-technology. And quite often there is not even a need for highly sophisticated criminal counter-technology. To use Yvonne Jewkes' (2005) words: if the spectacular events of the early twenty-first century have taught us anything, it is that 'high-tech solutions' to perceived security risks are in many cases no match for simple, 'low-tech' criminal motivation and determination.

In a world of aspiring sovereigns, the world becomes gradually more objectified. The aspiring sovereign looks at the world as if it were an endless collection of objects that need controlling. The world also includes other aspiring sovereigns of course. They too are objects that somehow need to be controlled. The aspiring sovereign is, however, only interested in the superficial, i.e., in the surfaces of the objects in the world. Indeed, why would an aspiring sovereign be interested in the very heart, in the very soul of objects? And why would the aspiring sovereign wish to be close, or intimate, with the 'objects' out there? They could only slow him down on the road to absolute sovereignty. Technology, the aspiring sovereign hopes, will help him to analyse those *surfaces*, control their movements and keep *distance*.

Let us be clear: the above does not mean to suggest that late modern globalized culture has been fully and completely pervaded by the will to or desire for extreme levels of sovereignty. The 'sovereignty' kernel that emerged immediately after the Second World War never managed to achieve complete cultural dominance. But it did have and it continues to have a significant effect on many, if not all, aspects of contemporary life. Below we explore this impact in more detail.

We have already arrived!

The mood – or attitude even – which we alluded to in the previous section, fed into another generic and widely shared sentiment which itself emerged slightly later. A new middle class had appeared in most Western democracies, in Europe in particular. Quite affluent, reasonably highly educated, and with considerable access to burgeoning consumer markets, this new class of professionals, middle managers, educators, health workers, and so on, began to cultivate what has since come to be known as 'post-material needs'. Safe in the knowledge that their continuous access to material goods had been secured, they focused on issues such as well-being and the styling of the self. To a significant extent this gave the consumer economy such an additional boost that many, since about the 1970s, started to talk about 'consumer cultures' or 'consumer societies' instead. One thing we need to note straight away is this: in consumer societies, the overall, deep 'logic' is one whereby problems are not so much solved but 'fixed' by looking around elsewhere, i.e., on the consumer market, in order to locate items or tools ('technology') which may then be mobilized, used and implemented (if necessary in a variety of combinations) in the situation at hand.

There is a particular sentiment that pervades post-material life and culture. That sentiment can perhaps be captured by an exclamation: 'We've already arrived!' (see also Lippens 2010). We've already arrived (in our post-material world) so why change? Of course, life in advanced consumer societies is constant change, but that kind of change isn't real, genuine change. It is only change of, or in consumption patterns. But genuine change, such as deep social change in order to solve deep social problems, is not what the bearers of post-material culture desire. They've already arrived. There is, then, a certain conservative streak in post-material culture. It manifests itself not just in the everyday lives of the post-material generations, but also at the macro level, e.g. in international relations. There it emerged almost as soon as the ideological cold war ended, when writers such as Francis Fukuyama (1989) proclaimed 'the end of history' a fact in neo-liberal democracy (see Lippens 2005, for the impact of this sentiment on

anti-terrorist strategies and practices). In this perspective, real social problems should not be solved (through social *change*), only managed or controlled (using technology). The reluctance with which post-material generations tend to consider, let alone engage in genuine change – social change in particular – has been noted and theorized by a great number of commentators. The French theorist, Guy Debord, for example, already in 1967 pointed towards the by then fully-fledged consumer economy as the origin of a lack, in Western societies, of deep, genuine communication (Debord 1967). In consumer societies, one consumes. And consuming one does alone. The consumer, while consuming, is not engaged in a joint, social project. Consumption is essentially a solitary act. Again: consumer societies are replete with communication and all kinds of social activity. But precious little of it is focused on or geared towards genuine change. Consumer communication is superficial communication. By the early 1980s, the German philosopher Jürgen Habermas (1984) could only note the near total absence, in modern consumer societies, of genuine, constructive communication in a dwindling 'public sphere' which by then had been sapped almost completely of its erstwhile 'Utopian energies'. Only the noise of unrelenting, relentless consumption remains.

One of the more fundamental elements in this post-material conservative mood (to repeat: 'we've already arrived, so why change?') is the idea, or better, the desire for *protection*. A clear need is felt to protect the position which 'has been arrived at'. Criminologists such as Ian Taylor (e.g., in 1999) have long commented upon how the new middle classes live under the constant burden of their 'fear of falling' (i.e. their fear of losing what they've achieved and falling over board into economic hardship and social exclusion). This fear of falling in turn fuels a near obsession with the idea of protection. Protection is not sought in social change, or in the *solution* of very deep-seated social problems. On the contrary: there is a discernible unwillingness, in post-material culture, to even consider change. The post-material generations are not so much looking towards the future as to the mere protection of what is *present*. They refuse to make sacrifices to the future. They are unwilling to contribute to a future which requires them to abandon even the tiniest speck of what they have achieved. They won't submit to a code that requires them to forego access to resources in order to contribute to the construction of change. They decline to support grand social schemes or projects (they've already arrived, so why change?). But they do want protection, and they expect technology to provide it.

Protection takes place in the present. It is the present – i.e., the present position achieved by those who believe that they've already arrived – that needs protecting. In post-material culture it thus becomes imperative that all situations that one finds oneself in will have to have a certain amount of safeguards, or protection, in them so as to avoid a 'fall', any kind of fall for that matter. There seems to be little coincidence in the fact that one of the most significant crime prevention strategies during the latter decades of the twentieth century was called 'situational crime prevention' (Clarke 1980). What needs to be controlled or managed is 'situations' (and not 'social problems', which would need more durable *solutions*; see also Haggerty 2004a: 216–219). To continue, one of the most important elements in situational crime prevention is the use of 'techno-preventative measures' (alarm systems, CCTV cameras, infrastructural or architectural modifications, and so on). The aim here is the prevention of victimization, or, more broadly, the control and management of risk or insecurity in 'situations'. We will be able to expand on this in the next section. Suffice to say here that, in a post-material culture, this desire for situational techno-protection is part of the cultural make-up not just of those that govern, but also of the governed. It is not just part of the routines of those who usually 'do control' in an official capacity; those that are usually the 'controlled' share this very deep cultural attitude. They themselves, in their everyday lives, are constantly controlling their everyday life situations, and these – i.e., their everyday life situations – include attempts by other controllers

to control them (see also Wells and Barnard-Wills 2012, who, starting from David Lyon's (2003) work, provide an exploration of the intricacies of this predicament). In this culture the world appears as a never-ending concatenation of situations that need careful monitoring and, if necessary, ruthless management. Danger and risk should be detected (technologically), and if possible prevented (also technologically). If prevention fails, then the consequences of the events should be managed (again: technologically). More often than not the technology used to achieve these goals will be surface technology. Why would one, in the post-material culture, want to go beyond surfaces? Why would one want to probe other people's motivations, for example? Or their existential predicaments? In order to do what? Communicate? Work towards changing them? Rehabilitate them? But change is not needed in a post-material culture ('We've already arrived!'). The only thing that needs to be done is the control and management of all kinds of unwanted events. Surface technology that does not require the shortening of personal and moral distance between post-material actors usually suffices (see also Haggerty 2004a). But also: it is precisely *because* there is no longer a need for or an interest in the inner life of actors (more on that below) that control, in late modern times, tends to rely so heavily on technology, on all kinds of surface technology in particular.

Let us conclude this section on the following note. In one of the earlier papers on newer crime control technologies Peter Grabosky (1998) warned that such technologies risk 'overlooking . . . community relations, [and that] the art of interpersonal communication will be eroded if not lost' (ibid.: 5). But here we claim that the reverse holds true just as much: it could very well be the case that precisely the loss of interest in and the erosion of what seems to have become an irrelevance, i.e., genuine communication in the public sphere, have led security and crime control practitioners (and that includes ordinary people in everyday situations) to flee towards technological 'solutions'.

The birth of the control society and precaution

Commenting upon Michel Foucault's later work, and writing originally in 1990, the French philosopher Gilles Deleuze noted a transition, in most advanced economies, from a disciplinary logic to one that is centred on mere control (Deleuze 1995; see also Lyon 2003: 23). In other words, late modern consumer societies were gradually – albeit not completely – shedding earlier obsessions with discipline, adopting strategies and tactics of mere control instead. There should be no surprise here: consumer societies are fuelled by the constant creation and circulation of a wide variety of life styles which potential consumers are then seduced to adopt. Discipline, i.e., the forced reduction of a variety of behaviours and life styles to only a few 'standardized' or 'normalized' ones, as tends to be the case in traditional industrial economies, is not a form of governance which one would expect to take centre stage in advanced consumer societies. Disciplinary societies, writes Deleuze, function through 'order words'. Order words structure and 'order' behavioural patterns. Control societies, on the other hand, Deleuze continues, operate through the incessant creation and circulation of 'passwords'. Passwords regulate the access to a wide variety of all kinds of contexts and situations which, each, in the quasi-absence of an overall 'ordering' logic (or 'order word'), have their own operational and access logic embedded in them. One could read the word 'passwords' in a figural sense. Then it would refer to what we have explored in the above sections, i.e., the concatenation of situations which aspiring sovereigns (or, in a weaker version: self-styling consumers) find themselves in, day after day, and which they feel the need to incessantly control and manage, e.g., by regulating access, and by excluding anything or anyone that is perceived as potentially risky or dangerous. But the word can of course also be read in a literal sense. It does not take a long stretch of the imagination

to see that in the course of a couple of decades the use of actual physical and electronic passwords has, simply, exploded.

In all this, the inner life of the subjects whose access to situations needs to be regulated, controlled and managed, has lost its crucial importance. In disciplinary societies, the inner self was, and to some extent of course remains, important, for it is the inner life of actors that needs to be disciplined, and if necessary, transformed, i.e., standardized or normalized (this of course is one of the major themes in Foucault's (1977) *Discipline and Punish*). But in control societies, *who one is*, is no longer key. *What one is* has now become much more important. The *what* in the previous sentence refers to the mostly outward or superficial characteristics and features actors possess and that should allow access regulators and controllers to base their decisions on (group membership, ethnicity, nationality, financial creditworthiness, consumer profile, and so on). Such indicators are used to determine whether or not someone 'fits' a particular situation. Sociologists such as Malcolm Feeley and Jonathan Simon noticed this quite a while ago in jurisprudence and in criminal justice practice (Feeley and Simon 1994, see also Simon 1993). Already during the 1980s it became clear that the emphasis in those fields was shifting from a focus on offenders' individuality (or their inner life), once so crucial in criminal justice theory and practice, towards statistical categories which could then be used to make decisions based on *actuarial* calculations. And again technology (e.g., linked electronic databases) was and is being used to facilitate this process.

One additional comment can be made here. The information stored in databases can, and of course often *is* used to create profiles, including 'problematic', 'dangerous' or 'risky' categories. Data is archived, linked and processed, and used to generate images (statistical or otherwise) of all that is unwelcome in particular situations or contexts. The subjects who fit the 'unwelcome' categories then risk what Willem Schinkel (2011) calls 'prepression', i.e., a sense of being repressed just for fitting into one of the archival 'problematic' categories, and not necessarily for having committed an offence or for lacking the right papers or documents. In David Lyon's words (2003), this is a process of digitized 'social sorting'. The process of sorting is based on a wide variety of criteria that are not necessarily taken from the legal or criminal law sphere but, more often than not, from what Lucia Zedner (2007) has called the zone of 'pre-crime', all with an eye on precaution, prevention and early intervention. And as Koops (2010) has argued, it is here that panopticism is still very much alive, i.e., not just in the application of visual technology, but also, and perhaps more importantly, in the fact that we know that all kinds of personal data (visual information, our browsing and buying habits, biometric and ID information, criminal records, school performance, insurance records, tax data, and so on, and on) are constantly stored in a wide variety of databases which could potentially be, and often *are* interlinked to generate profiles, and to establish our personal 'fit' in them. The Italian philosopher Giorgio Agamben once (2004) used the phrase 'bio-political tattooing' in this context. In today's world of interlinked databases, each holding biometric and other indicators, we have all been tattooed in a way, and each of us is thus the potential object of a myriad of bio-political strategies. However, the profiles generated in those databases tend to be contextual and situational. They no longer refer to a 'standard' or 'normal' pattern. And the controlling, surveying eye need no longer necessarily be watching us from the centre (we *all* have, at least potentially, the controlling and surveying eye). The problem though, says Koops (2010), is that we could never know in advance which profiles will be generated using which data. Data collected in one context or sphere (e.g., browsing and buying habits) could potentially be used to decide our access to another one (job market, admission to school, and so on).

There is, then, in late modernity, a constant concern with the regulation of access to situations. And once again, this concern is not limited to those who usually tend to regulate and control situations in an official capacity. This concern is also alive in those who are usually at the receiving

end of such official control efforts. This concern cuts across demographic segments and across domains and fields of life and practice. It is, culturally, widely shared. There is, for the purpose of this contribution, one element to add to this. Out of this concern has emerged what many have come to call a 'precautionary culture' (for a good overview of this issue, see e.g., Pieterman 2009). A precautionary culture is a culture where the 'precautionary principle' provides the overall logic for policy decisions. This principle, simply put, holds that decisions should not be taken in favour of a particular intervention if it has not been established beyond any doubt that it (i.e., the intervention) is safe and without any harmful consequences, whether intended or unintended. This of course relates to what we have said above: there is a certain unwillingness, in late modern societies, to accept even the merest whiff of risk. Many are no longer prepared to contribute to *progress* (however defined) if such progress includes the potential of harm (however defined). Again we seem to come across this conservative streak ('We've already arrived!') in late modern culture. Much in this precautionary culture is opposed to the introduction of new technologies. On the other hand, more often than not it is this very precautionary culture which also generates demands for precautionary technology to be developed and implemented. To give just one example: the precautionary logic demands that security checks and procedures at airports are fully and completely failsafe and that has led to the adoption of full body-scan technology. This is not just about airport security, by the way: Amsterdam City Council is, as we write (July 2012), even considering the use of this technology at street level (news item posted on 27 June 2012 on www.nu.nl). But the problem then of course arises as to the health and safety issues – let alone privacy issues – that come with that type of X-ray-based technology.

In a precautionary culture, potential sources of risk and danger should not just be controlled or managed. They should, quite simply, be blocked off, and prevented from ever manifesting themselves in the first place. This changes the game in the field of risk and security practice (see also Haggerty 2003). It has contributed considerably to the exponential growth of security technologies, all precautionary distrust of technological innovation notwithstanding. Such technology is then usually implemented with an eye on *blocking off* particular events, situations or behaviours, e.g., automatic speed restrictors built into cars, or the physical redirection or removal of objects and persons deemed to represent a risk, or the sheer elimination in conflicts of potential sources of risk (all talk of 'winning minds and hearts' notwithstanding), and so on. Only the potential for risk or danger is recognized in such sources (locations, persons, objects, and so on) which are then dealt with accordingly. Their potential for change, or their more constructive, promising capacities, are largely ignored and in many cases precautionary decisions go hand in hand with a blind refusal to actually make cost–benefit analyses, or to at least have a democratic debate about the issues involved.

Precautionary measures, however, in all their radicalism, usually have consequences which tend to undercut the late modern aspiring sovereign's zeal for absolute control (which generated precaution in the first place). The blocking-off of city centres for automobiles in a bid to make the former safer, for example, will have economic and financial consequences, and is likely to hinder easy access to consumption. Or take the destruction, by campaigners, of GM crops (destroyed in a 'sovereign' fashion, in direct action, i.e., outside the law, and usually without any democratic debate about costs and benefits whatsoever, and so on). Such actions have an impact on food prices and, as a consequence, also on levels of social and economic exclusion and thus . . . risk and danger! Or take a typical military or humanitarian aid compound in a conflict zone. Such compounds are usually seriously fortified and equipped with sophisticated sensor and monitor technology. But that turns them into prime targets for ever more audacious attempts at massive destruction. A precautionary culture is a culture in unbearable but permanent, relentless agony.

A globalizing form of life

Using Foucault's later works on bio-politics (Foucault 2003; 2007), Mick Dillon and Luis Lobo-Guerrero (2009; but see also Lobo-Guerrero 2010) analyse how in late modernity the field of security tends to operate according to a logic whereby the protection of the heterogeneity of potential seems to be dominant. In Foucault's work on bio-politics, 'security' and 'securitization' are about the protection of particular forms of 'species being' (or 'ways of being in the world'). It is, in short, about protecting particular 'forms of life' (a term with Nietzschean antecedents). Forms of life emerge and dissipate of course. They never emerge pure though. They tend to hybridize with other forms of life. However, late modernity seems to have witnessed the emergence of a fairly dominant post-disciplinary form of life which is all about the maintenance and indeed the enhancement of what Dillon and Lobo-Guerrero call the 'pluripotentiality' and 'heterogeneity' of life. This of course relates to what we have introduced in previous sections, i.e., the need, in late modern advanced consumer societies, to allow a wide variety of life styles and life style choices to flourish and proliferate. But it also means more than that. In the late modern form of life *par excellence*, security practices are also about the protection of the *potential* for *further* liberty and for *further* heterogeneity. This form of life is at heart geared towards the unrelenting increase of the potential and capacity for *choice*. We have above already argued how in practice this form of life tends to be constantly over-coded by the simple codes generated by a consumer economy. But that should not blind us to the deeper origins of this late modern form of life. The late modern aspiring sovereign wants to have their cake and eat it too. They want to have the capacity to choose within the logic of consumer markets, but they also want the capacity to simultaneously choose to opt out as they think fit. They want to have the capacity to *choose*, always and anywhere. And they want *advance* warning of all that could potentially threaten to restrict this pluripotential capacity to choose (see Lippens 2011).

     This form of life has to a significant extent globalized. It may have emerged, as said, in the wake of the Second World War, but by the end of the twentieth century much if it had spread into the heart of a globalizing culture (one hastens to add that this spread of course was and remains uneven). Much has been written about globalization during the past few decades and it would make little sense to rehearse this literature here. For our purposes though, we need to focus on just one element: the constant emergence, in a fluid – to echo Bauman's (2000) metaphor here – or flexible and even whimsical globalized and globalizing culture, of 'events', of 'emergences', indeed of 'emergencies' (Dillon and Lobo-Guerrero 2009: 17), the origins of which are, more often than not, unpredictable, if not untraceable. And yet, predictability and traceability are essential in a form of life which is all about the protection and enhancement of the 'pluripotential' and 'heterogeneous' capacity of life. If pluripotentiality is the ultimate bed-rock logic in late modernity, then it is of crucial importance to be able to predict which of the future 'events', 'emergences' and 'emergencies' is going to be a threat to pluripotentiality and heterogeneity, and which, if any, might be beneficial. The late modern protector of pluripotentiality and heterogeneity is in constant need of advance warning. It is precisely that – advance warning – that much recent technology is not able to provide. Other 'non-technological' strategies do this much better, e.g. human intelligence gathering, or ethnographic research, for example. But newer technologies, particularly the kind that, as we have argued, collects and processes 'surface' data in a more or less 'distancing' manner, are only able, at best, to warn about imminent danger. Now it is, of course, the case that traditional strategies such as human intelligence gathering are still used, but as recent experience has shown (e.g., in the theatre of international conflict in places such as Iraq, Afghanistan and Pakistan), such strategies, nowadays, tend to rely on less than optimal capacity. In many cases a solution is then

sought in new technologies but that option, as argued, may not necessarily lead to *advance* warning of events and emergencies. The temptation then arises to resort to the precautionary principle as a guide to making security decisions: 'If we don't know what is going to happen, then let us simply block off all emergence.'

There is then a certain tension in this globalizing form of life. This form of life is, on the one hand, very much focused on and thrives on a will to or a desire for pluripotentiality, heterogeneity and choice. This will and this desire necessitate the availability of advance warning of possible threats in future events and emergencies. But the will to and desire for the capacity to at all times and anywhere choose in all pluripotentiality also lead to a certain reluctance to invest in labour-intensive or costly advance warning systems that rely on intricate forms of knowledge gathering based on the proximity of relevant actors. Very often the precautionary principle is then mobilized through the use of surface and distance technologies. Although the strict application of the precautionary principle may of course prevent threats to pluripotentiality, heterogeneity and choice from manifesting themselves, or from emerging in the first place, it may also, and simultaneously so, block off all that might have the capacity to actually protect and enhance the late modern, liberal form of life. This tension can be noticed not just in the field of international security, but also in the more mundane everyday strategies of crime or anti-social behaviour control. Take, for example, night life in urban centres. On the one hand, night life in urban centres thrives on and requires a wide variety of life-styling choosers to congregate together in small spaces in order to consume. On the other hand, this form of night life depends on forms of protection and security (technological or not) which, if implemented stringently, risk undercutting its own logic of operation. Once again we must note the deep agony that pervades late modern culture. It should then not come as too big a surprise if, in the context of such agony, technology's 'ambiguity' is the source and fuel, as has been noted by quite a few researchers already (Haggerty *et al.* 2011: 232), of 'strategies of resistance'.

Conclusion and avenues for future research

We began this chapter by stating that developments in what could be called late modernity saw the introduction and application of sophisticated technologies on a massive scale. We then provided an all-too-incomplete overview of such technologies. One aspect of many of those technologies that struck us is their military origins. Many were developed in the broader context of military security and operations with an eye on their use in (often international) conflicts. We have tried to outline the most important trends in and features of much technological development in the field of crime control and criminal justice, and security practice more broadly (the 'distancing' of actors; the focus on outwardly visible behaviours rather than on the inner life of actors, and so on). We also explored what we believe are the most important elements in the contextual background of the development and deployment of new technologies in crime control and security practice. We thus analysed the drift, in late modernity, towards precautionary societies that are underpinned by a dominant 'form of life' which is fuelled by a strong desire for or will to radical sovereignty. This drift, in other words, is a drift into a post-disciplinary culture where the aim of crime control, criminal justice and security practice is no longer centred around the transformation or reform of selves, but focused, on the contrary, on the mere management of situations, and the mere processing (including 'tracking', 'neutralization' or 'elimination', in military terms) of all kinds of objects that represent a potential threat to this desired for radical sovereignty. Our explorations are of course, and we readily admit, hopelessly incomplete. Here then is the place to point towards possible avenues for further research.

We have argued above that the generic background dynamics which, in our view, underpin the late modern drift to technology in crime control and security practice are unevenly spread across the globe. The use of highly sophisticated technology that is embedded in a military 'logic' should then also show a chequered, uneven pattern globally, or internationally. The agonistic tensions which we mentioned above may not everywhere be as manifest, or as sharp, as they are in many of the regions which we used to call Western democracies. This in our view is worth exploring further. In regions or areas where this tension is less manifest, this could, for example, mean that crime or security technology is less seen as ambiguous, and that *could* in turn then translate either into higher levels of acceptance, or lower ones, as the case may indeed be. Related to this – but quite separate an issue – is the one about possible cultural differences in the use and deployment of crime control and security technologies. Unlike speed cameras (which, to a large extent, seem to be almost universally loathed and resisted), CCTV cameras have been welcomed in places such as the United Kingdom, but in other parts of the globe this was much less the case. More research into the impact of cultural sensitivities around the use of such technologies would be welcome.

Another avenue for further research also relates to the potential agony with which the deployment of newer crime control and security technologies seems to be going hand in hand. Many of the technologies which we have discussed above have the potential to undercut the very conditions (economic or cultural) which generated them in the first place. Research into the particulars of actual manifestations or indications of such agonistic contradictions would be very interesting, particularly in those contexts where technological strategies and counter-strategies (or 'resistance') are or were locked in an 'arms race' that threatens to destabilize or simply collapse social systems.

The third and final avenue for further research could be found in an analysis of the uneven effects of the recent and current global and financial crisis (which itself of course has different impacts in different places across the globe) on the uses of technology in the 'security complex'. It could be the case, for example, that the deployment of technology in crime control and security practice is destined to become even more divided along social and economic lines than it already is. But it could also mean that strategies of resistance in future may become much more 'low tech', and therefore also more unpredictable, and potentially more destructive and devastating.

Acknowledgements

Discussion questions

1   Why is it that crime control strategies in 'late modernity' (roughly the period between 1970 and present day) tend to rely ever more on technology?
2   What is the impact of the digitization of both public and everyday life on crime control, and vice versa?
3   Is the drift towards near total technology-based crime control and security practice thinkable or possible, and if so, is it reversible?

Websites

Security professionals (e.g. police, private police, ICT security officers, international security contractors, and so on) and security technology producers dispose of a wide variety of venues where they can share information about recent developments and applications in security technology. Here's one such venue: http://www.securityinfowatch.com/.

Many, if not most, jurisdictions rely on official institutions that have the expertise and ability to advise their police organizations on technological 'improvement'. Here's the website of the official (UK) National Policing Improvement Agency (NPIA): http://www.npia.police.uk/.

Academics working in the field of policing or security studies tend to reflect more critically upon such technological developments and applications. Here's an academic e-journal which publishes reflective and critical articles on this topic, but with a focus on surveillance: http://library.queensu.ca/ojs/index.php/surveillance-and-society/.

References

Agamben, G. (2004) 'No to Bio-Political Tattooing', *Le Monde*, 10 January.

Bauman, Z. (2000) *Liquid Modernity*, Cambridge: Polity.

Blackburn, T., Butavicius, M., Graves, I., *et al.* (2002) *Biometrics Technology Review 2002*, Land Operations Division Systems Sciences Laboratory, available at: http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA415807.

Bowling, B., Marks, A. and Murphy, C. C. (2009) 'Crime Control Technologies: Towards an Analytical Framework and Research Agenda', in R. Brownsword and K. Yeung (eds) *Regulating Technologies*, Oxford: Hart, pp. 51–78.

Boyle, P. and Haggerty, K. D. (2009) 'Spectacular Security: Mega-Events and the Security Complex', *International Political Sociology*, 3(3): 257–274.

Broeders, A. P. A. (2008) 'Vergelijkend spraakonderzoek', in A.P.A. Broeders and E. R. Muller (eds) *Forensische Wetenschap: Studies over Forensische Kennis en Organisatie*, Deventer: Kluwer, pp. 508–514.

Broeders, A. P. A. and Muller, E. R. (eds) (2008) *Forensische Wetenschap: Studies over Forensische Kennis en Organisatie*, Deventer: Kluwer.

Brown, S. (2006) 'The Criminology of Hybrids: Rethinking Crime and Law in Technosocial Networks', *Theoretical Criminology*, 10(2): 223–244.

Catanese, S., Ferrara, E. and Fiumara, G. (2011) 'Forensic Analysis of Phone Call Networks', available at: http://www.emilio.ferrara.name/wp-content/uploads/2011/06/SNAM-2011.pdf.

Clarke, R. (1980) 'Situational Crime Prevention: Theory and Practice', *British Journal of Criminology*, 20(2): 136–147.

Commissie Criminaliteit en Technologie (2005) *Technologie en Misdaad. Kansen en Bedreigingen van Technologie bij de Beheersing van Criminaliteit*, Den Haag (official report).

Debord, G. (1967) *Society of the Spectacle*, Cambridge, MA: Zone Books.

Deleuze, G. (1995) 'Postscript on Control Societies', in G. Deleuze, *Negotiations*, New York: Columbia University Press, pp. 177–182.

Dillon, M. and Lobo-Guerrero, L. (2009) 'The Biopolitical Imaginary of Species Being', *Theory, Culture & Society*, 26(1): 1–23.

Doyle, A. (2011) 'Revisiting the Synopticon: Reconsidering Mathiesen's "The Viewer Society" in the Age of Web 2.0', *Theoretical Criminology*, 15(3): 283–299.

Feeley, M. and Simon, J. (1994) 'Actuarial Justice: The Emerging New Criminal Law', in D. Nelken (ed.) *The Futures of Criminology*, London: Sage, pp. 173–201.

Foucault, M. (1977) *Discipline and Punish*, New York: Vintage.

Foucault, M. (2003) *Society Must Be Defended*, New York: Picador.

Foucault, M. (2007) *Security, Territory, Population*, Basingstoke: Palgrave Macmillan.

Fukuyama, F. (1989) 'The End of History', *The National Interest*, 16 (Summer): 3–16.

Grabosky, P. (1998) 'Technology and Crime Control', *Trends and Issues in Crime and Criminal Justice*, 78: 1–6.

Habermas, J. (1984) 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies', in J. Habermas, *The New Conservatism*, Cambridge: Polity, pp. 48–70.

Haggerty, K. D. (2003) 'From Risk to Precaution: The Rationalities of Personal Crime Prevention', in R. Ericson and A. Doyle (eds) *Risk and Morality*, Toronto: University of Toronto Press, pp. 193–215.

Haggerty, K. D. (2004a) 'Displaced Expertise: Three Constraints on the Policy-Relevance of Criminological Thought', *Theoretical Criminology*, 8(2): 211–231.

Haggerty, K. D. (2004b) 'Technology and Crime Policy: Reply to Michael Jacobson', *Theoretical Criminology*, 8(4): 491–498.

Haggerty, K. D., Wilson, D. and Smith, G. J. D. (2011) 'Theorizing Surveillance in Crime Control', *Theoretical Criminology*, 15(3): 231–237.

Haraway, D. (1991) *Simians, Cyborgs and Women*, New York: Routledge.

Jewkes, Y. (2005) 'High-Tech Solutions to Low-Tech Crimes? Crime and Terror in the Surveillance Assemblage', *Criminal Justice Matters*, 58(1): 6–7.

Koops, E. J. (2010) 'Law, Technology, and Shifting Power Relations', *Berkeley Technology Law Journal*, 25(2): 973–1035.

Latour, B. (1993) *We Have Never Been Modern*, Cambridge, MA: Harvard University Press.

Lippens, R. (2004) 'Viral Contagion and Anti-Terrorism: Notes on Medical Emergency, Legality and Diplomacy', *International Journal for the Semiotics of Law*, 2: 125–139.

Lippens, R. (2005) 'Deep Structures of Empire: A Note on Imperial Machines and Bodies', *Social Justice*, 32(1): 126–133.

Lippens, R. (2010) 'We zjin al Waar we Zijn Moeten!': Beschouwingen omtrent de Voorzorgcultuur' [We've already arrived! Thinking about the precautionary culture], in R. Pieterman and M. Hildebrandt (eds) *Zorg om Voorzorg* [Cautious about Precaution], Den Haag: Boom Juridische Uitgevers, pp. 217–236.

Lippens, R. (2011) 'Mystical Sovereignty and the Emergence of Control Society', in R. Lippens and J. Hardie-Bick (eds) *Crime, Governance and Existential Predicaments*, Basingstoke: Palgrave Macmillan, pp. 175–193.

Lobo-Guerrero, L. (2010) 'Criminology and Forms of Life', in R. Lippens and P. Van Calster (eds) *New Directions for Criminology: Notes from Outside the Field*, Antwerp: Maklu Publishers, pp. 119–134.

Logan, R. K. (2010) *Understanding New Media*, New York: Peter Lang.

Lovet, G. (2009) 'Fighting Cybercrime: Technical, Juridical and Ethical Challenges', *Virus Bulletin Conference September 2009*, 63–76.

Lyon, D. (2003) 'Surveillance as Social Sorting: Computer Codes and Mobile Bodies', in D. Lyon (ed.) *Surveillance as Social Sorting*, London: Routledge, pp. 13–30.

Mathiesen, T. (1997) 'The Viewer Society: Michel Foucault's Panopticon Revisited', *Theoretical Criminology*, 1(2): 215–234.

McGuire, M. (2007) *Hypercrime: A Geometry of Virtual Harms*, London: Routledge.

McMullan, J. (1998) 'Social Surveillance and the Rise of the "Police Machine"', *Theoretical Criminology*, 2(1): 93–118.

O'Reilly, C. (2010) 'The Transnational Security Consultancy Industry: A Case of State-Corporate Symbiosis', *Theoretical Criminology*, 14(2): 183–210.

Perrow, C. (1984) *Normal Accidents*, Princeton, NJ: Princeton University Press.

Pieterman, R. (ed.) (2009) *The Many Facets of Precautionary Logic*, special issue of *Erasmus Law Review*, 2(2).

Prauss, G. (1999) *Knowing and Doing in Heidegger's Being and Time*, Amherst, MA: Humanity Books.

Schinkel, W. (2011) 'Prepression: The Actuarial and New Technologies of Security', *Theoretical Criminology*, 15(4): 365–380.

Simon, J. (1993) *Poor Discipline*, Chicago: University of Chicago Press.

Stalder, F. and D. Lyon (2003) 'Electronic Identity Cards and Social Classification', in D. Lyon (ed.) *Surveillance as Social Sorting*, London: Routledge, pp. 77–93.

Taylor, I. (1999) *Crime in Context*, Cambridge: Polity.

Van der Ploeg, I. (2003) 'Biometrics and the Body as Information: Normative Issues of the Socio-Technical Coding of the Body', in D. Lyon (ed.) *Surveillance as Social Sorting*, London: Routledge, pp. 57–74.

Van Oenen, P. (2010) 'Paul Virilio: A Logistic Perspective on Crime', in R. Lippens and P. Van Calster (eds) *New Directions for Criminology: Notes from Outside the Field*, Antwerp: Maklu Publishers, pp. 79–98.

Wall, D. (2007) *Cybercrime: The Transformation of Crime in the Information Age*, Cambridge: Polity.

Wall, T. and Monahan, T. (2011) 'Surveillance and Violence from Afar: The Politics of Drones and Liminal Security-Scapes', *Theoretical Criminology*, 15(3): 239–254.

Wells, H. (2008) 'The Techno-Fix Versus the Fair Cop: Procedural (In)Justice and Automated Speed Limit Enforcement', *British Journal of Criminology*, 48: 798–817.

Wells, H. and Barnard-Wills, D. (2012) 'Surveillance, Technology and the Everyday', *Criminology and Criminal Justice*, 12(3): 227–237.

Yar, M. (2006) *Cybercrime and Society*, London: Sage.

Zedner, L. (2007) 'Pre-crime and Post-Criminology', *Theoretical Criminology*, 11(2): 261–281.

Media, crime, and culture
Simulating identities, constructing realities

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Media, entertainment, and crime
Prospects and concerns
Ray Surette and Rebecca Gardiner-Bess

Introduction: the relationship between media, crime, and justice

Crime has long been a staple of entertainment media and the popularity of crime and justice-related entertainment is undeniable (Callanan and Rosenberger 2011). Since the nineteenth century, in addition to being the central theme of police, detective, heist, and gangster stories, criminals and their crimes have been popular secondary plot elements in love stories, Westerns, comedies, and dramas. These early media portraits of criminals allowed audiences to identify with the criminals and to savor the danger of crime yet see it ultimately punished (Rafter 2007; see also Leitch 2002). Entertainment crime media is escapism and in the entertainment world of crime and justice, you will see impossible crimes, fights, and adventures by people with abilities that no ordinary human possess. The entertainment products of the media are best thought of as play, and crime-and-justice stories have accounted for about one-fourth of all entertainment output (Reiner 2002: 289). Their popularity has continued into the twenty-first century where of the top 40 shows in 2004–2005, one-third were centered on crime (Phillips and Frost 2012; see also Dowler and Zawilski 2007). As crime and justice entertainment has expanded, social effects were noted and social concerns were raised (Surette 2011). Paralleling the popularity of media crime content, new media technologies have expanded access to crime content. This is not a phenomenon limited to the United States, the advancement of media technologies today provides access to crime entertainment content in remote parts of the world with a click on a device (see also Allen 2000; Winston 2002; Pfeiffer *et al.* 2006; Wardle 2006; Curran *et al.* 2009). Driving this expansion has been media corporate needs for profitable content (Beale 2006). As a historically consistent source of profit, crime and criminal justice surpasses other topics and remains a media stable (Klite *et al.* 1997; McCall 2007). In addition, global access causes an increased level of concern among criminal justice researchers, policy-makers, governments, and the public.

Further exacerbating concerns with entertainment crime content is the current popularity of merged news and entertainment formats or infotainment media. Why has crime and justice infotainment content exploded? The answer is that as the media, initially led by television, became

more visual, intrusive, and technologically capable, audiences became more voyeuristic and entertainment-conscious (Surette and Otto 2002). Simultaneously, the growth of surveillance cameras provided footage for programs that rely on showing live "crimes." In the past 20 years there has been a rise of crime-reality television shows, blending "real" stories with entertainment formats (Kooitra and Mahooney 1999). These American-made crime shows are also popular in over 120 countries, with some countries creating their own crime-reality shows such as *Crimewatch UK* (Gruenewald *et al.* 2011: 169). Compared with pure entertainment content, research suggests that individuals are more impacted by reality-based crime shows because they are more likely to accept those formats as representatives of reality (Surette 2011). The feel with infotainment media is that you are learning the real facts about the world; the reality is that you're getting a highly stylized rendition of a narrow, edited slice of the world. Crime perfectly fits infotainment content demands for real events that can be delivered in an entertaining format and has the advantage of being immensely popular with the public.

Another important trend found in entertainment media is a tendency to construct criminals as predators. Such criminals dominate media portraits and are portrayed as the dominant domestic crime problem. History reveals that the image of the predator criminal has been a prevalent media image for more than a century and the modern entertainment media have given massive and disproportionate attention to pursuing innately predatory criminals as the prime crime-and-justice problem (Curran 1982: 227). These media constructs portray offenders as animalistic, irrational, and innate predators who commit violent and senseless crimes. The media have raised the predator criminal from a rare offender in the real world to a common, ever-present image in the media world. The public is led by the media to see violence and predation between strangers as an expected fact of life. The collective portrait of this content has been described as adhering to a "backwards law." The backwards law states that the media's crime and justice portraits will be the opposite of what is true. In regards to crimes, criminals, law enforcement, the courts, and corrections, the media construct a world that is not opposite to reality. The inaccurate images found in the entertainment media provide a distorted reflection of crime within society and a distorted reflection of the criminal justice system's response (Hindelang Criminal Justice Research Center 2011).

With the current technology, one can consume crime-related media instantly, on demand, and globally. When combined with the large proportion of media content that is crime-related, the skewed image of crime and justice media found there, and the public's insatiable interest in crime-related media, concerns about social effects have been raised. For example, the insatiable interest in media has impacted the global community and has greatly influenced the world-views across disparate cultures and countries. Thus, in developing countries such as Pakistan, the majority of youth regularly consume international media, with only a minority relying on media produced by the Pakistan government for their core information (Zeenat 2012). The social effects of an internationalized media are slowly emerging (see Jaffe 2012). Whatever its final impact, entertainment media consumption today is a global experience and crime-related media is a significant component of that experience. In sum, the twenty-first-century high-speed, media-rendered world of crime and justice entertainment generates a number of concerns. Due to their history, contentiousness, social importance, and unresolved status, five concerns about entertainment media and crime are discussed in this chapter. They are: (1) the impact of the media's portrayals of crime on media consumers; (2) the impact on real-world offenders; (3) the impact of new social media; (4) the role of government in determining media's crime content determination and allowing access to that content; and (5) the effect of crime and justice portraits on vulnerable populations.

Five contemporary concerns associated with entertainment crime media

Concern 1: Effect on media consumers' perceptions of the world

The first and oldest area of concern with media crime content is its effect upon audiences. Media has been perceived as playing an important criminal justice role in America for centuries. For example, *Uncle Tom's Cabin* played an important role on slave laws in the 1800s, the film *I Am a Fugitive from a Chain Gang* affected US correctional practices in the 1930s, and movies and books like the *Silence of the Lambs* influenced policies concerning the "threat" of serial killers in the 1980s. Today the criminal justice system is felt to be directly impacted by a media–driven social environment (Leishman and Mason 2003). The previously mentioned backwards law regarding crime content has been linked to a number of erroneous public perceptions about crime and expectations regarding the criminal justice system. A specific example from entertainment media is the 'CSI' effect which is felt to impact jurors and create unrealistic expectations concerning evidence (Barthea *et al.* 2012). A second concern connected to media crime content is an increase in consumer fear of crime being raised to disproportionate levels. In addition to fear, a degraded view of society has been raised as a concern with consumers who are exposed to higher amounts of crime content thought to develop a 'mean world-view' in which society is seen as suffering from more crime, as violent and dangerous. The cumulative concern with the content is that the inordinate fear of crime is connected to punitive criminal justice policy support and the rejection of rehabilitative approaches. These effects on attitudes are felt to be widespread and to influence a cross-section of the public so that everyone exposed is at-risk of having their criminal and justice world-views altered. An example of one such effect was observed in South Africa prior to the 2010 World Cup competition. As host to the World Cup, South Africa received increased global media attention and came to be portrayed as an exceptionally violent society. However, research suggested that, as in the United States, South Africa was actually experiencing a steady decline in crime. Due to the media's negative portrayal, the perception of a crime–ridden society became the image of South Africa and the fear of crime that was generated persisted after the soccer games had come and gone (Rohrer 2010).

Concern 2: Criminogenic media effects

A continuous debate regarding criminogenic media is whether it causes crime. The media's causal position in regards to criminality is crucial. Does exposure to media precede or parallel criminal behavior? In other words, do the media cause changes in subjects exposed to crime content or do criminally predisposed individuals selectively seek out media crime content that supports their already pre-established criminal behaviors? The public long ago reached its conclusion. As early as 1908, worries appeared that the media (then newspapers and books) were creating an atmosphere of tolerance for criminality and causing juvenile delinquency. Since then, public opinion polls consistently reflect the public's belief in a causal media role in crime and violence in society (Thomas 1908). For example, in 2000, more than two out of three Americans felt that television violence was an important cause of crime in the United States, and one-fourth felt that movies, television, and the Internet combined were a primary cause of gun violence.[1]

The concern over contemporary entertainment content as a cause of crime crystallizes as a hypothesized media modeling effect, commonly termed copycat crime. A copycat crime is a

crime that has been inspired by an earlier, media-publicized or generator crime – that is, there must be a pair of crimes linked through the media. The perpetrator must be directly exposed to the media content of the original crime and must have incorporated major elements of the crime. The victim, the type of crime, motivation or technique must have been lifted from the earlier media (Surette 2011: 70–71). Despite the pervasiveness of crime content, a criminogenic behavioral effect is felt to be limited to at-risk, predisposed, and in most instances pre-established offenders. Counteracting this effect, concentration on a limited audience, however, the global access to content has expanded the reach of a copycat effect. For example, in July 2012, a mass shooting occurred at the *Dark Knight Rises* film premier in Aurora, Colorado (CBS/AP 2012). Soon after, in New York, a Twitter user threatened to copy the Colorado mass murder at Mike Tyson's one-man Broadway show (Parascandola and Armaghan 2012). Similarly, in the US state of Maryland, a 28-year-old male threatened to shoot a former employer while comparing himself to the Joker when police took him into custody (Gorman 2012). In addition, death threats posted on Facebook in Canada threatened to carry out a mass shooting similar to the Colorado crime (Radia 2012). With new media, the potential for generator crimes resulting in copycat ones is a global phenomenon. So organizers in Tunisia and Egypt in 2011 exploited social media to assist in the organizing and mobilizing of citizens to spark the Arab Spring revolutions (O'Donnell 2011).

Since the nineteenth century, there has been a fascination with the media role in the creation of crime (Surette 2011: 70). Faced with continuing concern over a criminogenic effect from crime media, the film industry in the 1930s adopted a self-imposed code forbidding the production of films which instructed audiences in how to commit crime. Subsequently, following their respective technological advancements, the television networks and the video game industry adopted rating systems reflecting the severity of violence in their content. Irrespective of these adoptions, there remains a question of the effectiveness of these steps in the face of new media technology that has broadened and eased access to contemporary crime and justice content. Currently, there is a general belief that the media has a copycat effect on criminal behavior and that media content shapes some crimes and provides crime models for predisposed consumers. Today the criminogenic influence of the media remains a popular topic and concern has been raised by media commentators (Helfgott 2008: 368). This influence has a much wider impact because of the advancement of technology, as international boundaries no longer are relevant. In the past, societies relied on print media or the word of mouth for information. Today, with a click, the world is connected, and media generated in one country can have a massive triggering effect in another country. The debate on the pervasiveness of copycat crime and the magnitude of the media's impact on criminality and societal crime levels continues.

Concern 3: The impact of new media on crime and society

Since the beginning of the twentieth century, there has been an expansion of media forms, with the media landscape evolving at a startling pace (Collins 2011). In addition to the traditional print, sound, and visual media, today there are new digital interactive media exemplified by the Internet, electronic games, and PDAs. These new "social" media allow for faster and broader communications and encourage the merging and looping of content between media (Flew 2002; Lister *et al.* 2003). The basis of this concern is that as new media technologies and platforms replace older legacy media and subsequently extend mass media's reach and impact, they will simultaneously fuel the growth of "mediated reality." The concern is that as new media supplant traditional interpersonal communication networks of friends and family, they

will broaden the reach of crime content. The globalization of information has resulted, and the social reconstruction of crime news and crimes has followed suit (Ling and Campbell 2010).

Differences between new media and traditional media are important. First, there is less emphasis on large, passive, heterogeneous audiences. New media target audiences have a special interest in a narrow type of content. The effect of this approach is readily apparent on the Internet where one can find a large number of highly focused, narrow content, dedicated crime websites (Surette 2011). The second characteristic is the "on-demand" nature of new media. On demand means that the delivery of content is controlled and determined to a great degree by the consumer. In the media sphere, what was once considered distant and foreign is now "local" for connected consumers. This is seen in video game consoles that allow participants to play games with people from all over the world from the comfort of their home. Localization is not limited to video games. Social media sites unite the world by raising global social awareness on issues such as violence against women to organizing flash mobs. Today a number of commercial products allow selective use of television shows, movies, music, games, and social contacts. In addition, social media have eased the passing of media content from person to person, moving distribution of content from a centralized decision process to a diffused decentralized process. For example, people with a special interest in criminal forensics can have that content automatically recorded for subsequent viewing at their discretion. Except for live events that one wants to experience in real time, little media content must be consumed at a particular time and in a particular place.

A third characteristic that is most unique to the new media is interactive participation (Kiousis 2002). A contemporary new media consumer can be an active participant in the development of the content, the distribution of the content, the social assessment of the content, and the ultimate impact of the content. Interactivity is most apparent in the realm of video games where the electronic content is immediately determined by the actions of the players (Collins 2011: 296). Whether a victim is killed or spared, a crime solved or not, a criminal caught or escapes is not predetermined by a story author but is post-determined by gamers (Grodal 2003b). Additionally, chat rooms, blogs, and Internet sites also allow web surfers to create and influence the content they consume (Grochowski 2006). The overarching concern with new media and crime is that participatory media consumption will increase access to crime instructions and subsequent crime modeling, as demonstrated by the posting of criminal behaviors on YouTube, such as "Ghost Riding," where individuals dance atop moving but driver-less cars, and which enjoyed a cycle of popularity and spawned a burst of imitators in 2010.

Concern 4: Control over the media's crime and justice portrait

The development and reach of new media have heightened concerns about control of the portraits distributed in entertainment and infotainment media. Thus, the role of government in determining media content and access to media content is another ongoing media and crime area of concern. With dueling traditions of free press and private for-profit media and due process protections in Western societies, the goals of the government and the media regarding content often clash. These clashes frequently involve high entertainment value criminal justice events that are co-opted and distributed as sources of entertainment and profit. The media hijacking and dramatization of actual criminal cases has birthed the media trial – the media co-optation of a crime or justice event by the media which is marketed along entertainment-style storylines (Surette 1989). In a media trial, the media cover all aspects of a case, often highlighting extralegal aspects. Personalities, personal relationships, physical appearances, and idiosyncrasies, regardless of legal relevance, are portrayed. Live visual content is preferred and a media trial becomes a dramatic mini-series developed around real criminal events. In their portraits the media promote

simplistic explanations of crime within the authoritative and dramatic vehicle of a 'real' trial. In practice, crime in these productions is nearly universally attributed to individual characteristics and failings rather than to social conditions, and media trials represent the final step in the long process of merging news and entertainment that is infotainment. The inherent conflict between authority and mass media has become particularly apparent in the recent actions of a number of authoritarian governments that have struggled to restrict access to new media and control their social effects while simultaneously participating in emerging global social, trade, and culture networks.

Concern 5: Effects on vulnerable populations

The final concern area involves how the entertainment and infotainment crime portraits impact particular social groups. Concerns have been raised about negative effects on women, minorities, the mentally ill, victims of crime, crime fighters, and offenders. For example, media portraits have been tied to wider social stereotypes portraying women as emotional, offenders as incorrigible, minorities as crime-prone, victims as helpless and contributory, police as callous, and the mentally ill as dangerous psychopaths. Thus entertainment-based crime portraits of women have been criticized as misogynistic, and as showing women as simultaneously helpless and deceitful, as appropriate victims of crime and inappropriate holders of power, who ultimately need to adhere to traditional female social roles. Similarly, the police are portrayed as violent crime control advocates who are dismissive of due process protections and procedures. The concern with the media portraits of gender and minorities overlaps with how victims, offenders, and crime fighters are portrayed. Victims are often ignored and undervalued in crime media or, when portrayed, are made to fit into a helpless, innocent trope. All three portraits are presented in "ideal" caricatures. Ideal offenders in the entertainment media are outsiders, strangers, foreigners, aliens, and intruders who lack essential human qualities and are beyond rehabilitation. The "ideal victim" is an innocent, naïve, trusting person in obvious need of protection. Children and pregnant women are the archetypal ideal victims (Altheide 2002: 146). And although capable of great violence similar to offenders, the "ideal crime fighter" displays the additional admirable qualities of sacrifice and a noble nature. The shared concern associated with these portraits is that they collectively promote simplistic explanations and solutions for crime.

With these five concerns to hand, we can now ask what research says about the validity of each concern. We turn next to answers to that question and discuss the available research.

Current research findings regarding each concern

1 Research on audience effects

By the end of the twentieth century there had been a significant shift in the criminal justice system toward more punitive policies in the United States. Policies were adopted to make incarceration more onerous for adult offenders and to allow juveniles to be prosecuted and punished as adults. There was also an unprecedented increase in the incarceration rates, accompanied ironically by a decrease in crime (Beale 2006: 409; Fox and Zawitz 2010). By 2010, the violent victimization rate had decreased by 13 percent and had exhibited a steady decrease since 1993 (Truman 2011). Although the rate of victimization continues at low levels, the United States continues to confine a larger proportion of its population than other advanced nations (The Sentencing Project 2012). The United States is the world's leader in incarceration with 2.2 million people currently in the nation's prisons or jails – a 500 percent increase over

the past thirty years (ibid.). As a result, the United States is significantly more punitive than other Western democracies.

The research question is, what role does media content play in this paradox of increased punitiveness in collusion with decreased crime? In contrast to the declining rates of victimization, public opinion polls in a number of countries show that most people believe the opposite, that crime has been steadily increasing, when in reality it has been decreasing. In 2011, for example, in a Gallop poll, 68 percent said there is more crime in the USA than there was in the previous year (Saad 2011). When declining victimization rates are juxtaposed with increased public concern, the question arises as to what the cause of the increase in fear among a less victimized populace can be. The content of the media regarding crime is a common candidate.

Although one cannot pinpoint the exact cause of the anxiety, most researchers agree that the media do play an important role in the public's perception of crime. Leading law and film scholars note that "media is a powerful tool of persuasion, manipulation, and communication" (Augustine and Augustine 2012). Additional support is found in research that shows a statistically significant relationship between media consumption, fear of crime, and support for punishment (Boda and Szabo 2011). The relationship appears to be cross-cultural. For example, in a recent survey conducted in Trinidad and Tobago, the results supported the theory that media exposure impacted the perception of and accuracy of crime levels. Research in general in this area has supported the notion that the media play an intermediary role between one's background and real-world experiences and a person's perception of crime (Sotirovic 2001; 2003; Surette *et al.* 2011). In authoritarian countries, the generation of fear in the public may be in the government's interest. A government-controlled news media has an undeniable power over the public's perception of any given crisis and a steady current of fear that drives false dichotomous choices of following national policies or working with enemies of the state (Klein 2012).

At this point, while the media do play a role in shaping public attitudes towards crime and justice, delineating their exact role proves difficult as the relationship between consumption and perception has proven to be complex. Thus, research has shown that heavy media consumption results in a higher level of trust in the police and the courts as well as more concern about crime. In particular, consumption of crime-related fiction seems to build a positive image of real criminal justice institutions (Boda and Szabo 2011). Along the same lines, those who do not trust the media tend to have less confidence in the criminal justice system. And while the media saturated with rampant predatory criminals do not necessarily lead to negative views of the criminal justice system, they do appear to lead to punitive policy support (Griffin and Miller 2006). Looking cross-culturally, media effects on audiences are not universal and research on one audience and its media cannot be blithely applied to an audience from another country. Pre-existing cultural differences and perceptions of the media will modulate the effects of similar content across dissimilar cultures, especially in countries where there is suspicion of the media and resistance to their influence.

2 Research on criminogenic media

As for criminogenic media, two research questions are relevant. The first is whether violent media generate aggressive behavior. Driven by the folk logic of "monkey see, monkey do," establishing whether "child see, child do" holds true in terms of the media and aggression has proved more difficult than first expected (Boyle 2005; Sparks and Sparks 2002: 278–280). Researchers have posited a stimulating effect as the causal dynamic for a media–aggression link. The most commonly advanced mechanism in this body of research involves imitation, where viewers learn to imitate values and norms supportive of aggression, imitate techniques to be

aggressive, and learn the acceptable social situations and targets for aggression. Advocates of a stimulating effect feel that children in particular learn aggression the same way they learn other social skills – by watching and imitating behavioral models. Accordingly, the more violence that children are exposed to in the media, the more likely they are to act aggressively.

Although experimental studies have confirmed that exposure to visual media violence can lead to short-term imitation, researchers do not know exactly how and to what extent the media cause long-term changes in aggressive behavior. Despite the general agreement that there is a persistent positive association between violence in the media and viewer aggression, the substantive importance of this relationship remains undetermined. A number of researchers, for example, argue that the media have not been established as significant causes of aggression (Freedman 2000; Ferguson 2002: 446–447; Huesmann and Taylor 2006: 393–415; Gunter 2008: 1061–1122; Murray 2008: 1212–1230). In their view, exposure to violent content and violent behavior may be linked – but the relationship is not causal. Rather, both stem from the predispositions of some media consumers who seek out violent content and act violently because of their own predisposition to aggression. If this position is correct, eliminating portrayals of violence in the media will not reduce the level of violence in society (although the form of violence may change due to the removal of media models of aggression) because the number of individuals predisposed to violence will remain the same.

Irrespective of the ongoing debate, most researchers today conclude that the media is a contributor to social aggression. Most crime is nonviolent, though, and one can be aggressive without breaking the law, so even if the media are important causes of aggression, media still may not be important causes of crime. Therefore, the more directly relevant research question for crime and justice looks at the media as a cause of crime. Focusing on the generation of copycat crime, the question is: Does the presentation of crimes in the media result in people copying those crimes?

Research on criminogenic media effects is unfortunately sparse. One reason for the dearth of research is the inherent difficulty in researching possible relationships between the media and criminal behavior. Experiments are difficult to conduct so that most of the available evidence consists of anecdotal reports and surveys of prisoners to gauge the extent and nature of copycat crime. This research does show that some real-life crimes are sometimes copied soon after being depicted in the media (Gunter 2008: 1066). Whether a copycat effect is substantial enough to influence aggregate crime levels has not been established, however. For example, in the best-designed aggregate examination media effects on officially recorded crime, Karen Hennigan and her colleagues examined crime rates in the United States prior to and following the introduction of television in the 1950s. Hennigan *et al.*'s study supported the idea that television, at least its introduction, influenced property crimes rather than violent crime. Whether this influence continues today cannot be clearly determined because we can no longer separate mass media's influences from other on-going social changes. Hennigan and her colleagues speculated that the media still contributes to an increase in property crime rates to some unknown degree. Other subsequent research has failed to tie the media to aggregate crime levels and recent reviews have concluded that any link between exposure to violence media and general levels of violent criminal behavior is weak at best and moderated by consumer predispositions and social factors (Browne and Hamilton-Giachritsis 2005: 701–710; Huesmann and Taylor 2006: 393–415; Coyne 2007: 205–211; Savage 2008: 99–128, 1123–1136; Savage and Yancy 2008: 772–791). A significant relationship between swings in media content and general criminality in society has not been shown.

If research has not been able to find an aggregate media effect on crime, a media effect must be concentrated among pre-existing offenders and must influence the quality rather than the

quantity of crime in society. There is a consensus among researchers that the media criminogenic effect generally influences individuals with preexisting criminal behavior. Most individuals in the anecdotal reports who mimic media crimes have prior criminal records, suggesting that the media affects criminal behavior rather than the number of criminals (Surette 2011: 71). Copycat offenders usually have the criminal intent to commit a particular crime before they copy a media-based technique (Heller and Polsky 1976: 151–152; Pease and Love 1984). They are typically career criminals involved in property offenses rather than first or violent offenders. The research reports no clear evidence of a strong media criminalizing effect on the previously law-abiding citizen. The implication is that the media serves as molder of crime, as rudders more than triggers of criminality (Surette 2011: 72–73).

Another question concerning criminogenic media concerns the mechanisms of how the media generate copycat effects. Here again, knowledge is limited and speculation prevails. In that the concept implies the imitation of an initial crime, the obvious starting point in discussing copycat crime is imitation (Curtis 1953: 142–157; Vine 1973: 292–304).

Initial copycat crime researchers attributed copycat crime to a process of simple and direct imitation based on social learning principles (Akers 1998). Today imitation is considered a necessary but insufficient factor in the generation of copycat crime and an additional mechanism has been posited (Berkowitz 1984; see also Berkowitz and Rogers 1986). This mechanism, termed priming, posits that the portrayals of crimes by the media activate a cluster of associated ideas and concepts within the potential copycat offender that increase the likelihood that he or she will behave similarly (Dijksterhuis and Bargh 2001; Roskos et al. 2002). Priming holds that when people read or hear or witness an event via the mass media, ideas within their minds having a similar meaning are activated for a short time, and these thoughts can result in related actions. Thus after exposure to violent media, individuals will be primed to have more hostile thoughts, to see aggression as justified, and to behave more aggressively (Jo and Berkowitz 1994: 46). The cognitive theory concept of "scripts" from communication research has also been applied to copycat crime. Scripts are seen as pre-established behavioral directions that individuals hold in their memory and scroll up to direct behavior as needed. Cognitive scripts serve as a guide for behavior by laying out the sequence of events that one believes are likely to happen and the behaviors that one believes are appropriate in particular situations (Huesmann 1998: 73–109). It is thought that criminal scripts can be acquired by observing criminogenic media during fantasy role-playing, a part of normal child development. Role-playing encourages the acquisition of generalized social role scripts – the role-playing child, for example, acquires the persona of a social role and subsequently acts as he or she thinks a doctor, athlete, or criminal would act. The more salient to the child the observed criminality is, the more the child fantasizes about and rehearses the social role (Huesmann 1986: 131; Claxton 2005). Media-embedded cues, such as the presence of a gun, later encountered in the real world would prime and sometimes activate the acquired criminal scripts (Huesmann 1986).

Thus, whether real-world criminogenic effects, such as copycat crime, emerge in any particular individual depends on the idiosyncratic interactions of the content of a particular media product (its characterizations of crime and criminals), the individual's predispositions (personal criminal history, family, and environmental factors), and the media's social context (preexisting cultural norms, crime opportunities, and pervasiveness of the mass media). The more heavily the consumer relies on the media for information about the world and the greater his or her predisposition to criminal behavior, the greater the likelihood of an effect. Copycat crime appears to be concentrated in predisposed, at-risk individuals primed by media characterizations of crime to activate acquired criminal scripts (Gunter 2008: 1097).

3 Research on new media, crime and justice

Akin to copycat crime, there has been little research on the relationship between new media and crime but hypotheses abound. New media have hypothesized criminogenic effects when they provide avatar-like criminal models to copy and stimulate communications about crime (Sherry 2001; Anderson 2004; Anderson *et al.* 2007; Whitaker and Bushman 2009). For example, a rap song can generate interpersonal communications that encourage vandalism or violence in youth gangs, or new social media such as blogs and Twitter can encourage imitation across geographically separated groups. The Internet is seen as a particularly powerful criminogenic influence, due to it having both mass and interpersonal elements. As both a mass and an individual media, the Internet provides a unique one-to-many communication avenue; it is word-of-mouth communication with global reach (Rogers 2003: 215–216). Where real-world criminogenic instructors are not available, the Internet can therefore substitute and deliver detailed how-to crime information and encouragement (Parks and Roberts 1998; Rogers 2003: 207). In addition to copycat effects, new media further provide individuals a virtual location to commit a new type of crime, *cybercrime* (Speer 2000), and provide new platforms and distribution venues for crime-related content to influence perceptions and attitudes about crime and justice. Counterbalancing its reach and ease of accessibility, the credibility of the Internet-provided information is not unquestioned by its users. Although many individuals obtain their information about the world from the Internet, it has been simultaneously perceived as a less than credible source of news by consumers (Waid-Lindberg *et al.* 2011: 52).

Irrespective of the perceived validity of their content, it has been argued that the significance of new media derives from their ability to move audiences from passive media content customers to active media co-producers of content (Grodal 2003a). New media allow the public not only to comment on crime portrayals but also to participate in criminal justice proceedings (Collins 2011: 296). Combined with computers to generate virtual realities, crime experienced via new media provides by far the closest experience of crime and justice compared to real-world experience. For crime and justice, this means that media consumers can experience committing a virtual murder rather than just observing one, help to catch an offender rather than just watch over the shoulder of a crime fighter, and determine guilt or innocence of a defendant rather than just follow a trial (Fox *et al.* 2007).

A recent example of the dynamic between new media and crime is shown in a recent Ugandan site on a new media-based criminal justice-related campaign. In the campaign, social media were flooded with information calling for the arrest of a former Ugandan drug lord Joseph Kony (Shih 2012). Seeking to obtain public support for the apprehension of Kony, a new media savvy group, Invisible Children, created and launched on the Internet a 29-minute video depicting the victims of Kony's crimes in the 1990s. Within a few days of launch, nearly 10 million people had viewed the video and with the subsequent support of American celebrities, a world-wide call for Kony's arrest arose (Shaw 2012). This outcry was despite the fact that Kony had been living in obscurity since the 1990s and was believed to be dead or in exile. The Internet video drew mixed reactions from within Uganda and the resurrection of his crimes continues to flood social media (Shih 2012). Examples of this kind establish that new media are perceived as a powerful set of social influences while the utilization of and understanding of their effects are little understood. At this point in time, despite their enormous potential and widespread speculated effects, new media stand more as an under-researched crime and media concern than as an established, understood mechanism.

4 Research on creation of and access to the crime and justice media portrait

Unlike the United States, both many developing countries and developed countries that do not share a Western Enlightenment-based view of the restricted role of government regulation on the media have closer media–government relationships. Many of these countries have state-owned media outlets controlling the imagery of crime and justice that is produced and distributed. When freer Western-style media appear in these countries, conflict follows, and decisions about social policies regarding access and control to crime and justice content are often ideological rather than research-based. Indeed, the impact of competing approaches is frequently stated as an obvious "given" and starting point for most discussions.

For example, recently in Zimbabwe, there was a move by the government to regulate international news media from producing material that was defamatory to the Zimbabwe government. The view stated by a Zimbabwean official justifying this regulation was that the media were a natural resource and as such should not be used to vilify the government (Klein 2012). According to that world-view, strong government control of the media, their content, and the distribution of their content can be justified. In developed Western countries such as the United States, the conflict between access and control is more nuanced, and the clash is best exemplified in the coverage of high profile criminal trials. The social impact of these trials comes from the massive attention they receive and public debate they arouse. These trials become socially significant because they influence the public's attitudes and views regarding crime and justice for years, and it is expected that such trials will become more common and global due to the reach of new social media (Drucker 1989). Prior research on these trials has revealed specific system-wide effects such as the generation of a secondary effect on similar but non-publicized cases (Surette 1999). The balancing of media access and due process remains the central point of conflict when these media trial events erupt.

A substantial but inconclusive amount of research has been conducted on the effectiveness of judicial steps to deal with media attention to criminal proceedings. The courts essentially have two strategies they can pursue: a judge can be proactive and seek to limit the creation of prejudicial media content, or a judge can be reactive and seek to limit the effects of media content on the judicial proceedings after its dissemination to the public. Proactive mechanisms include restrictive and protective orders on trial participants and closure of trials, barring the press from attending. These approaches directly clash with the US First Amendment protection of freedom of the press and have been vigorously resisted. The second approach, which is generally preferred by appellate courts over the first strategy because it does not directly limit the activities of the media (Bruschke and Loges 2004), rests on the premise that even if most of the public is biased by media information, an unbiased jury can still be assembled and an unbiased trial can be conducted. Reactive steps include expanding jury selection (the voir dire), granting trial continuances, granting changes of venue, sequestering jurors, and providing special instructions to the jury. Research on the relative effectiveness of either strategy or the interaction between mechanisms has not cleared up the ambiguity about what trial judges should do, and today individual judges are largely left to their own intuition and experience in deciding which strategy to follow.

5 Research on vulnerable populations

Research on vulnerable populations has focused on the portrayals of victims and offenders in crime-related content. Considering first the portrayal of victims of crime, the impact of the

media image of victims has been put forward as harmful in a number of ways. The first harm comes from the low level of importance given to most crime victims in the media. Although sometimes important for determining a crime's newsworthiness, research reports that crime victims are often ignored. Murder victims in particular are marginalized, and homicide frequently happens to characters who mean little to the other characters or to the audience (Sumser 1996: 78). The modern audience is encouraged to react to murders not with a "My God, how horrible!" response but with a "How curious, I wonder how it was done" reaction. When described, media crime victims tend to be portrayed as female, very young or elderly, or a celebrity (Mawby and Brown 1984; Chermak 1995; Meyers 1996; Pritchard and Hughes 1997; Sorenson *et al.* 1998; Reiner, *et al.* 2003). As victims of crime, recent studies have shown that violence against women is more newsworthy than violence against males (Gruenewald *et al.* 2011: 2), and that female victims that support prevailing stereotypes generally receive more media coverage (ibid.: 24–25). The ideal crime victim in the media appears to be a child or pregnant woman (Altheide 2002: 146; Minnebo 2006: 65–93). The marginalization of the crime victim may be changing, however, at least in infotainment. Since the 1990s, a shift to the victims' perspective has been observed in the construction of child murder victims, which has shifted from telling the killers' stories to emotional stories about the impact on victims' family and community (Wardle 2006: 515). Within this new infotainment formatted coverage of crime victims, victims' rights have been constructed as a needed criminal justice reform (Rentschler 2007: 219–239). Entertainment trends in portraying female victimization are for fewer female villains, more female assistant crime fighters, and many more female victims (Sumser 1996: 141; Escholz *et al.* 2004: 161–180; Cecil 2007a: 243–258).

Overall, the victimization rates of persons in the media correlate more with fear of crime than with the public's actual victimization risk. In addition to media victim portraits being demographically mismatched with official victim statistics on age and gender, greater proportions of both news and entertainment media victims are portrayed as randomly selected and as having no prior connection to their assailants (Chermak 1995: 107). In sum, in addition to misleading constructions of victimization which paint crime as a random, unavoidable event, entertainment media victims normally play one of two extreme roles. Victims are either helpless fodder quickly dispatched, or emerge as wronged heroic crime-fighting avengers. Unlike the real world of crime, where existing relationships between victims and criminals are the most significant factor in the generation of crime, in the media-constructed world, the more important relationship is between the crime fighter and the criminal. Overall, most victims in the media exist only to be victimized; once that function is fulfilled, they are shunted aside to allow the central contest between the heroic crime fighter and the evil criminal to be played out.

Not normally thought of as a vulnerable population due to their media image as predator criminals, the impact of the portrait of offenders does not generate public concern. Not surprisingly, research on the portrait of criminals has found almost no correspondence with official statistics of persons arrested for crimes. The typical criminal portrayed in the media is mature, white, and of high social status, whereas statistically the typical arrestee is a young, poor, minority member (Escholz *et al.* 2004: 161–180). Although other types of criminals are portrayed, a violent predatory street criminal is what the public considers most often due to the media's constructed image of criminality (Graber 1980).[2] Tied to the dominant criminal predator image, crime media tends to portray the mentally ill as particularly dangerous, violent, and unpredictable. As noted, such images have been put forward as raising public fear of crime levels and lowering consideration for rehabilitative policies, even for non-violent and youthful offenders.

Ironically, if you move from the media portraits of how crimes are committed and investigated and where criminals are caught to the end of the criminal justice system where criminals are

punished, incarcerated offenders are often portrayed as victims of corrupt correctional systems rather than as social predators. Once incarcerated, the victimization of offenders in entertainment media is due to other violent, psychotic inmates or violent, psychotic correctional officers. As any review of the prison film genre will reflect, both clearly are more dangerous than the struggling inmate heroes often portrayed as the main characters in media portraits of corrections.

Concerning female offenders, they are primarily shown linked to male offenders and as white, violent, and deserving of punishment. Female criminals are paradoxically portrayed as motivated by greed, revenge, and love (Bond-Maupin 1998: 30–44; Bailey and Hale 2004; Cecil 2007a: 243). Regarding female inmates, the most common portrait of female prisoners is found in low-budget movies that are squalid mixes of sex and violence (Clowers 2001: 28; Britton 2003; Ciasullo 2008: 197). With remarkably few exceptions, female inmates are found in constructions containing high levels of gratuitous sex (primarily lesbianism and rape), dominance, and sadism (Clowers 2001: 28; Ciasullo 2008: 197). Not limited to commercial films, this focus on violence and sex in female prisons has also been found in recent reality-infotainment news magazines, talk shows, and documentary programs which frame women's imprisonment in a similar fashion (Cecil 2007a: 243–258; 2007b: 321). Collectively, these images provide unchallenged messages of female offenders and ignore the true social stresses and correctional issues associated with female imprisonment (Freeman 2000: 46; Cecil 2007b: 321).

Not surprisingly, the overall portrait of females in crime and justice media content has been criticized. Whether it is their portrait as victims of crime, crime fighters, attorneys, or criminal offenders, the portrait of females in the media has been found to be deleterious. In media portraying crime-fighters, women are usually under-represented and, when present, are typically relegated to stereotypical roles (Collins 2011; Luyt 2011: 366). For example, as law enforcement officers and civilian crime fighters, the portrait of females reflects the larger gender-biased portrayal of women in the media as pseudo-masculine or hyper-feminine creatures. Similar to the portrayals of policewomen, female attorneys are frequently defeminized as career women or projected as creatures dominated by sexual conflicts or repression. Female attorneys are more often shown as young, white, single, childless, and in lower echelon positions in their law firms and criminal justice agencies. They also share with male attorney portrayals an unrealistic level of involvement in dangerous and sensational criminal law cases. The media construction of the female lawyer frequently assumes the incompatibility of the social roles of attorney and woman. Even so, female attorneys appear to fare better than media policewomen in that some aspects of their likely real-world experiences are portrayed, however, like policewomen, their sexuality dominates their media portrayals (Bailey *et al.* 1998).

Similar to the portrayal of females, research on the crime and justice portrayal of minorities as either offenders or victims reports stereotypical and negative images as common. Media content routinely underplays the victimization of minorities (Wilbanks 1984; Johnston *et al.* 1994; Meyers 1994; 1996). Black women are also more often blamed for their own victimization, attracting victimization due to their dress, behaviors and company (Meyers 2004; Bjornstrom *et al.* 2010). News and crime-reality programming reflect the broader trend as well. Typically in the news the violent criminal disproportionally is portrayed as black and their victim as white (Dixon and Linz 2000; Dixon *et al.* 2003). Research has shown, for example, that a white victim with a white suspect receives less coverage than other types of equally rare homicides such as a black-on–white homicide (Gruenewald *et al.* 2011). Black suspects are also depicted as more menacing than their white counterparts and are more likely to be shown resisting arrest (Entman 1990). Thus, when black-on-black crime is portrayed, it is often portrayed as part of an isolated social problem of urban black-on-black violence in poor neighborhoods (Gilliam Jr. and Iyengar 2000;

Pizarro *et al.* 2007). Young minority offenders were found to be portrayed as aggressive, short-sighted, remorseless killers who largely target other young black males (Bennett *et al.* 1996; Fox 1996). Research suggests that these racial depictions have an impact on white viewers who are more likely to conclude that a perpetrator is black even when there is no image available and are more likely to believe that a black suspect is guilty, deserving of punishment, and likely to recidivate (Peffley *et al.* 1996; Gilliam Jr. and Iyengar 2000). Regarding Hispanic offenders, they are generally represented less than blacks or whites, but the portraits of Hispanics in crime media have been found to increase as size of the Hispanic population has increased in the United States (Bjornstrom, *et al.* 2010). For Hispanic homicide victims, motives that did not involve domestic disputes were considered more newsworthy but, in general, research on the impact and details of the typical crime media involving Hispanics has not been generated (Gruenewald *et al.* 2011).

Research summary

The existing research suggests the following propositions: A substantial proportion of people exposed to crime media will show effects concentrated in their attitudes and perceptions about crime and criminality. Strong behavioral effects are relatively rare and are most likely to appear in at-risk established offenders. In addition, the media's ability to generate greater numbers of predisposed at-risk individuals appears to be real. Therefore, in the future as new media change the media–consumer relationship, the media's criminogenic effects are expected to be enhanced as their current crime-and-violence content contributes to an increased number of people at-risk for negative media influences due to racial strife, income disparities, and poor social conditions.

The social dynamic underlying the media image of crime is that of a society populated by wolves, sheep, and sheepdogs. In the media vision of society, evil predator criminal wolves prey on defenseless victims (the sheep: women, children, the elderly), while crime-fighting heroes (the sheepdog: usually white and male) intervene and promote retributive justice. Over the course of the last century, characters in this ecology have darkened. Media criminals have become more animalistic, irrational, and predatory; their crimes have become violent, random, and senseless; media crime fighters have become more violent and deadly; media victims have become more innocent. These portraits collectively reduce crime to an individual contest between heroes and villains who have become more alike and less human – the former a demon, the latter a demigod (Christie 1986).

Future research needs

Audience effects

Given the fact that media consumers are no longer passive and localized, the developing relationship between new media users and media content creation is expected to significantly impact media crime and justice entertainment. Researchers need to move from a direct effects perspective that has dominated the media research paradigm to a dynamic audience research perspective where content is interpreted and modified as it is consumed. The new consumer–media consumption process needs to be delineated. Researchers need to consider the international effect on the media and broaden their research models in order to fully define a global audience. Research on the impact of new social media on criminals and criminality and the effects of the activities of interactive audiences is especially indicated. Recent research on copycat crime suggests that effects will be substantial and pervasive (Surette 2012).

Criminogenic media

The impact of entertainment media content on crime is speculated to involve the process of "narrative persuasion" (Green and Brock 2000: 701–721). In that most media consumed is narrative or story-based, consumer interaction with narrative media is recognized as qualitatively different from using media to obtain news or factual knowledge, and terms such as "transportation," "engagement," and "absorption" are used to describe this type of media interaction. Applied to crime, one research hypothesis is that a consumer who is initially unlikely to copy a particular crime can be persuaded to do so by observing a model who is portrayed as also initially unwilling to commit the crime, but who undergoes a transformation in the media narrative, in which the crime comes to be seen positively. Narrative persuasion dynamics therefore provide an unstudied possible route for media to influence individuals who would ordinarily be resistant to media influence (Slater and Rouner 2002: 173–191). Research that explores which media crime content is most narratively persuasive and whether exposure to such content influences consumer's subsequent actions and attitudes is recommended.

New media

The availability of new media technologies has expanded infotainment programming, which relies heavily on images of real crimes, criminal investigations, and criminal justice agency activities for content. What effect the use of new media will have on the promulgation of crime and justice information is unclear. A major research question will be whether the increased distribution of crime-related content cross-culturally changes how crime and justice are considered across cultures. Perhaps the public debate will move from arguments about factual claims to interpretative ones, as there will more often be images available to establish basic facts connected to crimes and fewer will argue about *what kind of* crime happened but more people will argue about *why* crime happens. Thus, the fact that an attack on the US Embassy in Libya is not disputed due to the existence of a video of the event but the response to the attack is under review. In a similar fashion, there is a possible positive benefit from moving the criminal justice debate to discussions about alternative policies and beyond the current focus on how best to implement a single punitive policy. Research into whether such a trend developed is required.

   Another research area in need of attention is the effect of the emerging mediated reality on societies. As stated, interactive participatory media change the relationship between media and media users and have steadily moved the mediated experience closer to a real-world experience. They have also changed the way people interact with each other, with less direct, face-to-face conversation but more "face-to-face-like" communication via social media technology. The full effects of interactive media, both in games that emulate the experiences of crime and violence and as a means to carry on personal relationships, on the social construction of crime-and-justice reality are expected to be significant. An associated research question concerns the enhancement of narrative persuasion effects from the intensified looping of media content. New media effects are thought to cycle through the media and society in loops, and content is extracted from one context or medium, reframed, reused, and result in new, fully mediated realities. These looping effects are observed in both massively mediated real events such as the 2001 World Trade Center attacks, the Virginia Tech University mass shooting, the impact of the anti-Mohammed movie in the Middle East, and in the numerous created-for-media pseudo-events common in the infotainment media. The effect that these media–reality loops have on crime and justice as new media replace traditional media is a pressing research question (Grabe and Drew 2007: 167). In this research, there needs to be a dual focus. On one hand, the impact of crime and justice

content via established and new media in developed countries needs to be continued to be studied. On the other, and perhaps with more urgency, the emergent impact of crime-related media and new media on developing societies needs to be explored and understood.

Portrait control and access

Two research questions are in need of attention concerning the control of and access to crime media. The first is the effect of content control policies on a society. The relationships between levels of media content control, public safety, due process, and government legitimization have not been fully explored. The second research question concerns the effectiveness of mechanisms to limit the negative consequences of media attention on criminal justice proceedings. After-the-fact attempts to compensate for bias generated from massive coverage are often costly, disruptive, and of questionable effectiveness (Brusche and Loges 2004: 137). Evidence suggests that biasing influences persist even when the substantial efforts are made to limit that influence (Tyler 2006: 1062). The more intrusive steps such as closure are more effective but they preclude any positive social effects such as increased system legitimization generated by media coverage of the criminal justice system. Research is needed to assess the effectiveness of judicial mechanisms for combating pre-trial publicity effects and what balance between judicial responses work best.

Vulnerable populations

Finally, research on a host of speculated effects from media content on vulnerable populations is indicated. For example, research on the relationship between portrayals of victims and how police, prosecutors, and jurors assess victimization and contribute to their victimization is needed. The interactions between vulnerable population characteristics also call out for research. When female and minority status are combined in a media-rendered portrait, are media effects enhanced? Similarly, how do gender, offender status, and mental illness interact within media portraits? The current state is that content analysis has established that vulnerable populations are negatively portrayed but the effects of these portrayals on society have not been well explored.

Policy implications

By depicting a predatory violent social environment, the media project messages to criminals and the law-abiding population concerning whom to trust and victimize and how to behave. The media message is that crime is caused by predatory individuals who are inherently different from the law-abiding citizens. Combating these predators requires a special person, an equally tough, predatory, and unfettered crime fighter. Criminality in the media is an individual choice and other social, economic, or structural explanations are usually portrayed as irrelevant. The message is that counter-violence is the most effective means of combating crime, that due process considerations hamper the police, and that the law works in the criminal's favor. Furthermore, the media's emphasis on the front end of the criminal justice system promotes pro-law enforcement and crime control policies, therefore punitive "quick fixes" are supported over long-term prevention (Sotirovic 2001: 311). Underlying this construction is a media-based explanation of crime in which individual personality traits are the cause of crime, and violent interdiction is its solution.

With the above common media content suggesting punitive criminal justice policies over other approaches, the rise of new media and the global distribution of the typical predator criminal raise additional policy questions. Prior to the twenty-first century the Internet was one of many media information sources. However, due to its growing popularity, more individuals today rely on the

Internet as their window on the world (see the Pew Research Center: For the People and Public Press 2011). One concern is that an unregulated Internet allows children, adults and individuals predisposed to criminal activity access to previously unattainable materials. Thus, the International Telecommunications Union (ITU) – a UN body whose functions were primarily limited to global telephone systems – will convene the World Conference on International Telecommunications (WCIT) that will review the current International Telecommunications Regulations (ITRs) with an eye toward regulation of the Internet. The telecommunication regulations were last negotiated in 1988 and there is broad consensus that the regulations need to be updated to reflect the new media and communication technology landscape (MacKinnon 2012). Since its 1988 ratification, the Internet has become the main media source for the majority of consumers (Downes 2012). However, there is concern that this ratification will allow governments to limit access to the Internet and restrict information distribution, impacting not only individuals but major international Internet providers (International Communication Union 2012). Doing so could raise Internet revenues for a number of governments, however, and a set of developing country governments have lined up with Russia, China, and authoritarian regimes in support of the proposed changes (MacKinnon 2012). Along the same lines, the Russia/China/Tajikistan/Uzbekistan Union (RCTU) has proposed a "code of conduct" regarding the Internet to the United Nations that aims to strengthen country-level control of the Internet (U.N. A/66/359 (Sept. 14 2011)).

The primary concern with these attempts to rein in the Internet is over-regulation of the Internet, especially in authoritarian countries. For example, authoritarian regimes such as China maintain strict Internet access rules and promulgate propaganda in addition to sometimes fully blocking access to unwanted information. Strategic agenda-setting and issue framing on the Internet can also help authoritarian regimes improve their public image and increase their longevity in power. When content is seen as being a threat to social stability, economic growth, or national security, the Chinese government will exert considerable control over the Chinese media. To most media scholars, involvement in international trade and the global economy has not changed the nature of Chinese media (Zhu *et al.*, forthcoming 2013).

At the transnational level, the Council of Europe is therefore developing principles for human rights on the Internet, which are based on the European Convention on Human Rights and the European Court of Human Rights. In concert, the European Union is striving to create a market-orientated governance environment to promote a more free-wielding framework for the Internet for member countries than is under consideration in the UN efforts. The United States is also acting independently and is developing its own Internet strategy. For example, the US House of Representatives recently passed a resolution urging the White House to block UN efforts to assert control over the Internet. It is the "consistent and unequivocal policy of the United States," the lawmakers affirmed, "to promote a global Internet free from government control and advance the successful multi-stakeholder model that governs the Internet today" (Montgomery 2012). Due to its massive influence on the Internet, whatever policy emerges in the United States is expected to steer global regulations.

These labors reflect the growing concern regarding the social and political effects of new media. As new media use rises, the policy question is, under whose jurisdiction should Internet activity fall? The policy question that must be answered is, who, if anyone, should be authorized to regulate global online communities? With no universal laws on the Internet or the role of government in its regulation and little research to guide policy formation, there continues to be confusion on the jurisdictional boundaries and the enforcement of existing laws. Regarding the crime content that has generated concern, the criminal justice community needs to be in the forefront in counteracting media stereotypes and reducing deleterious effects by educating the media and the public on crime.

Conclusion

Each step in the evolution of media has brought the mediated experience closer to the experience of first-hand attendance of an event (Grodal 2003a: 129–155). An individual today can experience crime and criminal justice via the media and come away with an actual experience. The World Wide Web and other new media have immensely increased the choices people have regarding media content, and changes in the media have had significant impacts on the criminal justice system. Today mediated crime-and-justice experience and knowledge dominate real-world crime-and-justice experience and knowledge. Despite media impressions to the contrary, most people have limited direct experience with crime and a criminal justice system. Receiving a traffic ticket remains the most common mode of real-world contact between most citizens and law enforcement. Of those victimized by crime, having something stolen is far more common than violent victimization, which remains concentrated in poor communities. Therefore, for most of us, the mediated experience is the main source of our crime-and-justice experience and knowledge. Heightening this media-reliant experience, experiencing crime and justice via the media is preferable to experiencing crime-and-justice events directly in the real world. Few people would seek out the experience of being a crime victim, but many enjoy experiencing crime in the media. The mediated experience where one is safe and provides multiple points of view is also preferable to actual experience for many other criminal justice events such as working a street patrol, attending a criminal trial, or serving a prison sentence.

Therefore, it is no surprise that many children today spend more time in a media-constructed reality than in a directly experienced reality. A hybrid reality is in the making in which an expanding media-generated reality loops and interweaves with a diminishing non-mediated face-to-face reality (Rushkoff 1994). Mixing and remixing media-constructed and real-world events harbingers a future where media constructions of other media constructions will dominate the social construction of reality. Directly experienced reality will lose its social significance and mediated knowledge will reign.

Discussion questions

1   How might a vulnerable population that is portrayed as dangerous or criminal in entertainment media fight their media portrait and its negative social effects?
2   How does the social media-driven change in the distribution of crime and justice content from a centralized organization-dominated process to a decentralized individual personal experience change the impact of that content?
3   How might the Internet change the dynamics of copycat crime?
4   With people living more in a personal mediated reality via the World Wide Web and multi-purpose new social media devices, and less in a directly experienced physical face-to-face reality, how are perceptions of crime and justice formed and how would you try to influence those perceptions in today's world?

Websites

http://www.thecrimeportal.com.
http://www.trutv.com/library/crime/index.html.
http://www.cnn.com/JUSTICE.

Notes

1 *Sourcebook of Criminal Justice Statistics 2000*, "Table 2.42 Attitudes toward the Causes of Crime in the United States," and "Table 2.45: Respondents' Perceptions about the Primary Cause of Gun Violence." Available at: http://www.albany.edu/sourcebook/archive.html.
2 Travis Dixon and others further report that minorities are represented in news and entertainment in such a way as to encourage the perception of minorities as violent and criminal (see Dixon and Linz 2000: 547–573; Dixon *et al.* 2003: 495–520; Dixon and Maddox 2005: 1555–1570; Dixon 2008: 106–125).

References

Akers, R. L. (1998) *Social Learning and Social Structure: A General Theory of Crime and Deviance*, Athens, OH: Northeastern University Press.

Allen, C. (2000) "Sold American: Consultants and News Issues Abroad," in R. Anderson and L. Strate (eds.) *Critical Studies in Media Commercialism*, Oxford: Oxford University Press.

Altheiede, D. (2002) *Creating Fear*, Hawthorne: Aldine de Gruyter.

Anderson, C. (2004) "An Update on the Effects of Playing Violent Video Games," *Journal of Adolescence*, 27: 113–122.

Anderson, C., Gentile, D. and Buckley, K. (2007) *Violent Video Games Effects on Children and Adolescents: Theory, Research and Public Policy*, New York: Oxford University Press.

Augustine, R. S. and Augustine, J. (2012) "Religion, Race, and the Fourth Estate: Xenophobia in the Media Ten Years after 9/11," *The Tennessee Journal of Race, Gender and Social Justice*, 1: 1–24.

Bailey, F. and Hale, D. (2004) *Blood on Her Hands: Women Who Murder*, Belmont, CA: Wadsworth.

Bailey, F., Pullock, J. M. and Schroder, S. (1998) "The Best Defense: Images of Female Attorneys in Popular Films," in F. Bailey and D. Hale (eds.) *Popular Culture, Crime and Justice*, Belmont, CA: Wadsworth.

Barthea, E. P., Leonea, M. C. and Lateanob, T. A. (2012) "Commercializing Success: The Impact of Popular Media on the Career Decisions and Perceptual Accuracy of Criminal Justice Students," *Teaching in Higher Education* (forthcoming).

Beale, S. S. (2006) "The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness," *William and Mary Law Review*, 48: 397–481.

Bennett, W. J., Dilulio, J. J. and Walters, J. P. (1996) *Body Count: Moral Poverty and How to Win America's War Against Crime and Drugs*, New York: Simon & Schuster.

Berkowitz, L. (1984) "Some Effects of Thoughts on Anti- and Prosocial Influence of Media Events: A Cognitive-Neoassociation Analysis," *Psychological Bulletin*, 95: 410–417.

Berkowitz, L. and Rogers, K. (1986) "A Priming Effect Analysis of Media Influences," in J. Bryant and D. Zillman (eds.) *Perspectives on Media Effects*, Hillsdale, NJ: Erlbaum.

Bjornstrom, E. E. S., Kaufman, R. L., Peterson, R. and Slater, M. (2010) "Race and Ethnic Representations of Lawbreakers and Victims in Crime News: A National Study of Television Coverage," *Social Problems*, 57: 269–293.

Boda, Z. and Szabo, G. (2011) "The Media and Attitudes Towards Crime and the Justice System: A Qualitative Approach," *European Journal of Criminology*, 8: 329–342.

Bond-Maupin, L. (1998) "'That Wasn't Even Me They Showed': Women as Criminals on *America's Most Wanted*," *Violence Against Women*, 4: 30–44.

Boyle, K. (2005) *Media and Violence: Gendering the Debates*, Thousand Oaks, CA: Sage.

Britton, D. M. (2003) *At Work in the Iron Cage: The Prison as Gendered Organization*, New York: New York University Press.

Brown, B. and Hamilton-Giachritsis, C. (2005) "The Influence of Violent Media on Children and Adolescents: A Public–Health Approach," *Lancet*, 365: 701–710.

Bruschke, J. and Logos, W. (2004) *Free Press vs. Fair Trials*, Mahwah, NJ: Erlbaum.

Callanan, V. J. and Rosenberger, J. S. (2011) "Media and Public Perceptions of the Police: Examining The Impact of Race and Personal Experience," *Policing and Society: An International Journal of Research and Policy*, 21: 167–189.

CBS/AP (2012) *The Aurora Shooting Victims*, available at: http://www.cbsnews.com/8301-201_162-57477243/the-aurora-shooting-victims/ (accessed 25 July 2012).

Cecil, D. (2007a) "Dramatic Portrayals of Violent Women: Female Offenders on Prime Time Crime Dramas," *Journal of Criminal Justice and Popular Culture*, 14: 243–258.

Cecil, D. (2007b) "Looking Beyond Caged Heat: Media Images of Women in Prison," *Feminist Criminology*, 2: 304–326.

Chermak, S. (1995) *Victims in the News*, Boulder, CO: Westview Press.

Christie, N. (1986) "The Ideal Victim," in E. A. Fattah (ed.) *From Crime Policy in Victim Policy: Reorienting the Justice System*, New York: St. Martin's Press.

Ciasullo, A. (2008) "Containing Deviant Desire: Lesbianism, Heterosexuality and the Women–In–Prison Narrative," *Journal of Popular Culture*, 41: 195–223.

Claxton, G. (2005) "Joining the Intentional Dance," in S. Hurley and N. Chater (eds.) *Perspective in Imitation: From Neuroscience to Social Science*, vol. 2, *Imitation, Human Development and Culture*, Cambridge, MA: MIT Press.

Clowers, M. (2001) "Dykes, Gangs, and Danger: Debunking Popular Myths about Maximum Security Life," *Journal of Criminal Justice and Popular Culture*, 9: 22–30.

Collins, R. L. (2011) "Content Analysis of Gender Roles in Media: Where Are We Now and Where Should We Go?," *Sex Roles*, 64: 290–298.

Coyne, S. (2007) "Does Media Violence Cause Violent Crime?," *European Journal of Criminal Policy Research*, 13: 205–211.

Curran, J. (1982) "Communications, Power and Social Order," in M. Gurevitch, T. Bennett, J. Curran and J. Woollacott (eds.) *Culture, Society and the Media*, London: Methuen.

Curran, J., Salovaara-Moring, I., Coen, S. and Iyengar, S. (2009) "Crime, Foreigners and Hard News: A Cross-National Comparison of Reporting and Public Perception," *Journalism*, 11: 1–17.

Curtis, J. (1953) "Gabriel Tarde," in C. Milanovich (ed.) *Social Theorist*, Milwaukee: Bruce Publishing.

Dijksterhuis, A. and Bargh, J. (2001) "The Perception-Behavior Expressway: Automatic Effects of Social Perception on Social Behavior," in M. Zanna (ed.) *Advances in Experimental Social Psychology*, New York: Academic Press.

Dixon, T. (2008) "Crime News and Radicalized Beliefs: Understanding the Relationship Between Local News Viewing and Perceptions of African Americans and Crime," *Journal of Communications*, 58: 106–125.

Dixon, T. and Linz, D. (2000) "Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television News," *Journal of Communication*, 50: 131–154.

Dixon, T. and Maddox, K. (2005) "Skin Tone, Crime News, and Social Reality Judgments: Priming the Stereotype of the Dark and Dangerous Black Criminal," *Journal of Applied Social Psychology*, 38: 1555–1570.

Dixon, T., Azocar, C. and Casas, M. (2003) "The Portrayal of Race and Crime on Television Network News," *Journal of Broadcasting and Electronic Media*, 47: 498–523.

Dowler, K. and Zawilski, V. (2007) "Public Perceptions of Police Misconduct and Discrimination: Examining the Impact of Media Consumption," *Journal of Criminal Justice*, 35: 193–203.

Downes, L. (2012) "Why Is The UN Trying to Take Over the Internet?," available at: http://www.forbes.com/sites/larrydownes/2012/08/09/why-the-un-is-trying-to-take-over-the-internet/ (accessed 9 August 2012).

Drucker, S. (1989) "The Televised Mediated Trial: Formal and Substantive Characteristics," *Communication Quarterly*, 37: 305–318.

Entman, R. (1990) "Modern Racism and the Images of Blacks in Local Television News," *Critical Studies in Mass Communication*, 7: 332–345.

Escholz, S., Mallard, M. and Flynn, S. (2004) "Images of Prime Time Justice: A Content Analysis of *NYPD Blue* and *Law & Order*," *Journal of Criminal Justice and Popular Culture*, 10: 161–180.

FCC (2012) "What We Do," available at: http://www.fcc.gov/what-we-do (accessed 25 June 2012).

Ferguson, C. J. (2002) "Media Violence: Miscast Causality," *American Psychologist*, 57: 446–447.

Flew, T. (2002) *New Media: An Introduction*, South Melbourne: Oxford University Press.

Fox, J. A. (1996) *Trends in Juvenile Violence: A Report to the United States Attorney General on Current and Future Rates of Juvenile Offending*, Washington, DC: s.n.

Fox, J. A. and Zawitz, M. W. (2010) "Long Term Trends and Patterns," in *Homicide Trends in the United States*, available at: http://bjs.ojp.usdoj.gov/content/homicide/hmrt.cfm (accessed 25 June 2012).

Fox, R., van Sickel, R. and Steiger, T. (2007) *Tabloid Justice*, Boulder, CO: Lynne Rienner.

Freedman, J. (2002) *Media Violence and Its Effect on Aggression*, Toronto: University of Toronto Press.

Freeman, R. (2000) *Popular Culture and Corrections*, Lanham, MD: American Correctional Association.

Gilliam Jr., F. and Iyengar, S. (2000) "Prime Suspects: The Influence of Local Television News on the Viewing Public," *American Journal of Political Science*, 44: 560–573.

Gorman, R. (2012) "Maryland 'Dark Knight' Copycat Can't Be Charged: Authorities," available at: http://articles.nydailynews.com/2012-08-01/news/32986067_1_weapons-charges-federal-charges-face-felony-charges (accessed 9 August 2012).

Grabe, M. and Drew, D. (2007) "Crime Cultivations: Comparisons Across Media Genres and Channels," *Journal of Broadcasting and Electronic Media*, 51: 147–171.

Graber, D. (1980) *Crime News and the Public*, New York: Praeger.

Green, M. and Brock, T. (2000) "The Role of Transportation in the Persuasiveness of Public Narratives," *Journal of Personality and Social Psychology*, 79: 701–721.

Griffin, T. and Miller, M. (2006) "Child Abduction, AMBER Alert, and Crime Control Theater," *Criminal Justice Review*, 33: 159–179.

Grochowski, T. (2006) "Running in Cyberspace," *Television and New Media*, 7: 361–382.

Grodal, T. (2003a) "Stories for Eye, Ear, and Muscles," in M. Wolf and B. Perron (eds.) *The Video Game Theory Reader*, New York: Routledge.

Grodal, T. (2003b) "Video Games and the Pleasures of Control," in D. Zillman and P. Vorderer (eds.) *Media Entertainment*, Mahwah, NJ: Erlbaum.

Gruenewald, J., Chermak, S. M. and Pizarro, J. M. (2011) "Covering Victims in the News: What Makes Minority Homicides Newsworthy?," *Justice Quarterly*, 1–29.

Gunter, B. (2008) "Media Violence: Is There a Case for Causality?," *American Behavioral Scientist*, 51: 1061–1122.

Helfgott, J. B. (2008) "The Influence of Technology, Media and Popular Culture on Criminal Behavior: Copycat Crime and Cybercrime," in *Criminal Behavior: Theories, Typologies and Criminal Justice*, Thousand Oaks, CA: Sage Publications.

Heller, M. and Polsky, S. (1976) *Studies in Violence and Television*, New York: American Broadcasting Company.

Hindelang Criminal Justice Research Center (2011) "Public Attitudes Toward Crime and Criminal Justice-Related Topics," available at: http://www.albany.edu/sourcebook/toc_2.html (accessed 30 April 2012).

Huesmann, L. R. (1986) "Psychological Process Promoting the Relation Between Exposure to Media Violence and Aggressive Behavior by the Viewer," *Journal of Social Issues*, 42: 125–139.

Huesmann, L. R. (1998) "The Role of Social Information Processing and Cognitive Schema in the Acquisition and Maintenance of Habitual Aggressive Behavior," in R. Green and E. Donnerstein (eds.) *Human Aggression*, New York: Academic Press.

Huesmann, L. R. and Taylor, L. (2006) "The Role of Media Violence in Violent Behavior," *Annual Review of Public Health*, 27: 393–415.

International Communication Union (2012) "Draft of the Future ITRS," available at: http://www.itu.int/en/wcit-12/Documents/draft-future-itrs-public.pdf (accessed 3 August 2012).

Jaffe, G. (2012) "Tinted Prejudice in China," *CNN.com*, available at: http://www.cnn.com/2012/07/24/world/asia/china-tinted-prejudice/index.html (accessed 12 November 2012).

Jo, E. and Berkowitz, L. (1994) "A Priming Effect Analysis of Media Influences: An Update," in J. Bryant and D. Zillman (eds.) *Media Effects: Advances in Theory and Research*, Hillsdale, NJ: Erlbaum.

Johnston, J., Hawkins, D. and Michner, A. (1994) "Homicide Reporting in Chicago Dailies," *Journalism Quarterly*, 71: 860–872.

Kiousis, S. (2002) "Interactivity: A Concept Explication," *New Media and Society*, 4: 355–383.

Klein, A. G. (2012) "Measuring Media Compliance and Divergence in the Nondemocratic Press," *Communication Monograph*, 79: 115–136.

Klite, P., Bardwell, R. and Saltzman, J. (1997) "A Day in the Life of Local TV News in America," *Rocky Mountain Media Watch*, 5: 1–3.

Kooitra, P. and Mahooney, J. (1999) "The Historical Roots of Tabloid TV Crime," in J. Ferrell and N. Brunswick (eds.) *Making Trouble: Cultural Constructions of Crime, Deviance and Control*, New Brunswick, NJ: Transaction.

Leishman, F. and Mason, P. (2003) *Policing and the Media: Facts, Fictions and Factions*, Cullompton: Willan.

Leitch, T. (2002) *Crime Films*, Cambridge: Cambridge University Press.

Ling, R. and Campbell, S. (2010) *The Reconstruction of Space and Time: Mobile Communication Practices*, Piscataway, NJ: Transaction Press.

Lister, M., Dovey, J., Giddings, S., Grant, I. and Kelly, K. (2003) *New Media: A Critical Introduction*, New York: Routledge.

Luyt, R. (2011) "Representation of Gender in South African Television Advertising: A Content Analysis," *Sex Roles*, 64: 356–370.

MacKinnon, R. (2012) "The United Nations and the Internet: It's Complicated," available at: http://www.foreignpolicy.com/articles/2012/08/08/the_united_nations_and_the_Internet_it_s_complicated?print=yes&hidecomments=yes&page=full (accessed 9 August 2012).

Mawby, R. and Brown, J. (1984) "Newspaper Images of the Victim: A British Study," *Victimology*, 9: 82–94.

McCall, J. (2007) *Viewer Discretion Advised: Taking Control of Mass Media Influences*, Lanham, MD: Rowan & Littlefield.

Meyers, M. (1994) "News of Battering," *Journal of Communication*, 44: 47–63.

Meyers, M. (1996) *News Coverage of Violence Against Women: Engendering Blame*, Thousand Oaks, CA: Sage.

Meyers, M. (2004) "African American Women and Violence: Gender, Race and Class in the News," *Critical Studies in Media Communication*, 21: 95–118.

Minnebo, J. (2006) "The Relation Between Psychological Distress, Television Exposure, and Television-Viewing Motives in Crime Victims," *Media Psychology*, 8: 65–93.

Montgomery, M. (2012) "Mike Montgomery: International Regulation Menaces Internet Freedom," available at: http://www.mercurynews.com/opinion/ci_21283221/mike-montgomery-international-regulation-menaces-Internet-freedom (accessed 12 August 2012).

Murray, J. (2008) "Media Violence: The Effects Are Both Real and Strong," *American Behavioral Scientist*, 51: 1212–1230.

O'Donnell, C. (2011) "New Study Quantifies Use of Social Media in Arab Spring," available at: http://www.washington.edu/news/2011/09/12/new-study-quantifies-use-of-social-media-in-arab-spring/ (accessed 2 November 2012).

Parascandola, R. and Armaghan, S. (2012) "NYPD Has Identified the Twitter User Linked to Colorado Copycat Threats Against Broadway Theater," available at: http://www.nydailynews.com/news/crime/nypd-identified-twitter-user-linked-colorado-copycat-threats-broadway-theater-article-1.1132136?localLinksEnabled=false (accessed 9 August 2012).

Parks, M. and Roberts, L. (1998) "Making MOOsic: The Development of Personal Relationships Online and a Comparison of Their Off-Line Counterparts," *Journal of Social and Personal Relationships*, 15: 517–537.

Pease, S. and Love, C. (1984) "The Copycat Crime Phenomenon," in R. Surette (ed.) *Justice and the Media*, Springfield, IL: Thomas.

Peffley, M., Shields, T. and Williams, B. (1996) "The Intersection of Race and Crime in Television News: An Experimental Study," *Political Communication*, 13: 306–327.

Pfeiffer, C., Windzio, M. and Kleinman, M. (2006) "Media, Evil and Society: Media Use and Its Impacts on Crime Perception, Sentencing Attitudes and Crime Policy in Germany," in J. Freilich and R. Guerette (eds.) *Migration, Culture, Conflict, Crime and Terrorism*, Farnham: Ashgate.

Phillips, N. and Frost, N. (2012) "Crime in Prime Time," in R. Bing III (ed.) *Race, Crime and the Media*, New York: McGraw-Hill.

Pizarro, J. M., Chermak, S. M. and Gruenewald, J. (2007) "Juvenile 'Super-Predators' in the News: A Comparison of Adult and Juvenile Homicides," *Journal of Criminal Justice and Popular Culture*, 14: 84–111.

Pritchard, D. and Hughes, K. (1997) "Patterns of Deviance in Crime News," *Journal of Communication*, 47: 49–67.

Rafter, N. (2007) *Shots in the Mirror: Crime Films and Society*, Oxford: Oxford University Press.

Radia, A. (2012) "Ryan John Lewis, Vancouver Man Arrested for Making 'Dark Knight' Shooting Threat," available at: http://ca.news.yahoo.com/blogs/dailybrew/ryan-john-lewis-vancouver-man-arrested-making-dark-195318448.html (accessed 9 August 2012).

Reiner, R. (2002) "Media Made Criminality: The Representation of Crime in the Mass Media," in M. Maguire, R. Morgan and R. Reiner (eds.) *The Oxford Handbook of Criminology*, Oxford: Oxford University Press.

Reiner, R., Livingstone, S. and Allen, J. (2003) "From Law and Order to Lynch Mobs: Crime News since the Second World War," in P. Mason (ed.) *Criminal Visions: Media Representations of Crime and Justice*, Cullompton: Willan.

Rentschler, C. (2007) "Victims' Rights and the Struggle Over Crime in the Media," *Canadian Journal of Communication*, 32: 219–239.

Rogers, E. (2003) *Diffusion of Innovations*, New York: Free Press.

Rohrer, F. (2010) "How Dangerous Is South Africa?," BBC, available at: http://news.bbc.co.uk/2/hi/8668615.stm (accessed 1 November 2012).

Roskos-Ewoldsen, D., Roskos-Ewoldsen, B., Francesca, R. and Carpentier, D. (2002) "Media Priming: A Synthesis," in B. Jennings and D. Zillman (eds.) *Media Effects: Advances in Theory and Research*, Mahwah, NJ: Erlbaum.

Rushkoff, D. (1994) "Media: It's the Real Thing," *NPQ Quarterly*, 4–15.

Saad, L. (2011) "Most Americans Believe Crime in U.S. Is Worsening," available at: http://www.gallup.com/poll/150464/Americans-Believe-Crime-Worsening.aspx (accessed 12 June 2012).

Saad, L. (2012) "In U.S., Jobs a More Glaring Issue for Some Groups than Others," available at: http://www.gallup.com/poll/155375/Jobs-Glaring-Issue-Groups-Others.aspx (accessed 1 August 2012).

Savage, J. (2008) "The Role of Exposure to Media Violence in the Etiology of Violent Behavior," *American Behavioral Scientist*, 51: 1123–1136.

Savage, J. and Yancy, C. (2008) "The Effects of Media Violence Exposure on Criminal Aggression: A Meta-Analysis," *Criminal Justice and Behavior*, 35: 772–791.

Shaw, L. (2012) "Kony 2012 Video Goes Viral, Big Names Line Up in Support," available at: http://www.reuters.com/article/2012/03/08/us-kony-youtube-idUSBRE8270Y020120308 (accessed 12 June 2012).

Sherry, J. (2001) "The Effects of Violent Video Games on Aggression: A Meta Analysis," *Human Communication Research*, 27: 409–432.

Shih, G. (2012) "Campaign Against Ugandan Warlord Sweeps Internet," available at: http://www.reuters.com/article/2012/03/09/us-kony-twitter-idUSBRE82803S20120309 (accessed 12 June 2012).

Slater, M. and Rouner, D. (2002) "Entertainment-Education and Elaboration Likelihood: Understanding the Processing of Narrative Persuasion," *Communication Theory*, 12: 173–191.

Sorenson, S., Peterson-Manz, J. and Berk, R. (1998) "News Media Coverage and the Epidemiology of Homicide," *American Journal of Public Health*, 88: 1510–1514.

Sotirovic, M. (2001) "Affective and Cognitive Processes as Mediators of Media Influences on Crime-Policy Preferences," *Mass Communication and Society*, 4: 311–329.

Sotirovic, M. (2003) "How Individuals Explain Social Problems: The Influences of Media Use," *Journal of Communication*, 45: 122–137.

Sparks, G. and Sparks, C. (2002) "Effects of Media Violence," in J. Bryant and D. Zillman (eds.) *Media Effects Advances in Theory and Research*, Mahwah, NJ: Erlbaum.

Speer, D. (2000) "Redefining Borders: The Challenges of Cybercrime," *Crime, Law, and Social Change*, 34: 259–273.

Sumser, J. (1996) *Morality and Social Order in Television Crime Drama*, Jefferson, MO: McFarland.

Surette, R. (1989) "Media Trials," *Journal of Criminal Justice*, 17: 293–308.

Surette, R. (1999) "Media Echoes: Systemic Effects of News Coverage," *Justice Quarterly*, 16: 601–631.

Surette, R. (2002) "Self Reported Copy Cat Crime Among a Population of Serious Violent Juvenile Offenders," *Crime and Delinquency*, 48: 46–69.

Surette, R. (2011) *Crime and Criminality*, 4th edn, Belmont, CA: Wadsworth.

Surette, R. and Otto, C. (2002) "A Test of a Crime and Justice Infotainment Measure," *Journal of Criminal Justice*, 9: 100–125.

Surette, R., Chadee, D., Heath, L. and Young, J. R. (2011) "Preventive and Punitive Criminal Justice Policy Support in Trinidad: The Media's Role," *Crime, Media, Culture*, 7: 31–48.

The Pew Research Center: For the People and Public Press (2011) "More Young People Cite Internet Than TV: Internet Gains on Television as Public's Main News Source," available at: http://www.people-press.org/2011/01/04/Internet-gains-on-television-as-publics-main-news-source/ (accessed 25 August 2012).

The Sentencing Project (2012) "Trends in U.S. Corrections," available at: http://www.sentencingproject.org/detail/news.cfm?news_id=1304&id=107 (accessed 4 July 2012).

Thomas, W. I. (1908) "The Psychology of Yellow Journalism," *American Magazine*, 65: 491–496.

Truman, J. L. (2011) "Criminal Victimization, 2010," available at: http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2224 (accessed 1 June 2012).

Tyler, T. (2006) "Viewing CSA and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction," *Yale Law Journal*, 115: 1050–1085.

U.N. A/66/359 (Sep. 14 2011) Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the

Secretary-General, China, the Russian Federation, Tajikistan and Uzbekistan, United Nations General Assembly, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/496/56/PDF/N1149656.pdf?OpenElement (accessed 8 August 2012).

Vine, M. (1973) "Gabriel Tarde," in H. Mannheim (ed.) *Pioneers in Criminology*, Montclair, NJ: Patterson Smith.

Waid-Lindberg, C. A., Dobbs, R. R. and O'Connor, Shelley, T. (2011) "Blame the Media? The Influence of Primary News Source, Frequency of Usage, and Perceived Media Credibility on Punitive Attitudes," *Western Criminology*, 12: 41–59.

Wardle, C. (2006) "It Could Happen to You: The Move Towards 'Personal' and 'Societal' Narratives in Newspaper Coverage of Child Murder," *Journalism Studies*, 7: 515–533.

Whitaker, J. and Bushman, B. (2009) "A Review of the Effects of Violent Video Games on Children and Adolescents," *Washington & Lee Law Review*, 66: 1033–1051.

Wilbanks, W. (1984) *Murder in Miami: An Analysis of Homicide Patterns and Trade in Dade County (Miami) Florida, 1917–1983*, New York: University Press of America.

Winston, B. (2002) "Towards Tabloidization? Glasgow Revisited," *Journalism Studies*, 3: 5–20.

Zeenat, I. (2012) "Media Influence on Public Opinion and the Perceptions of Media Owners and Consumers about Its Effects," *International Journal of Academic Research in Accounting, Finance and Management Sciences*, 2: 9–31.

Zhu, J., Lu, J. and Shi, T. (2013) "When Grapevine News Meets Mass Media: Different Information Sources and Perceptions of Government Corruption in Mainland China," *Comparative Political Studies*, 46: 1–27 (forthcoming).

18

Crime, culture and the media in a globalizing world

Eamonn Carrabine

It is often said that we live in a media-saturated world, and this chapter will explore how some of the dynamics between crime and justice are conceived of in an era of global inter-connectedness. The transformations in media technology wrought by print, telegraph and wireless communication, which gave birth to the electronic age from the mid-twentieth century, have led to the phenomenon of mediatization. Defined as a powerful force eroding divisions between 'fact and fiction, nature and culture, global and local, science and art, technology and humanity' to the extent that 'the media in the twenty-first century have so undermined the ability to construct an *apparent* distinction between reality and representation that the modernist episteme has begun to seem somewhat shaky' (Brown 2003: 22, emphasis in original). In other words, the advent of postmodernity has meant that it is becoming increasingly impossible to distinguish between media image and social reality (Osborne 1995: 28). This blurring of boundaries is captured well in the following passage:

> Today, as criminals videotape their crimes and post them on YouTube, as security agents scrutinize the image-making of criminals on millions of surveillance monitors, as insurrectionist groups upload video compilations (filmed from several angles) of 'successful' suicide bomb attacks and roadside IED (Improvised Explosive Device) detonations, as images of brutality and victimization pop up on office computer screens and children's mobile phones, as "reality TV" shows take the viewer ever deeper inside the world of the beat cop and prison setting, there can be no other option but the development of a thoroughgoing *visual* criminology.
>
> (Hayward 2010: 2, emphasis in original)

It is significant that Keith Hayward is drawn to the concept of the 'Mediascape' (Appadurai 1996) in his attempt to develop a visual criminology that can grasp how the power of images plays a decisive role in shaping the social imaginary. Of course, the 2011 protests and revolutions in the Middle East were also characterized by distinctive forms of cyber-organizing through social media like Facebook, Twitter and YouTube, which helped shape grassroots political activism while also enabling new forms of surveillance dedicated to countering dissent.

These are important arguments for understanding the relationships between crime and the media, not least since the very reach of global media networks is now unparalleled. Of course, it is not simply that there are many more media technologies consumed all over the world, but

that these developments are breaking down conventional understandings of time and space by making events instantly available to us wherever we are. The 'speed' of modern communication is not a politically neutral occurrence (Virilio 1986), as the acceleration of perception does not necessarily bring us closer together but can reinforce the distance between neighbours and strangers. In a classic essay on television news, Michael Ignatieff (1999: 25) has described how this tendency has prompted 'one of the dangerous cultural moods of our time', the belief that the world is so out of control and so dreadful that all we can do is disengage from it.

This experience of dislocation and fatalism is far removed from the optimism of the earliest media theorists, who saw the growth in electronic communications in positive terms. Marshall McLuhan ([1964] 1994), for example, coined the term 'global village' to describe how modern media could transcend the divisive nationalisms of the past, increase mutual responsibility and unite us all. As we will see, these diametrically opposed understandings continue to shape debates on the nature of the global public sphere and its significance for the future of the human condition. Indeed, the concept of the 'mediapolis' has been developed to convey 'both the reality and the possibility of global communication' (Silverstone 2007: 22), and we will shortly be exploring how mediated space offers certain possibilities, while curtailing others. The chapter begins by setting out how the implications of the proliferation of global media have been understood, before turning to how the concept of moral panic has been developed by criminologists to grapple with the force of representation. It then describes how media theorists have sought to understand the social relations fostered by increasingly networked societies. Finally, in order to consider specific policy implications, and to further unravel the politics of representation, the chapter turns to the controversies and debates surrounding how pornography infiltrates and proliferates in modern media culture.

Globalization, imperialism and the mediapolis

Although the term 'globalization' is not used as much now as it once was, it remains a helpful way of characterizing some of the distinctive elements of late modernity. Definitions typically begin by describing globalization as the increasing interconnectedness of societies, and it refers to the various processes in which the peoples of the world are drawn into a single global society (Albrow 1990). One important dimension of globalization is the increasing integration of financial markets and networks of corporate control. Developments in information technology have enabled the almost instantaneous movement of huge financial transactions across vast distances. Information itself has become central to this new world economy, where the convergence of telecommunications, computing technologies and digital media provides seemingly endless amounts of information to be gathered, stored, transmitted and used in new ways. It is no accident that the term globalization came to prominence at the end of the Cold War, when the relationship between the United States and the Soviet Union that had defined international affairs since 1945 changed, and so it must also be understood as a political phenomenon. In particular, it should be seen as an ideological aspect of neo-liberalism – where a general belief in free trade as the best way of achieving prosperity is promoted. It is a vision of a new globalized world order where nation-states become more integrated with each other and transnational organizations, to the extent that the world is best regarded as a single, albeit competitive, marketplace.

Of course, alongside these economic and political elements there are also important cultural and social dimensions of globalization. Here the emphasis is on how the global and the local interact at a time when social relations are constituted through new forms of mobility, polarization and disembedding mechanisms. Communication and transportation networks are

powerfully reshaping boundaries, compressing time and space, disconnecting us from traditional sites of identity formation. The nation, in particular, is especially threatened. As states struggle to maintain control over populations, markets, and culture in the face of both homogenizing processes and the fierce reassertion of local or regional identities in response to global change, new hybrid identities emerge, organized around diasporas, lifestyles and fundamentalism (Hall 1992). In this regard, new media technologies have the capacity to bring people closer together in ways that differ from the 1960s and 1970s. At that time, the term cultural imperialism was used to describe the flow of information from media industries, and the unequal exchange of ideas was clearly situated in the dynamics of colonialism, whereas globalization suggests audiences have the ability to engage in a two-way dialogue, due to the interactivity of digital technologies, and the increasing exchange of information between different groups across permeable national borders is contributing to the sense of a more global culture.

These are complex arguments and they are worth unpacking in a little more detail. The cultural imperialism thesis developed in the 1950s and 1960s to describe how the colonial empires of Britain and France had been superseded by the commercial interests of US corporations, working in tandem with political and military interests. Herbert Schiller (1969) was the leading proponent of this idea, arguing that traditional local cultures were undermined by their growing dependency on Western media products and their accompanying ideologies promoting the 'American way of life'. The consequence is that these regions and populations have no choice but to adapt to the logics and desires of American consumer culture, despite many parts of the world lacking the resources to fully participate in them. In this way, the values and attitudes spread by CNN News, Hollywood films, MTV programmes, Walt Disney cartoons, and so on are not innocent or harmless media products, but are bound up with the American imperial drive to secure its economic, political and military dominance in the post-war era.

Critics have since disputed this view, questioning the somewhat simplistic distinction between the 'West' and the 'Rest', the insufficient attention paid to the reversal of regional media flows and the nuanced ways in which these cultural exports are appropriated in particular places. Many of the subsequent debates on globalization can then be read as a reaction against the assumptions of this thesis, as John Tomlinson (1991: 175) explains, 'the idea of cultural imperialism contains the notion of a purposeful project – the intended spread of a social system from one centre of power across the globe' whereas globalization suggests the 'interconnection and interdependency of all global areas which happens in a far less purposeful way' and is 'the result of economic and cultural practices which do not aim at global integration but which nevertheless produce it'. This is an important clarification and echoes Arjun Appadurai's (1990; 1996) contention that there are mediascapes, technoscapes, financescapes, ideoscapes and ethnoscapes, which each distinguish postmodern globalization from modernization and modernity by this simultaneous universalization of culture and the fragmentation of culture into diverse local, hybrid and multiple forms. Nevertheless, there is evidence to suggest that the concept of globalization has recently fallen out of fashion, as the early twenty-first century has seen the resurgence of terms like empire and imperialism to describe the current condition.

The return is partly explained by geopolitical events, namely, the neo-conservative-led invasions of Afghanistan and Iraq, but also the publication of Antonio Negri and Michael Hardt's (2000) influential book *Empire*, which anticipated some of the malign consequences of this imperial adventure. Yet these ideas were not just revived by the radical left, as David Hesmondhalgh (2008: 95) demonstrates, liberal and conservative thinkers have been drawn to imperialism: as in 2002 when the *New York Times* 'famously gave up its front page to the words "The American empire. Get used to it"', and other commentators have since proclaimed the virtues of 'enlightened' empire in an effort to grasp this new world order. But some caution is needed

here, because 'imperialism' is being used in different ways and David Harvey's (2003: 26) concept of 'capitalist imperialism' is especially helpful, defined as 'a contradictory fusion of "the politics of state and empire". . . and the molecular processes of capital accumulation in space and time'. Far from being new, the imperialism of the American century is in fact, much more like the British imperialism of old, which rediscovered the 'original sin of simple robbery' that Harvey goes on to describe as 'accumulation by dispossession' (itself a revision of Marx's concept of primitive accumulation). The significance of Harvey's work is that it provides an understanding of political economy that situates the global commodification of culture in a context of capitalist accumulation, where efforts to secure market dominance are paramount.

Some remain unconvinced that globalization has undermined the nation-state and national identity to the extent that is often claimed by social theorists. The following passage gives some perspective to these debates:

> The available evidence suggests that national (and local) cultures remain robust; national institutions continue in many states to have a central impact on public life; national television and radio broadcasting continue to enjoy substantial audiences; the organization of the press and news coverage retain strong national roots and imported foreign products are constantly read and reinterpreted in novel ways by national audiences, that is, they become rapidly indigenized . . . Given the deep roots of national cultures and ethnohistories, and the many ways they are often refashioned, this can hardly be a surprise. Despite the vast flows of information, imagery and people around the world, there are only a few signs, at best, of a universal or global history in the making, and few signs of a decline in the importance of nationalism.
>
> (Held 2002: 10)

Much of the research describes the flow of Western or American-made media into a country and assumes that it has certain ideological and cultural effects. There are at least three questionable assertions with this: (1) that there is a coherent ideological message in the content and form of the media; (2) that the message is actually perceived by viewers; and (3) that it is perceived the same way by viewers in different countries (Tomlinson 1991: 47). Such assumptions echo long-standing debates over the corrupting power of the media on audiences, which we will cover in more detail in the next section. However, I want to conclude this section with a discussion of how the relations between global media and global capital can be theorized, to grasp the complex cultural infrastructure of contemporary social relations.

Given that global interdependence between societies has reached the current levels that it has, there are growing debates over how this new world should be lived in, which have been approached through the lens of cosmopolitanism and the idea that the media provide a global civic space. Roger Silverstone (2007: 22) has called this space the 'mediapolis', as one of the most important roles that the media, in all its diversity, performs is the setting of boundaries, and in doing so it poses important questions on how 'the relations between self and other are to be conducted in a global public sphere'. It then follows that such topics as media justice, compassion, hospitality and responsibility emerge as key conditions shaping a more ethical media culture in which the 'mediated other will be listened to and heard' (ibid.: 24). Like the *polis* of ancient Greece, modern mediated space offers one thing but often delivers another less than virtuous social environment, reinforcing social divisions and typically stifling critical debate.

In developing his account of the mediapolis, Silverstone (ibid.: 19) emphasizes just how much of the media's work is concerned with constructing and maintaining boundaries – from micro to macro levels their 'primary cultural role' is a ceaseless 'playing with difference and sameness'.

Beginning in the nineteenth century with the newspaper press and then cinema, radio and television, there emerged a mass media. As each of these technologies grew from initial uncertainty and intense competition with older, more established media, they eventually forged equally advantageous relationships in many instances. This is what he describes as a 'centripetal phase' where each medium 'articulated the boundaries of national and linguistic cultures', whereas now we live in era where the media are more 'centrifugal' and developments such as the Internet have profoundly changed the shape of communication, reaching out to the 'social margins' and making 'boundary work . . . even more significant, if not more challenging and complex' (ibid.). The rise of digital media and technoculture have certainly seen a vast expansion of global cultural flows, with a greater emphasis on interactivity, but a key question remains over the kinds of connectivity encouraged in increasingly networked societies. It is significant that the dominant preoccupations of criminologists in this area over the past 40 years or so have been with the distinctive moral force of the media, and it is here we now turn to the concept of moral panic, which can be understood as a particularly dramatic form of symbolic othering and public condemnation of deviance.

Moral panics in an age of anxiety

The concept of moral panic is one of the few terms from the social sciences that have entered into popular vocabulary. From its initial formulation in the early 1970s, the concept has been adapted, criticized and dismissed in equal measure by criminologists, sociologists and other commentators. Yet, at the same time, the social processes described by moral panic theory are now so well known to journalists, politicians and within the culture industries generally that certain reactions are entirely predictable and greeted with cynical weariness, or even ridicule, when the scaremongering becomes all too transparent.

Although the experience of fear is universal to the human condition and felt by every living creature, the actual sources of dread are socially distributed. It was only in the 1930s that the social sciences began to draw attention to the specific problems posed by anxiety, when the impact of Freudian psychoanalysis started to register in the broader intellectual climate. Indeed, the key insight is that anxiety is the price we pay for possessing a sense of self. It is 'a riddle whose solution would be bound to throw a light on our whole mental existence' (Freud 1991: 441). Ever since the publication of W.H. Auden's (1948) epic poem *The Age of Anxiety*, written just after the terror of world war, numerous commentators have used the title to describe the existential fate of modern times. By the end of the twentieth century, terms like 'culture of fear', 'fear of crime' and 'risk society' had been coined – each announcing that we live in an era of intense worry, while many of the debates surrounding 'postmodernism' have been understood as a kind of '*fin-de-siècle* neurosis' (Wilkinson 2001: 4). Even though commentators were initially reluctant to describe the aftermath of the 11 September 2001 attacks as a form of 'repressive hysteria' (Garland 2008: 25), there is evidence that this has begun to change, with work appearing that now describes the social reaction from within a broad moral panic framework (Weber and Lee 2009).

Moral panics can be analyzed from a range of theoretical perspectives. These include the symbolic interactionism of the original definitions, later Marxist revisions, various postmodern challenges, as well as more orthodox attempts to tame the concept in American sociology through the study of collective behaviour. Yet what is lost in this migration is any sense of the urgent politics of anxiety that is crucial to the development of the concept in Britain. Indeed, here all of the recent attempts to update the concept are drawn to the risk society thesis, while, across the Atlantic, North American scholarship has focused on social problem construction in ways

that have often required the analyst to suspend any 'particular political or ideological assumptions' (Best 2008: ix). In the celebrated work of Ericson, Baranek and Chan (1987; 1991), the mass media are regarded as pivotal in shaping social consensus around meanings of crime, law and deviance, but their analysis is thoroughly 'committed to a separation of fact and value' (Brown 2011: 414). However, I will argue that the concept remains a crucial one and needs to more thoroughly reconnect with the sociology of modernity to make sense of the fears haunting our social worlds. I begin by outlining the sociological origins of moral panics, before describing the criticisms the concept has received and then insisting that contemporary media spectacles do still foster distinctive moral relations in quite fundamental ways.

From the outset, the concept of moral panic has been concerned with societal reaction, and their symptomatic character – how they are rooted in major underlying structural changes and the impassioned outrage they can provoke – reveals much about the contours of normality, tolerance and repression endured in a society. The founding texts are Jock Young's (1971) *The Drugtakers* and Stanley Cohen's (1972) *Folk Devils and Moral Panics*. They both innovatively built on developments in American sociology of deviance tradition. These, combined with the British statistician Lesley Wilkins's (1964) understanding of 'deviancy amplification', were crucial to how the concept developed in Britain. Both acknowledge the influence of Marshall McLuhan's (1964) celebrated account of the consequences of the shift from print to electronic media, captured in his iconic phrase that the 'medium is the message'.

McLuhan (1964) argued that the world initially expanded through urbanization and transport developments, but has now 'imploded' as the mass media bring the world closer together again. It is this 'implosive factor' that Cohen and Young (1973: 340) find essential for the 'media are the major and at times the sole source of information about a whole range of phenomena' and thereby point 'to continual bombardment by images of phenomena that otherwise could be conveniently forgotten'. The model used to explain how moral panics occur is deviancy amplification and versions of it are to be found in all the classic studies. Cohen (2002) uses the notion to show how the petty delinquencies of rival groups of mods and rockers at seaside resorts were blown up into serious threats to law and order, and he goes to some lengths to situate the moral panic in a social context. In particular, the hostile reaction revealed much about how post-war social change was being experienced. The new affluence and sexual freedom of teenage youth cultures in the 1960s fuelled jealousy and resentment among a parental generation who had themselves grown up experiencing the hungry Depression of the 1930s, a traumatic world war and subsequent drab austerity.

Young (1971) also used the idea of deviancy amplification in his study of drug use in bohemian London, describing how the mass media transformed marijuana use into a social problem through sensationalist and lurid accounts of hippie lifestyles. Crucially, he notes how the high-pitched indignation contains a potent mix of fascination and repulsion, dread and desire that moral guardians exhibit towards the objects of their anxiety. There is a strong Durkheimian theme here, in that the boundaries of normality and order are reinforced through the condemnation of the deviant and thereby generate powerful feelings of 'collective effervescence'. But what Cohen (1972) and Young (1971) both were emphasizing was that this process only occurred in modernity through a considerable distortion of reality.

This emphasis on how the media distort the reality of social problems was developed by Stuart Hall and his colleagues at the Birmingham Centre for Contemporary Cultural Studies in their *Policing the Crisis: Mugging, the State, and Law and Order* (1978). In this book, an explicitly Marxist account of crime is developed that stands in some contrast to this Durkheimian sociology of deviance tradition. The book draws together the Birmingham Centre's work on youth subcultures, media representation and ideological analysis in a magisterial account of the

hegemonic crisis in Britain that began in the late 1960s and anticipates the victory of Margaret Thatcher's authoritarian 'law and order' programme in the 1980s. The book ostensibly explores the moral panic that developed in Britain in the early 1970s over the phenomenon of mugging. Hall and his colleagues demonstrate how the police, media and judiciary interact to produce ideological closure around the issue through a signification spiral. Black youth are cast as the folk devil in police and media portrayals of the archetypal mugger – a scapegoat for all social anxieties produced by the changes to an affluent, but destabilized society.

Critical issues

In mainstream criminology the moral panic concept has received extensive criticism. Some took issue with the empirical evidence presented by Hall and his colleagues (Waddington 1986) and for over-stating the extent to which the criminality crisis was contrived by elites to suit their dominant interests (Goode and Ben-Yehuda 1994). Sympathetic critics have applauded the theoretical sophistication of the analysis, but worry about the consequences this has had for the study of street crime (Hallsworth 2008). By the 1990s, the complaint had become that the concept of moral panic is used indiscriminately and 'applied to anything from single mothers to working mothers, from guns to Ecstasy, and from pornography on the Internet to the dangers of state censorship' (Miller and Kitzinger 1998: 221). Meanwhile, others warned against eliding all anxieties under a single heading 'of some (hypothetically universal, endlessly cyclical) feature of social life, namely panickyness' (Sparks 1992: 65).

In his wide-ranging review of the concept, Cohen (2002: xxvii) acknowledged that the term 'panic' has caused much trouble, but remains 'convinced that the analogy works'. The term still does convey well the drama, urgency and energy of certain media narratives, but problems persist in the contrast between an 'irrational' panic and the supposedly 'rational' analysis of it. It is this last difficulty that lies at the centre of Simon Watney's (1997) perceptive critique. He argued that the gradual and staged creation of folk devils as described in classic moral panic theory was incapable of grasping how the entire field of sexuality is saturated with 'monstrous' representations. Nor can it distinguish between different degrees of anxiety or explain how sexuality is regulated through a multiplicity of overlapping and competing institutions.

These ideas were developed by Angela McRobbie and Sarah Thornton (1995) in their influential attempt to update moral panic theory in the light of multi-mediated social worlds. Their argument emphasizes that contemporary moral panics now have an extremely short shelf life and a rapid rate of turnover, making it extremely difficult to cling to a model that emphasizes their episodic quality, spirals and flows. In addition to their increase in frequency, moral panics are also now far more likely to be contested, while the 'hard and fast boundaries between "normal" and "deviant" would seem to be less common' (McRobbie and Thornton 1995: 572–573). On their reckoning, these changes result from the vast expansion and diversification of the mass media, which, for Garland (2008: 17, emphasis in original), heralds a significant 'shift *away* from moral panics as traditionally conceived (involving a vertical relation between society and a deviant group) towards something more closely resembling American-style "culture wars" (which involve a more horizontal conflict between social groups)'.

The extent of pluralism should not be overstated here. While it is clear that there has been a proliferation of communication technologies encouraging new spaces for diverse niche interests, there has also been a broader tendency towards the merging of news and entertainment. Arguably it is conflict rather than consensus that is the decisive change. This is due to the bitterness of contemporary identity politics, which not only provokes deeply polarized reactions to most social issues but suggests a significant normative shift in the status of many deviant groups has

taken place. Though clearly not all, as the pariah figures of the paedophile and the terrorist continue to testify in very different ways. Likewise, Young (2009: 13) has recently described how indignant moral outrage is still stoked by powerful feelings of *ressentiment*:

> the alarm about pitbulls may well be vested in the fears of an underclass, of 'chavs', the pronouncement on the dangers of binge drinking may well relate to a moral dislike of the hedonism of modern youth, and the 'dissolute' nature of the night-time economy.

It is highly significant that much of the earlier commentary on the underclass relied on characterizing certain groups in the working class as suffering from a pathological relationship to *production* (the world of socially useful labour), whereas 'chavs' are defined through a pathological relationship with *consumption* – as manifest in dire forms of taste poverty (Hayward and Yar 2006).

At the same time, there have arisen new sites of social anxiety generated by the pace and scale of industrial advances in Western societies. Since the mid-1980s, particular fears have built up around nuclear, chemical, biological, environmental, genetic and medical hazards. Some well-known examples include global warming, nuclear fallout, toxic pollution, BSE, bird flu and other food scares that have made us acutely aware of the catastrophic potential of scientific and technological developments. Many have turned to the concept of 'risk society' (Beck 1986) to understand the anxieties provoked by these transitions to late modernity. According to Beck, the pace of technological innovation generates global risks, such as nuclear war and environmental catastrophe, which outstrip our ability to control them, creating new hazards and uncertainties that previous generations did not have to face. Yet accompanying these global risks is a more pervasive 'ambient fear' that 'saturates the social spaces of everyday life' and 'requires us to vigilantly monitor even the banal minutiae of our lives' (Hubbard 2003: 52). Urban fortress living, manifest in the protection of privileged consumption places (private homes, retail parks, heritage centres, leisure complexes) distinguishes between those who belong and those who threaten. Each of these defensive responses to insecurity only serves to heighten our awareness of unforeseen danger lurking around every corner.

It has been argued that the increased frequency of dramatic moral narratives in the mass media over the past two decades is partly a response to the increased pressures of market competition, but is also a key means by which:

> the at-risk character of modern society is magnified and is particularly inclined to take the form of moral panics in modern Britain due to factors such as the loss of authority of traditional elites, anxieties about national identity in the face of increasing external influences and internal diversity.
>
> (Thompson 1998: 141)

Moral panics are now an integral dimension of modern media culture. They have become an institutionalized part of social life and are a routine part of governing through crime – encouraging a new kind of political subjectivity that sees danger and menace everywhere. Malcolm Feeley and Jonathan Simon contend that 'moral panics are now part of the manufactured background, a feature of the larger order of knowledge and power that never goes away or recedes, and that must be constantly guarded against' (Feeley and Simon 2007: 51). In this, they share the diagnosis that the 'problem of uncertainty' (Ericson 2007: 204) has become the dominant principle organizing political authority and social relations in neo-liberal societies.

What is missing though is an account of the implosive character of contemporary media spectacles and the distinctive moral relationships that the media impose upon audiences. These

are crucial points, as indignant denunciation is only one way of responding to what is seen and read – indeed, one of the fundamental requirements of viewing is that we are obliged to take sides. The act of not looking, or changing channels, if a story is too disturbing is to ignore the pain experienced by others. To turn away, feel pity, get angry or be overwhelmed by the horror of it all are each dispositions that a culture of spectatorship encourages. In what follows, I develop these arguments through a consideration of the different moral relations the modern mass media cultivate and their place in public life.

Understanding media

Both Jock Young and Stan Cohen have made clear their indebtedness to the famous Canadian media theorist Marshall McLuhan. Although McLuhan remains a somewhat controversial figure, his overall contribution is one that emphasizes how different media fundamentally change social life. Throughout his career McLuhan remained convinced that developments in media technologies brought many benefits, especially with 'cool' media – like television, hi-fi systems and telephones – that require high levels of audience participation to complete meaning. In doing so, these media reconnect our senses, encourage intense involvement and bring us together to produce social bonds enabling the 'human family' to become 'tribal once more' (McLuhan [1964] 1994: 172). One of the examples he uses is how televised events like President Kennedy's funeral illustrate the 'unrivalled power of TV' to unite 'an entire population in a ritual process' (ibid.: 337). The key significance then of the 'implosion' of electric media is that they do not just bring us physically closer together, but emotionally move us to communally participate in human solidarity. This is an understanding of the media that sees the possibilities of a global conscience united in emotional empathy toward the suffering of distant strangers. Had he lived to see the public responses to the Ethiopia famine in 1984, the Asian tsunami in 2004, and the Haiti earthquake in 2010, then he might well have found encouraging evidence for this internationalization of responsibility that media coverage makes possible.

Of course, the early moral panic theorists shared this Durkheimian understanding of the power of the mass media to ritually unite communities in emotionally charged ways, but the shared indignation generated in response to certain kinds of deviance was regarded as not only unhealthy but intensely neurotic. The roots of this social attitude have been traced by Svend Ranulf (1938), when he describes how communities restore their unity by condemning and persecuting suitable foreign, or marginal, groups, in a discussion of the rise of Nazism in Germany and Protestant puritanism in England. Here moral indignation is understood as a transhistorical phenomenon of '*ressentiment*', which reinforces group cohesion by scapegoating foreign, polluting bodies (Jews in 1930s Germany, idle vagabonds in Calvinist ascetism). In highlighting the collective hostility that moral panics unleash, the new deviancy theorists were also echoing other critics of McLuhan's optimistic understanding of the media.

One of the earliest rebukes came from Guy Debord ([1967] 1977: 29) who maintained that, far from unifying humanity in a network of communication, the global village marks the triumph of capitalism as a 'global spectacle' that shatters the 'unity of the world'. Raymond Williams ([1974] 1990: 127–129) took issue with McLuhan's technological determinism and criticized his 'idealist model of human history'. Even those who are clearly influenced by McLuhan reverse his central claims:

> Much of the time we are witnesses to what is rightly called a 'pseudo' public sphere, where politics and docile politicians act out a travesty of democratic debate. No wonder, as Jean

> Baudrillard (1983) suggests, the masses are generally turned off from 'serious' politics and turned on to something else that is much more entertaining.
>
> (McGuigan 2005: 429)

Ever since Baudrillard's (1967) review of *Understanding Media*, he has been regarded as a postmodern proponent of McLuhan's vision. Yet he utterly rejects neo-tribal optimism, while taking the idea that the 'medium is the message' beyond anything envisaged by McLuhan. Baudrillard (2001: 42) follows McLuhan by seeing the message of television as lying not in its content, but in 'the new modes of relations and perceptions that it imposes' and its destructive replacement of lived relations with semiotic relations. Too much is seen obscenely fast. As he puts it, '[we] are no longer a part of the drama of alienation; we live in the ecstasy of com-munication' and 'this ecstasy is obscene' (Baudrillard 1985: 130). Baudrillard's is clearly a hyperbolic voice, but his overall point is that the contemporary media transform social experiences in quite damaging ways – where the banal becomes serious, democracy turns into show business and incoherence is privileged over meaningful debate.

In this pessimistic assessment of the mass media he is joined by Jürgen Habermas ([1962] 1989) who influentially described how the formation of a bourgeois public sphere in the eighteenth century marked a decisive stage in the development of rational debate. The transition from feudalism to capitalism brought with it the commodification of culture and opened up the liberal, democratic possibility of well-informed individuals resolving their differences through enlightened reason rather than brute force. Yet, by the nineteenth century, the public sphere had become contaminated and weakened through 'refeudalization' – in that advertising, public relations and other techniques of information management have returned the public sphere to trivial spectacle and subordinate to selective commercial interests. Extending this argument to the early twenty-first century, we can see how political spin doctors, global media corporations and tabloid celebrity marketing have replaced monarchs, church and nobility as the patrons and sponsors of much mass communication.

Of course, critics have disputed the appropriateness of the feudal analogy to contemporary media, whereas others claim that he has idealized the bourgeois public sphere. Habermas initially responded by acknowledging that social interests shape communication, but he insists the Enlightenment remains an unfinished project as the possibilities of communicative rationality have yet to be realized. More recently, he has suggested that there may well be some cosmopolitan potential in mediated communication, but in the final analysis he retains the pessimistic verdict (Habermas 2006: 9–10). There are evidently parallels with Silverstone's (2007) own understanding of the mediapolis, which he describes as:

> both more and less than the Habermasian public sphere. It is more because within it communication is multiple and multiply inflected: there is no rationality in an image, and no singular reason in a narrative . . . The mediapolis is less than the public sphere, in its modesty. There is no expectation that all the requirements for fully effective communication can be met by those responsible for its initiation, and those, in good faith, who contribute to it.
>
> (Silverstone 2007: 33)

Clearly there are some fundamental differences here. Arguably the real power of contemporary media lies in the way each of these forces neutralize one another – rendering audiences almost helpless before the endless flow of mediated misery encountered in their daily lives. It has even been noted that the most profound moral demand television makes on spectators is to place us

as witnesses of human suffering, without giving us the option to act directly on it (Ellis 2000: 1). However, there are many ways spectators respond to and actively involve themselves with what they see on screen, read in newspapers, or browse online.

Ethics, rhetoric and spectatorship

A central claim of this chapter is that the discourses produced by mediated moral panics should be understood as rhetorics of indignant denunciation – these are typically directed at the scapegoats, but the persecutors could also find themselves angrily accused of prejudice. In his account of how modern media use images and language to render distant suffering not only intelligible but also morally acceptable to the spectator, Luc Boltanski (1999) identifies three rhetorical 'topics' with which audiences engage with mediated misfortune. The distinctive argument is that ever since the end of the eighteenth century, when pity became central to politics, the topics of 'denunciation', 'sentiment' and 'aesthetics' have become the ethically proper ways of responding to the disturbing spectacles of distant suffering. In doing so, they provide an invaluable starting point for understanding how mediatized events can, at times, unleash great social change, while, at others, produce little more than banal indifference among media audiences. Each involve competing ways of organizing emotions and, by extension, the norms that govern the ethics of cosmopolitan citizenship.

Although indignant denunciation is motivated by anger, it 'can be criticized as an empty substitute for action' (ibid.: 70) and is often discredited for the ways it appeals to vindictive desires like revenge, envy and resentment. A second way in which spectators can sympathize with the unfortunate is through 'sentiment', which provokes a 'tender-heartedness' that recognizes the suffering of another, so as to be moved to compassion. However, it is the very sentimentalism itself that has been condemned and disqualified as an indulgence. To take an example that illustrates some of these issues, ever since the 1960s the image of a starving African child, with pleading eyes, has become a powerful symbol of human suffering and has been used by agencies like Oxfam and Save the Children in appeals to Western adults for charitable donations.

By the 1980s, the images had become more shocking – pictures of emaciated bodies of starving young children, only hours from death, featured in a number of campaigns – accompanied with text explaining that 'While you're eating between meals, he's dying between meals' and 'You're not the only one with weight problems' (Holland 2006: 153–155). At the same time neo-colonial critics attacked this kind of imagery for stressing helplessness and dependence, which sustains 'a patronizing, offensive and misleading view of the developing world as a spectacle of tragedy, disaster, disease and cruelty' (Cohen 2001: 178). From the 1990s onward such imagery was denounced as 'aid pornography' while hiding the close relationships between Western affluence and the increasing poverty in the rest of the world. New codes of practice were drafted in response and most agencies pursued a strategy of 'positive images' where recipients are not seen as feeble beneficiaries of charitable donations.

Problems remain, however, about the reality behind, and the rhetoric of, the image – too much 'information can confuse the power of the image, and an understanding of political complexities deflects emotional response' (Holland 2006: 155). Of course, these humanitarian organizations are acutely aware of 'compassion fatigue' and have developed sophisticated ways of renewing campaigns in response to criticism and apathy. One recent policy, favoured among a number of international development charities, has been to use celebrities as a way of attracting popular media coverage and personalizing complex situations so that foreign affairs are made accessible to the ordinary public. The worry is that by transforming politics into

entertainment, the difficulties surrounding development issues are submerged beneath the banalities of celebrity lifestyle, brand identity and show business.

The third possibility of engaged spectatorship arises from criticism of the first two. It consists of being moved by neither indignation nor sentimentalism, but instead through an aesthetics of the sublime, where 'suffering is looked at in the face and confronted in its truth, that is to say as pure *evil*' (Boltanski 1999: 119, emphasis in original). The complaint here, however, is that to aestheticize tragedy will ultimately anaesthetize the feelings of those who witness suffering. Indeed, Boltanski's book concludes with a discussion of the contemporary 'crisis of pity' rendered by the mass media and the 'spectacle' effects they produce. Susan Sontag has made a similar point:

> Imagery that would have had an audience cringing and recoiling in disgust forty years ago is watched without so much as a blink by every teenager in the multiplex. Indeed, mayhem is entertaining rather than shocking to many people in most cultures.
>
> (Sontag 2004: 90)

It is significant that Cohen (2002: xxxv) has himself moved from an early interest in over-reaction (panic) to under-reaction (denial) in his later work – the 'ways we are manipulated into taking some things too seriously and other things not seriously enough'. Elsewhere I have developed these arguments in relation to the sexual torture scenes so apparent in the notorious Abu Ghraib photographs, which did not provoke shock so much as recognition among many commentators. Internet pornography, reality television, performance art and campus humiliation rituals are among the sources said to have inspired the brutality and at the same time domesticating it well within the terms of US popular entertainment. Indeed, there is much evidence to suggest that these violations of humanity scarcely trouble consciences – a view borne out by the banal response to the cruelty in so many sections of American public opinion (Carrabine 2011).

To understand how these processes operate necessitates examining how media organizations and institutionalized practice produce news stories, the textual conventions and meanings embedded in them and the diverse ways in which audiences respond. Moreover, it requires a normative commitment to not simply exposing the socially constructed nature of reality but rather a reopening up of important epistemological questions over the sociology of knowledge and rival ways of knowing the world. Yet it is also important to note that the distinction between what *is* and what *ought to be* is often integral to news reporting. The 'new journalism' of the late nineteenth century sought to expose hidden realities, by revealing the secrets of the rich and prompting sympathy for the poor through 'human interest' stories. This was as true for crusading editors like W.T. Stead in Britain and Joseph Pulitzer in the United States as it was for the 'muckraking' journalism of Lincoln Steffens and Ida Tarbell, and has informed much of the subsequent investigative reporting that flourished in the 1960s and 1970s, while more contemporary 'citizen journalism' has the capacity to present alternative truths and challenge official assertions of fact.

It is also significant that new media technologies themselves have generated distinctive anxieties, which should not be simply reduced to a fear of the new, but rather that a certain paranoid disposition structures much of the debate. It is one that has been described as a 'hermeneutics of paranoia' that arises in 'a particular context of self to technology and the visual' (Fuery 2009: 70), and thereby governs much of the mistrust, threat and uncertainty surrounding new technology. This is especially evident in how the mainstream media have tended to depict the Internet, which has been through the 'rhetoric of "moral panic"' where digital culture is depicted in 'negative terms' where threats like viruses, spam, fraud, stalking and various other

kinds of electronic harassment proliferate, while the users are 'pathologized' and typically described in distinctive ways: 'the excessive female body, the abused female body, the "pirate" teenager, the tech-savvy Al-Qaeda operative' are just some of the examples that have been identified (Gournelos and Gunkel 2012: 10).

Yet the most prevalent focus of public concern over new media technology centres on the problems posed by pornography, which take a number of forms and are worth exploring in more detail. Not least since the issues enable a consideration of specific policy implications, and will allow a more nuanced account of the politics of representation to emerge. Newspaper editors have long been aware of how sex sells – from the sexualization of mundane events, through the detailing of celebrity sex scandals, to the salacious reporting of violent sex crime – yet today a porn aesthetic has become firmly 'mainstreamed' (Attwood 2010a) across a broad range of social activities. Alongside the 'pornification' (Paasonen *et al.* 2007) of modern media culture, much attention has also focused on images thought to exist at the edges of culture that are seen as increasingly extreme and shocking.

Pornography, sexualization and regulation

The origins of modern attitudes to pornography have been traced back to the merging of two very different events occurring in the late eighteenth century: the creation of "secret museums" for objects classified as obscene, and the growing volume of writing about prostitution (Kendrick 1997). Historians have shown how literary and visual representations of 'sex' have varied over time, as have ideas of what to regulate and prohibit. But it is clear that by the nineteenth century the definitions of what was pornographic, obscene or indecent depended on who could access the material, which was largely restricted to erudite men. The assumption was that only a privileged few specialists could read and look at a class of objects, while the great many could not. Pornography as a distinctive form of regulation emerges in 'response to the perceived menace of the democratization of culture' (Hunt 1996: 13). By the middle of the century, states across Europe increasingly turned to the moral surveillance of their subjects and the first major obscenity trials were conducted initially in France, then England and Germany, before the United States embarked on its own crusades against pornography.

It was the Victorians who influentially defined obscenity as material that had the capacity to 'deprave and corrupt' in legislation that still shapes contemporary debates (Kendrick 1997: 121). The history of censorship and obscenity laws reveals that state control was justified in the name of protecting the weak – particularly the young, poor and female – from the dangers of immorality. Once the trade moved from being just between gentlemen, but circulated on the unruly metropolitan streets, it was then that obscenity became a social problem, driven by concerns of the availability of such material for mass consumption and advances in print media.

Producers have always been adept at exploiting the latest technology and it is clear that the invention of photography considerably changed the nature of sexual imagery and secured the place of sexuality in modern, commodity culture. The traffic in illicit images flourished from the medium's inception. Louis Daguerre patented the daguerreotype in 1840 and within ten years the French government were sufficiently alarmed by the circulation of explicit photographs to introduce legislation prohibiting the sale of obscene photographs (Kendrick 1997: 248). In an important essay on photographic history Abigail Soloman-Godeau (1991: 233–237) maintains that amidst all this 'sexually coded imagery' there is an important 'shift from a conception of the sexual as an activity to a new emphasis on specularity – the sexual constituted as a visual field' which is intimately linked to other cultural developments, like the newly invented department stores organized around the fetishistic display of goods and the enormous popularity

of 'illusionistic spectacles' produced by stereoscopes, magic lanterns and dioramas in the Victorian era. In her account, photography produces an 'erotics of the fragment', especially of female body parts, and it is this commodification of women – closely tied to the eroticizing of commodities – that is the hallmark of consumer culture.

It is also clear that as long as the pornographic market was restricted to the upper classes, it articulated their obsessions: libertine, scientific, and objectifying the subordinated (Sigel 2002). One example is the 'occidental fascination with the harem' which depicted a 'microcosm of empire where sexual conquest was commensurate with imperial conquest' (Colligan 2006: 23). Developments in print technology were crucial, as they enabled texts and images to be consumed by a wider public, eventually reaching the masses in cheap visual form by the 1880s through the invention of photolithography, which permitted the inexpensive manufacture of pornographic picture postcards and distribution on an international scale. One estimate has it that some 140 billion postcards were sent around the world between 1894 and 1919, while many more were collected and never sent through the mail (Sigel 2002: 122). These illicit images recycled already well-established conventions and reproduced social divisions, emphasizing racial and sexual subordination for a mass market. Ultimately, it was the expansion of empire in the nineteenth century that enabled the traffic in pornography, informing its fantasies and facilitating its movement around the world.

The invention of motion pictures in the 1890s enabled further displays of nudity and cinematic pornography is credited as emerging in France, but with others quick to follow – notably Argentina, Austria, Italy and the United States. These 'stag films' were shot in 10-minute lengths so as to fit on 'a single, easily smuggled reel' and featured 'hard-core intercourse interspersed with raucous intertitles' (Milter and Slade 2005: 173). Alongside film, inexpensive paperbacks, illustrated pamphlets, slot machines and the burgeoning postcard trade further enabled the distribution of pornography across the class structure and national markets. Although various states countered the expansion of consumer pornography by organizing censorship campaigns and passing new legislation, these measures did little to stall the trade. After the Second World War, the American cultural influence in Western Europe proved to be decisive, especially with the arrival of "pin-up girls" then ubiquitous in the popular culture of the 1940s and 1950s, allowing a very 'public model of sexuality' to flourish, which was then followed by the American "porno" film and magazine (Sigel 2005: 15). By the 1960s and 1970s, many European governments began to partially legalize pornography in response to a more 'permissive' mood of sexual liberation, while new legal definitions of artistic, historical and literary merit emerged in the landmark obscenity trials of the era.

Technological innovations have always been crucial to the development of the pornography industry, and the example of the battle between VHS and Betamax video formats in the late 1970s is often used to illustrate the case. Betamax eventually lost out to VHS, despite having a superior picture and sound quality, and this defeat is attributed to their refusal to license pornography. Of course, other factors played an important role and while the history of porn can be regarded as a journey from print to film, video, CD-ROM, DVD and up to the Internet, with an increasing emphasis on the visual image over the written word, it is important to note that the industry today makes use of commercial strategies based on convergence. That is the content and distribution are managed in such a way that the same product can be marketed across different formats and platforms, while media mergers have seen single corporations now owning what were previously distinct and separate areas of commercial activity. Companies that initially made their fortunes from magazines, like Larry Flint Publishing and Playboy, have moved into DVD and Web production and distribution, pay-per-view TV and retailing to increase profits and exert greater control over the industry (Paasonen et al. 2007: 6). Indeed, it

has been argued that just like mainstream media corporations, 'porn companies with global ambitions regard mastery of distribution as more crucial than increased production' (Milter and Slade 2005: 176) when it comes to profit maximization.

Nevertheless, the 'video revolution' heralded a vast increase and change in the production of distribution of hardcore pornography. Although adult theatre releases of feature-length films had enlarged mainstream markets, it was home video technology that enabled the expansion of pornographic media into more private spaces of consumption from the 1980s. This development was further facilitated by the rapid growth of the Internet, where online pornography was crucial in demonstrating the commercial promise of the new technology. Certainly, the industry 'pioneered deluxe online shopping mall designs, secure payment systems and video streaming' (O'Toole 1998: 369) and the increased accessibility of porn, alongside the anonymity of online consumption, has transformed sexuality in quite profound ways (Dines 2010). We will consider the feminist anti-pornography movement, of which Gail Dines is an important representative, in a moment for it is important to recognize that technology is not the only factor driving pornography as a global industrial practice. These technological developments have also been accompanied by changes in media regulation, which have seen many countries relaxing censorship laws and thereby enabled the mainstreaming of pornography.

The British case is particularly instructive. As the government legalized soft-core pornography the industry expanded in the late 1960s through copying magazine formats that were successful in the United States, local entrepreneurs developed their own home-grown titles catering to different classes on the top shelves of high street newsagents and certain chain stores (Hunt 1998). Once a profitable and legal space had been established, regulation did not simply repress activity, it also formed 'a set of production imperatives with significant effects on the *content* of magazines' (Smith 2005: 156, emphasis in original). Having legalized soft-core pornography, publishers and distributors sought to stay on the right side of the law, yet the definitions of what remains obscene and indecent continue to be evasive and much is left to the discretion of those who enforce the various statutes. In Britain, these include the Obscene Publications Acts (1857, 1959 and 1964), the Protection of Children Act (1978), the Video Recordings Act (1984), the Sexual Offences Act (2003) and the Criminal Justice and Immigration Act (2008), which makes the possession of 'extreme' pornographic material a criminal offence (and is discussed in more detail below). Each has set benchmarks that have proved to be open to dispute and the problems in the legislation have been explored by a number of commentators (including Kendrick 1997; O'Toole 1998; Petley 2012).

The tension between the law and the market also means that producers have to negotiate complex social and cultural changes. Some of these issues have been described as follows:

> The real threat to top-shelf magazines has not come from the Internet, the law, or moral campaigners; these magazines have, in fact, been hit hardest by increasingly liberal attitudes to nudity . . . In the early 1970s, when *UK Penthouse* sold up to 300,000 issues per month, men's interests were inadequately catered to by the mainstream magazine industry . . . The advent in the late 1980s of men's magazines offering a diverse mix of journalism, celebrity news and photographs, consumer goods, relationship discussions, and some sexual content without the attendant 'dirty mac' label, has dealt the most decisive blow to the adult market . . . The problems are manifold: although British attitudes to nudity have changed, they do not necessarily favor the kinds of nudity available in traditional soft-core and legislation still exists that prevents significant development of the visual rhetorics of top-shelf magazines. New technologies and media formats have forged new ways of representing sexual activities.
> (Smith 2005: 163)

While the 'new lad' magazines like *FHM*, *Loaded* and *Maxim* were certainly more respectable than their soft-core rivals, it is important to situate their arrival in the broader sexualization of popular culture that has occurred over the past three decades. The changes are far from straight-forward and are multi-faceted, so it is worth examining them in more detail.

Mainstream culture

One distinction has it that the sexualization of culture describes a wide array of phenomena, where sex permeates practically every aspect of existence, while pornification is a more specific term referring to the blurred boundaries between pornography and mainstream media (Paasonen, *et al.* 2007: 8). The latter describes the proliferation of sexually explicit imagery from the late 1980s onwards. As porn became 'chic' across the worlds of high art and popular culture, where artists like Robert Mapplethorpe and Cindy Sherman deliberately deployed a pornographic aesthetic in their work, while pop stars including Madonna, Lady Gaga and Britney Spears have drawn on imageries from the commercial sex trade to bring an illicit edge to their performances, so the codes and conventions of pornographic representational practice have 'become acceptable, even fashionable' (McNair 2010). To take just one example, the magazine advertising campaign for teenage Skechers training shoes depicted pop singer Christina Aguilera in 'porn clichés as a garter belt-clad nurse with a phallic hypodermic needle; as a cop in short shorts with handcuffs and a suspect bent over the hood of car, and, as a plaid-skirted schoolgirl and over-sexed teacher' (Kinnick 2007: 8). Since the 1990s there has been significant change in how women's bodies have been represented in advertising, with the accent on fun, pleasure, and empowerment, which now presents women as active, desiring sexual subjects – rather than the passive, mute objects of the past.

By incorporating porn into mainstream media products the intention is clearly to use some of the 'dirty glamour' and 'sense of danger' associated with porn, but, in doing so, the media legitimate and normalize sexual imagery in the fabric of everyday life (Poynor 2006: 132). More recently Lee clothing and American Apparel have run controversial advertising campaigns that deploy the aesthetics of amateur pornography in ways that are 'not always "lighter" or less extreme' (Neely 2012: 102) than that featured in hard-core imagery. The visual references are typically deployed through an ironic, knowing tone of address that marks out the parody as a question of style, taste and sensibility in an effort to undermine potential criticisms. Those who do take the issues too seriously are unable to get how porn revels in artificiality, excess and pastiche. It is this logic that informs how advertisers have come to produce commercials ridiculing the vocabulary of their own trade. In some respects, this is simply repackaging old sexual stereotypes in a new brash language of female empowerment, as in the Aguilera campaign. In others, it is an attempt to address hip, young, urban consumers who are regarded by advertisers as sceptical and knowing, with a postfeminist emphasis on women gaining power and control through the commodification of their appearance. This is a subtle, but decisive shift, not least since it makes 'critique much more difficult' as Rosalind Gill (2010: 107) has shown in her analysis of how 'porn chic' has become normalized in advertising imagery.

More generally, sex has become increasingly visible in mainstream Western culture, changing the meanings of sexuality, developing new forms of 'public intimacy' (McNair 2002), and now is an important site of leisure and consumption. In the British context, where commercial sex had been restricted to seedy backstreet sex shops or the top shelves of newsagents, the landscape has changed considerably:

> today the places, products and performances associated with sex for its own sake are becoming more visible. Commercial sex is gaining a toehold in the high street and being gentrified.

> Strip joints have become gentlemen's clubs. The Rampant Rabbit vibrator is now almost as well known as that much older sign for sex, the Playboy bunny girl, signifying a new interest in women as sexual consumers. Porn shops have been joined by the cheap and cheerful sexual paraphernalia of the Ann Summers empire and by elegant and expensive boutiques selling lingerie, toys and erotica. Pole dancing is being repackaged as a form of keep-fit, and burlesque is undergoing a revival, producing new stars such as Dita von Teese.
>
> (Attwood 2010a: xiv–xv)

This passage conveys how commercial sex products, services and experiences have become an almost ubiquitous presence in contemporary culture.

The Playboy bunny is a case in point, where the branded logo now appears across a range of merchandise, much of which is aimed at young teenagers. The range includes clothing, cosmetics, phone cases, bedroom sets, jewellery and stationery. In February 2009, the British chain store WH Smith eventually withdrew Playboy stationery after a series of complaints from consumers. In the past the company had defended the decision to sell the products, which according to a representative were 'just a fashion range, a harmless bit of fun, with no inappropriate imagery and no deeper significance' (Poynor 2006: 6). That the retailer was unable to see there might be a problem with selling pencil cases adorned with an icon of the porn industry to school children is indicative of the cultural amnesia at work here. Another British chain store, Tesco, was also forced to withdraw its range of pole dancing kits for pre-pubescent girls following criticisms from campaigners. These anti-sexualization movements are important and they chime with a growing literature condemning the social processes normalizing pornography in contemporary culture.

Much of the literature is written by North Americans and is mainly concerned with the rapid growth and size of the porn industry in their own country, which generates more revenue than Hollywood and all the major league sports combined (Williams 2004: 2). The proliferation of pornography has generated a number of critical interventions in recent years. They include Ariel Levy's (2005) account of *Female Chauvinist Pigs*, which highlighted the rise of 'raunch culture' to describe how commercial sex had acquired such normative status that women incorporated its aesthetics so as to present themselves as strong, independent and exciting. According to Levy, this is not a sign of empowerment, but yet another way in which women are objectified and a further indication of how desire and desirability are increasingly governed by commerce. A similar diagnosis is detailed by Pamela Paul (2005) in her discussion of how American culture has become *Pornified*, where the increased accessibility and acceptability of porn, particularly on the Internet, have detrimental effects on consumers and their relationships. A report by the American Psychological Association (2007) is also regarded as significant for elaborating a distinctly negative understanding of 'sexualization' (Wouters 2010: 724–725), while Gail Dines (2010) has continued the critique in her mapping of the alienating and corrosive consequences of *Pornoland*. Clearly each of these publications condemns the commercialization of sexuality, whether this be in the spread of porn, pole dancing, sex toys or striptease, but all frame the problem largely in moral terms.

In many respects, these arguments mark the revival of anti-pornography feminism that had been so influential in the 'sex wars' of the 1970s and 1980s. In this radical movement, the slogan 'pornography is the theory and rape the practice' (Morgan 1980) caught the mood of the times. The leading representatives included Andrea Dworkin, Susan Griffin and Catherine Mackinnon, who each argued that pornography degraded women and reproduced violent male sexuality. Although their positions on censorship varied, they shared the view that porn oppresses women and controversially formed uneasy alliances with neo-conservatives and Christian groups to

generate a new form of 'legal moralism'. Other feminists highlighted the problems and contradictions in the anti-pornography position. Elizabeth Wilson (1992) accused the movement of fundamentalism: intolerance, denial, preacher-style harangues, living life through repressive rules, and above all else a profound suspicion of sexuality.

Moreover, it was argued that anti-pornography feminism is based on an unhelpful distinction between male sexuality as violent and lustful whereas female sexuality is gentle and tender, which upholds the 'notion that women are victims of sex and that sex is degrading to women but not to men' (Turley 1986: 89). In turn, some recent feminist scholarship has defended pornography, especially if it encourages sexual freedom or challenges heteronormativity, while denouncing the language of martyrdom and victimhood associated with the movement's activism. Both sides situate the problem in moral terms: pornography is 'either degrading therefore bad *or* it is enjoyable and thus morally good' (Power 2009: 45, emphasis in original), and while the debate remains entrenched in such questions, it lacks a more nuanced account of cultural variation and historical specificity. It is to such matters that Cas Wouters (2010) directs attention, arguing that too narrow a view has prevailed, missing deeper and broader shifts in human interactions gathering pace since the late nineteenth century. Anti-pornography and anti-sexualization movements are seen as part of a broader reworking of the ideal of monogamy, where changing taboos surrounding sexual practices are especially significant. The analysis demonstrates how sex is bound up with a set of manners governing our intimate lives and social relationships, which echoes Michel Foucault's (1979) influential writings on the *History of Sexuality* and Anthony Giddens's (1992) study on the *Transformation of Intimacy* in late modernity (Attwood 2010b). By contextualizing the commercialization of sexuality in a broader historical and theoretical framework, the approach reveals much about the social and political conditions underpinning cultural life.

Extreme media

Such an approach is also useful for understanding contemporary anxieties about the role of the Internet in disseminating increasingly 'extreme' images. In the British context, these concerns crystallized in the 2008 Criminal Justice and Immigration Act, which makes it a criminal offence to possess what it defines as 'extreme pornographic images'. Before then it had been an offence to produce or distribute material likely to 'deprave and corrupt' a viewer, but now it is the consumer who faces prosecution if found guilty, representing a significant legal change and is intended to install a 'censor inside the head of the individual subject' (Petley 2012: 150). The legislation was introduced following a campaign launched after the murder of Jane Longhurst in 2003, which sought to demonstrate the harms caused by extreme pornography.

During the trial, the defendant, Graham Coutts, maintained her death occurred during a consensual asphyxial 'sex game' that went wrong, while the prosecution described his habitual use of websites featuring sexual violence as evidence to show his predilection for macabre sexual fantasies. The sites included images of 'rape and torture and violent sex', 'asphyxiation and strangulation' and 'genuine deceased appearance' and the day before she died, Coutts had viewed a site entitled 'death by asphyxia' (Carline 2011: 318). Following the trial, the victim's mother Liz Longhurst, led a highly influential campaign calling for a ban on such websites and while nobody suggested that the downloaded images had directly caused Coutts to strangle Jane Longhurst, they had 'normalized' his 'perverted view of sexual pleasure' (Attwood and Smith 2010: 173). Nevertheless, debates in Parliament soon became entrenched in liberal, free speech defenders versus those who find pornography morally degrading and offensive to community standards.

The subsequent legislation has proven to be controversial, from opposing perspectives, where anti-pornography feminist groups criticized the limited scope of the measures. Most images of rape are excluded from the Act, creating a problematic distinction between 'violent' and 'non-violent' rape (MacGlynn 2010: 192). Another set of objections came from organizations highlighting the potential for the legislation to persecute people involved in consensual sadomasochistic practices and other minority expressions of sexuality (Jones and Mowlabocus 2009: 616). In the ensuing public and policy debates old divisions were simply redrawn, where the desire to censor was evidently 'premised on notions of taste' (Carline 2011: 322) and the 'government relied on morality and disgust-based justifications' (MacGlynn 2010: 202). The extreme porn debate condenses a range of anxieties about the increasing sexualization of society and the role played by media technologies in enabling the dissemination of this material. A well-known example is how the term 'pornography' has been used to describe a recent cycle of horror films including *Saw* (2004), *Hostel* (2005) and *Wolf Creek* (2005), which have been dubbed 'torture porn' on account of their gruesome depictions of torture, mutilation and nihilistic cruelty (Edelstein 2006). At around the same time Jean Baudrillard (2005) coined the term 'war porn' to describe the infamous Abu Ghraib photographs taken by American troops in Iraq.

These different uses of the term suggest a crisis over the meaning of 'porn', and indicate that it may be less concerned with images of sexual pleasure than with various attempts to make a spectacle of the body. This theme is developed by Steve Jones and Sharif Mowlabocus (2009: 622) where they discuss how numerous 'representations of body rupture have become immensely popular in western culture' across a broad range of factual and fictional media where scenes of 'opening up' the body are now commonplace. What unites these otherwise diverse images is their focus on extreme experiences and the visceral sensations they provoke. Similarly, Feonna Attwood (2011: 19) situates these extreme forms of representation in a 'broader cultural trend towards the depiction of humiliation, suffering and terror', which raises pressing new questions on 'the ways in which the body, technology and the self are represented and experienced in contemporary Western societies'. It is by examining these wider processes we can understand why it is that the boundaries of the forbidden, taboo and illicit have been reconfigured in recent times. If these boundaries are policed through the regulation of audiences, as Kendrick (1997) maintains, then the conclusion to be drawn is that the greatest threat will be posed by those media technologies that permit the greatest circulation.

Although liberals defend pornography on the grounds of free speech, it is clear that the producers are not remotely concerned with sexual liberation but with making large profits. And as Nina Power (2009: 51, emphasis in original) puts it, the 'sheer *hard work* of contemporary porn informs you that, without delusion, sex is just like everything else – grinding, relentless, boring (albeit *multiply* boring)'. By highlighting the capitalist tendencies of pornography, she reminds us that the scale of the business has far-reaching ramifications. A key factor driving the growth of the industry has been the development of digital technologies enabling cheaper, easier and faster access to porn. The point can be further developed by pursuing the implications of what has been termed the 'pathological public sphere' (Seltzer 1997). In Habermas's influential account, the public sphere arose in the eighteenth century as an arena of rational debate that was an alternative to despotic state violence, yet today there is 'a radical mutation of and relocation of the public sphere', which is now focused, Seltzer (ibid.: 4) maintains, on the 'shared and reproducible spectacles of pathological public violence'.

In his analysis of contemporary 'wound culture', Seltzer (ibid.: 3) demonstrates how a fundamental reconfiguration of individual and collective understandings of suffering, trauma and witnessing has recently taken place, which 'takes the form of a fascination with the shock of contact between bodies and technologies'. It is here that the concerns over increasingly

'extreme' forms of representation can be situated, which would enable a more critical understanding of the kind of social relations encountered in the mediapolis and would connect with the arguments presented earlier in this chapter. It remains the task of future work to develop these points considerably further, but the material presented here should be seen as part of an ongoing project dedicated to unravelling the power of images in contemporary societies.

Discussion questions

1   What do you understand by the term mediatization?
2   Does globalization lead to cultural imperialism?
3   Has the concept of moral panic outlived its usefulness?
4   What might an ethics of cosmopolitan citizenship involve?
5   Why should the mainstreaming of pornography be a criminological issue?

Websites

http://www.bl.uk/learning/histcitizen/21cc/crime/media1/crime.html.
A British Library website containing articles about crime from newspapers over past centuries. The historical sources included here are wide-ranging and cover murder, robbery, youth crime, and political militancy.

http://britac.studyserve.com/home/lecture.asp?ContentContainerID=124.
A discussion on 'Moral Panics: Then and Now' by Stan Cohen, Stuart Hall and David Garland at the British Academy in 2007.

http://www.flickr.com/groups/criticalcriminology.
A recently established site on the relationship between crime, criminology, and the visual, formed with the intention of providing a critical eye on all three.

http://www.newmediastudies.com
A website for the study of new media, which includes articles, reviews, guides and other resources.

http://www.object.org.uk/
OBJECT is one of a number of campaign organizations recently set up to challenge the sexual objectification of women.

References

Albrow, M. (1990) *The Global Age*, Cambridge: Polity.
American Psychological Association (2007) *Report of the APA Task Force on the Sexualization of Girls*, Washington, DC: American Psychological Association.
Appadurai, A. (1990) 'Disjunction and Difference in the Global Cultural Economy', in M. Featherstone (ed.) *Global Culture: Nationalism, Globalization and Modernity*, London: Sage.
Appadurai, A. (1996) *Modernity at Large*, Minneapolis, MN: University of Minnesota Press.
Auden, W. H. (1948) *The Age of Anxiety*, London: Faber and Faber Limited.
Attwood, F. (2010a) 'Introduction: The Sexualization of Culture', in F. Attwood (ed.) *Mainstreaming Sex*, London: I.B. Tauris.
Attwood, F. (2010b) 'Sexualization, Sex and Manners', *Sexualities*, 13, 6, pp.742-747.
Attwood, F. (2011) 'The Paradigm Shift: Pornography Research, Sexualization and Extreme Images', *Sociology Compass*, 5, 1, pp.13-22.
Attwood, F. and Smith, C. (2010) 'Extreme Concern: Regulating "Dangerous Pictures" in the United Kingdom', *Journal of Law and Society*, 37(1): 171-188.
Baudrillard, J. (1985) 'The Ecstasy of Communication', in H. Foster (ed.) *Postmodern Culture*, London: Pluto Press.

Baudrillard, J. (2001) *The Uncollected Baudrillard*, ed. G. Genosko, London: Sage.

Baudrillard, J. (2005) 'War Porn', *International Journal of Baudrillard Studies*, 2(1), available at: http://www.ubishops.ca/baudrillardstudies/vol2_1/taylor.htm (accessed 22 April 2012).

Beck, U. (1986) *Risk Society*, London: Sage.

Best, J. (2008) 'Foreword', in S. Waiton, *The Politics of Antisocial Behaviour: Amoral Panics*, London: Routledge.

Boltanski, L. (1999) *Distant Suffering: Morality, Media and Politics*, Cambridge: Cambridge University Press.

Brown, S. (2003) *Crime and Law in Media Culture*, Buckingham: Open University Press.

Brown, S. (2011) 'Media/Crime/Millennium: Where Are We Now? A Reflective Review of Research and Theory Directions in the 21st Century', *Sociology Compass*, 5/6: 413–425.

Carline, A. (2011) 'Criminal Justice, Extreme Pornography and Prostitution: Protecting Women or Promoting Morality?', *Sexualities*, 14(3): 312–333.

Carrabine, E. (2008) *Crime, Culture and the Media*, Cambridge: Polity.

Carrabine, E. (2011) 'Images of Torture: Culture, Politics and Power', *Crime, Media, Culture*, 7(1): 5–30.

Cohen, S. (1972), *Folk-Devils and Moral Panics: The Creation of the Mods and Rockers*, London: McGibbon and Kee.

Cohen, S. (2001) *States of Denial: Knowing about Atrocities and Suffering*, Cambridge: Polity.

Cohen, S. (2002) 'Moral Panics as Cultural Politics: Introduction to the Third Edition', in *Folk Devils and Moral Panics*, 3rd edn, London: Routledge.

Cohen, S. and Young, J. (eds) (1973) *The Manufacture of News*, London: Constable.

Colligan, C. (2006) *The Traffic in Obscenity From Byron to Beardsley: Sexuality and Exoticism in Nineteenth-Century Print Culture*, Basingstoke: Palgrave Macmillan.

Debord, G. ([1967] 1977) *Society of the Spectacle*, Detroit: Black & Red Books.

Dines, G. (2010) *Pornoland: How Porn Has Hijacked our Sexuality*, Boston: Beacon Press.

Edelstein, D. (2006) 'Now Playing at your Local Multiplex: Torture Porn', *New York Movies*, Available at: http://nymag.com/movies/features/15622/ (accessed 2 April 2012).

Ellis, J. (2000) *Seeing Things: Television in an Age of Uncertainty*, London: I. B. Tauris.

Ericson, R. (2007) *Crime in an Insecure World*, Cambridge: Polity.

Ericson, R., Baranek, P. and Chan, J. (1987) *Visualizing Deviance: A Study of News Organization*, Milton Keynes: Open University Press.

Ericson, R., Baranek, P. and Chan, J. (1991) *Representing Order: Crime, Law, and Justice in the News Media*, Toronto: Toronto University Press.

Feeley, M. and Simon, J. (2007) '*Folk Devils and Moral Panics*: An Appreciation from North America', in D. Downes *et al.* (eds) *Crime, Social Control and Human Rights: From Moral Panics to States of Denial, Essays in Honour of Stanley Cohen*, Cullompton: Willan.

Foucault, M. (1979) *The History of Sexuality*, vol. I: *An Introduction*, London: Allen Lane.

Freud, S. (1991) 'Anxiety', in *Introductory Lectures on Psychoanalysis*, London: Penguin Books.

Fuery, K. (2009) *New Media: Culture and Image*, Basingstoke: Palgrave Macmillan.

Garland, D. (2008) 'On the Concept of Moral Panic', *Crime, Media, Culture*, 4(1): 9–30.

Giddens, A. (1992) *The Transformation of Intimacy*, Cambridge: Polity Press.

Gill, R. (2010) 'Supersexualise me! Advertising and the "midriffs"', in F. Attwood (ed.) *Mainstreaming Sex*, London: I.B. Tauris.

Goode, E. and Ben-Yehuda, N. (1994) *Moral Panics: The Social Construction of Deviance*, Oxford: Blackwell.

Gournelos, T. and Gunkel, D. (2012) 'Introduction: Transgression Today', in D. Gunkel and T. Gournelos (eds) *Transgression 2.0: Media, Culture, and the Politics of a Digital Age*, London: Continuum.

Habermas, J. ([1962] 1989) *The Structural Transformation of the Public Sphere*, Cambridge: Polity Press.

Habermas, J. (2006) *Times of Transition*, Cambridge: Polity Press.

Hall, S. (1992) 'The Question of Identity', in S. Hall, D. Held and T. McGrew (eds) *Modernity and its Futures*, Cambridge: Polity.

Hall, S., Critcher, C., Jefferson, T., Clarke, J. and Roberts, B. (1978) *Policing the Crisis: Mugging, the State and Law and Order*, London: Macmillan.

Hallsworth, S. (2008) 'Street Crime: Interpretation and Legacy in *Policing the Crisis*', *Crime, Media, Culture*, 4(1): 137–143.

Harvey, D. (2003) *The New Imperialism*, Oxford: Oxford University Press.

Hayward, K. (2010) 'Opening the Lens: Cultural Criminology and the Image', in K. Hayward and M. Presdee (eds) *Framing Crime: Cultural Criminology and the Image*, London: Routledge.

Hayward, K. and Yar, M. (2006) 'The "Chav" Phenomenon: Consumption, Media and the Construction of a New Underclass', *Crime, Media, Culture*, 2(1): 9–28.

Held, D. (2002) 'National Culture, the Globalization of Communications and the Bounded Political Community', *Logos*, 1(3): 1–17.

Hesmondhalgh, D. (2008) 'Neoliberalism, Imperialism and the Media', in D. Hesmondhalgh and J. Toynbee (eds) *The Media and Social Theory*, London: Routledge.

Holland, P. (2006) *Picturing Childhood: The Myth of the Child in Popular Imagery*, London: I.B. Tauris.

Hubbard, P. (2003) 'Fear and Loathing at the Multiplex: Everyday Anxiety in the Post-Industrial City', *Capital and Class*, 80: 51–75.

Hunt, L. (1996) 'Introduction', in L. Hunt (ed.) *The Invention of Pornography: Obscenity and the Origins of Modernity, 1500–1800*, New York: Zone Books.

Hunt, L. (1998) *British Low Culture: From Safari Suits to Sexploitation*, London: Routledge.

Ignatieff, M. (1999) *The Warrior's Honor: Ethnic War and the Modern Conscience*, London: Vintage.

Jones, S. and Mowlabocus, S. (2009) 'Hard Times and Rough Rides: The Legal and Ethical Impossibilities of Researching "Shock" Pornographies', *Sexualities*, 12(5): 613–628.

Kendrick, W. (1997) *The Secret Museum: Pornography in Modern Culture*, New York: Viking.

Kinnick, K. (2007) 'Pushing the Envelope: The Role of the Mass Media in the Mainstreaming of Pornography', in A. Hall and M. Bishop (eds) *Pop-Porn: Pornography in American Culture*, London: Praeger.

Levy, A. (2005) *Female Chauvinist Pigs: Women and the Rise of Raunch Culture*, New York: Free Press.

MacGlynn, C. (2010) 'Marginalizing Feminism? Debating Extreme Pornography Laws in Public and Policy Discourse', in K. Boyle (ed.) *Everyday Pornography*, London: Routledge.

McGuigan, J. (2005) 'The Cultural Public Sphere', *European Journal of Cultural Studies*, 8(4): 427–443.

McLuhan, M. ([1964] 1994) *Understanding Media: The Extensions of Man*, London: Routledge.

McNair, B. (2002) *Striptease Culture: Sex, Media and the Democratisation of Desire*, London: Routledge.

McNair, B. (2010) 'From Porn Chic to Porn Fear: The Return of the Repressed', in F. Attwood (ed.) *Mainstreaming Sex*, London: I.B. Tauris.

McRobbie, A. and Thornton, S. (1995) 'Rethinking "Moral Panic" for Multi-mediated Social Worlds', *British Journal of Sociology*, 46(4): 559–574.

Miller, D. and Kitzinger, J. (1998) 'AIDS, the Policy Process and Moral Panics', in D. Miller, J. Kitzinger, K. Williams and P. Beharrell (eds) *The Circuit of Mass Communication*, London: Sage.

Milter, K. and Slade, J. (2005) 'Global Traffic in Pornography: The Hungarian Example', in L. Sigel (ed.) *International Exposure: Perspectives on Modern European Pornography, 1800–2000*, New Brunswick, NJ: Rutgers University Press.

Morgan, R. (1980) 'Theory and Practice: Pornography and Rape', in L. Lederer (ed.) *Take Back the Night: Women on Pornography*, New York: William Morrow.

Neely, S. (2012) 'Making Bodies Visible: Post-feminism and the Pornographication of Online Identities', in D. Gunkel and T. Gournelos (eds) *Transgression 2.0: Media, Culture, and the Politics of the Digital Age*, London: Continuum.

Negri, A. and Hardt, M. (2000) *Empire*, Cambridge, MA: Harvard University Press.

Osborne, R. (1995) 'Crime and the Media: From Media Studies to Post-modernism', in D. Kidd-Hewitt and R. Osborne (eds) *Crime and the Media: The Post-modern Spectacle*, London: Pluto Press.

O'Toole, L. (1998) *Pornocopia: Porn, Sex, Technology and Desire*, London: Serpent's Tail.

Paasonen, S., Nikunen, K. and Saarenmaa, L. (eds) (2007) *Pornification: Sex and Sexuality in Media Culture*, Oxford: Berg.

Paul, P. (2005) *Pornified: How Pornography Is Damaging Our Lives, Our Relationships, and Our Families*, New York: Owl Books.

Petley, J. (2012) 'Sick Stuff: Law, Criminality and Obscenity', in D. Gunkel and T. Gournelos (eds) *Transgression 2.0: Media, Culture, and the Politics of a Digital Age*, London: Continuum.

Power, N. (2009) *One Dimensional Woman*, Hants: O Books.

Poynor, R. (2006) *Designing Pornotopia: Travels in Visual Culture*, London: Laurence King.

Ranulf, S. (1938) *Moral Indignation and Middle Class Psychology: A Sociological Study*, Copenhagen: Levin & Munksgaard.

Schiller, H. (1969) *Mass Communication and the American Empire*, Boston: Beacon Press.

Seltzer, M. (1997) 'Wound Culture: Trauma in the Pathological Public Sphere', *October*, 80: 3–26.

Sigel, L. (2002) *Governing Pleasures: Pornography and Social Change in England, 1815–1914*, New Brunswick, NJ: Rutgers University Press.

Sigel, L. (2005) 'Introduction: Issues and Problems in the History of Pornography', in L. Sigel (ed.) *International Exposure: Perspectives on Modern European Pornography, 1800–2000*, New Brunswick, NJ: Rutgers University Press.

Silverstone, R. (2007) *Media and Morality*, Cambridge: Polity.

Smith, C. (2005) 'A Perfectly British Business: Stagnation, Continuities and Change on the Top Shelf', in L. Sigel (ed.) *International Exposure: Perspectives on Modern European Pornography, 1800–2000*, New Brunswick, NJ: Rutgers University Press.

Soloman-Godeau, A. (1991) *Photography at the Dock*, Minneapolis, MN: University of Minnesota Press.

Sontag, S. (2004) *Regarding the Pain of Others*, London: Penguin.

Sparks, R. (1992) *Television and the Drama of Crime: Moral Tales and the Place of Crime in Public Life*, Milton Keynes: Open University Press.

Thompson, K. (1998) *Moral Panics*, London: Routledge.

Tomlinson, J. (1991) *Cultural Imperialism*, London: Pinter.

Turley, D. (1986) 'The Feminist Debate on Pornography', *Socialist Review*, 87–88, May–August.

Virilio, P. (1986) *Speed and Politics*, New York: Semiotext(e).

Waddington, P. (1986) 'Mugging as a Moral Panic: A Question of Proportion', *British Journal of Sociology*, 32(2): 245–259.

Watney, S. (1997) *Policing Desire: Pornography, AIDS and the Media*, 3rd edn, London: Cassell.

Weber, L. and Lee, M. (2009) 'Preventing Indeterminate Threats: Fear, Terror and the Politics of Preemption', in M. Lee and S. Farrall (eds) *Fear of Crime: Critical Voices in an Age of Anxiety*, London: Routledge-Cavendish.

Wilkins, L. (1964) *Social Deviance: Social Policy, Action and Research*, London: Tavistock.

Wilkinson, I. (2001) *Anxiety in a Risk Society*, London: Routledge.

Williams, L. (2004) 'Porn Studies: Proliferating Pornographies On/Scene: An Introduction', in L. Williams (ed.) *Porn Studies*, Durham, NC: Duke University Press.

Williams, R. ([1974] 1990) *Television: Technology and Cultural Form*, London: Routledge.

Wilson, E. (1992) 'Feminist Fundamentalism: The Shifting Politics of Sex and Censorship', in L. Segal and M. McIntosh (eds) *Sex Exposed: Sexuality and the Pornography Debate*, London: Virago Press.

Wouters, C. (2010) 'Sexualization: Have Sexualization Processes Changed Direction?', *Sexualities*, 13(6): 723–741.

Young, J. (1971) *The Drugtakers*, London: Paladin.

Young, J. (2009) 'Moral Panic: Its Origins in Resistance, Ressentiment and the Translation of Fantasy in to Reality', *The British Journal of Criminology*, 49(1): 4–16.

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Part VIII

Green criminology

Environmental hazards, natural
disasters, and ecological sustainability

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19

Green criminology and green victimization

Melissa L. Jarrell, Michael J. Lynch and Paul B. Stretesky

Introduction

Green criminology studies crimes with tremendous consequences referred to as green crimes and green harms. Green crimes include a broad array of consequences that flow from human behaviors that damage the environment. Some of these green crimes are legally prohibited by environmental laws and regulations, and may be criminal, regulatory or civil in nature. Green crimes, however, also include injurious acts that the law has yet to recognize as harmful and are in need of regulation. Green criminologists play an active role in identifying green harms that produce injury and victimization that currently exist beyond the boundaries of the law. In identifying those green harms, green criminologists draw on research from a variety of fields such as public health, environmental justice, and natural sciences that have already established criteria useful for the identification of behaviors and actions that produce environmental damage.

Unlike other forms of crime, green crime's effects tend to be persistent and long term. Ordinary crimes or street crimes usually cover short durations in time. A motor vehicle theft may, for example, take minutes. The time span of green crimes, however, tends to be measured in terms of decades or even centuries since pollutants may last and accumulate in the environment. Once a pollutant is emitted into the environment, the life course of that crime begins and continues until the pollutant is cleaned up, or until it becomes inert.

Recent research by public health scientists suggests that green crimes are produced by a complex interaction between public demands for a healthy environment and protection from environmental harms, the results of scientific research on chemical pollutants and their health consequences, and corporate interests in minimizing the reach of environmental law and regulation. This environmental law and regulatory process, sometimes referred to as the contested illness process (Brown *et al.* 2011), continually redefines the political and legal scope of green crimes, harms and victimization.

Green crimes are everywhere, and much scientific research supports this contention by noting that environmental pollution and degradation are now ubiquitous in the world around us. As a result, green crimes produce a wide range of harms and affect a broad range of victims. The victims of green crimes include not only human victims that criminologists typically study when they examine street crimes, but also include victims that escape the vision of traditional criminology by including the environment, ecosystems and ecosystem components

(e.g., waterways, wetlands, forests, etc.) and non–human animal and non–human–non–animal species as victims. As a result, green crimes include behaviors such as pollution and toxic waste disposal, the filling of wetlands, deforestation, the production of global warming pollution, animal trafficking and trade in animal parts, and many other crimes and harms that create widespread, extensive victimization. Indeed, green criminologists argue that green crimes cause far more victimization than the kinds of street crimes traditional criminologists normally examine. Thus, the main purpose of green criminology is to draw research attention to the wide range of green harms humans commit and the devastating consequences of those actions, and in so doing, hopefully stimulate not only research interest in these issues, but public concern, policies, and activism designed to alleviate these problems.

Now two decades in the making, green criminology explores the ways in which humans cause direct harm to nature and natural ecosystems and, in polluting those environments alter their functioning while creating secondary victimization for the species that inhabit Earth, from human to nonhuman animals, flora, and so forth. Green criminology also examines issues related to environmental justice or the unequal distribution of toxic harms across human communities and populations based on the class, race and ethnicity of the affected groups. In addition, green criminology examines law, forms of social control, and social policies designed to control and remedy green harms.

Green criminology does not have a single unified focus when it comes to examining green harms and victimization. Like traditional criminology, green criminology relies on different theories, and has given rise to specializations that focus on particular kinds of green crimes. One example of this kind of specialization is the branch of green criminology that focuses on crimes against animals and wildlife, a topic that has attracted much attention in green criminology and is examined in Chapter 8 by Deborah Cao in this volume. Emerging forms of green criminology have drawn on the treadmill of production theory (ToP) to explore green crimes and victimization as a consequence of the ordinary operating principles of the capitalist treadmill of production and consumption (Lynch and Stretesky, forthcoming; Stretesky *et al.*, forthcoming; Long *et al.*, forthcoming).

As noted, green crimes cause extensive victimization to environmental systems, humans and non–human species. Green criminology draws attention to purposeful human conduct such as polluting behaviors which are far more widespread than street crime and cause significantly more harm to humans than behaviors such as homicide. Worldwide, for example, ten times as many people die prematurely from air pollution exposure and the consequences of global warming air pollution, than die from homicides (Burns and Lynch, 2004). Across the globe, the accumulation of environmental toxins has driven up rates of cancer, a green form of victimization that orthodox criminology fails to address. Traditional criminology also ignores the following forms of transnational green crimes explored by green criminologists:

1   The half-a-billion Chinese citizens who live in the Yangtze River basin (or what the Chinese call the Chang Jiang River) who are exposed daily to chemical pollutants produced by some 400,000 factories in that area;
2   The 19 million residents of Delhi, India, the eighth largest metropolitan area in the world, who are exposed on a daily basis to the worst levels of air pollution in the world;
3   The 12.5 million residents of Beijing, China (the world's 19th largest city), the 20.5 million residents of Mexico City, Mexico (the world's 4th largest city), the 14.5 million residents of Cairo, Egypt (the 6th most polluted city in terms of air pollution in the world), and the 15.8 million residents of Hong Kong (ranked 9th in terms of most urban air pollution) exposed to high levels of industrial air pollution;

4   The nearly 612 million people identified above, who suffer from a variety of green victimizations that number in the trillions annually, who escape the notice of traditional criminology, are a central concern for green criminology. These people, and many like them in other parts of the world, in the course of living out their daily lives, are constantly exposed to green harms created by the process of industrial capitalism that involve conscious decisions to harm the environment, and to largely ignore the consequences of those conscious harms for the human and non-human species of the world.

In this chapter, we explore the issue of green harms in their direct (environmental destruction) and indirect (harm to humans) forms; we omit harms against animals. In the first section, we provide an overview of green criminology, types of green crimes, and how we measure green crimes. We also provide a discussion of the consequences of green crimes and provide major examples of green crimes. In the second section, we discuss green research within the field of criminology and other disciplines; highlighting the research related to: causes of green harm, environmental regulation, green victimization, environmental justice, corporate environmental crime, the media and green crimes, and the effects of exposure to toxins on criminal behavior. In the third section, we examine recent research on the relationship between green crimes, victimization, and the treadmill of production. We conclude with suggestions for future research, policy implications, and a call for action.

What is green criminology?

The traditional definition of green crimes (also referred to as environmental crimes) addresses acts or omissions that violate federal, state, or local environmental standards and laws (Situ and Emmons 2000). While green criminologists sometimes employ a traditional, legal definition of green crimes, this is not always the case. Green criminologists recognize that law is a social construction; behaviors legally recognized as green crimes include only those behaviors that law-makers and the law-making process determine should be featured as crimes. The process of making law, however, is not an objective process, and interest groups play a role in influencing which behaviors are included within the scope of law. Corporations that pollute the environment, for example, lobby law-makers to protect their interests, and also use campaign contributions to affect the behavior of law-makers and to restrict the scope of environmental law. As a result, environmental laws may be a poor mechanism for determining whether a behavior should be considered criminal or harmful in a broader sense since the way law is made is affected by the translation of economic power into political influence.

Because environmental law is a non-objective, social construction, green criminologists also refer to some acts that damage the environment and cause green victimization as crimes even though those behaviors do not violate the law on the books. Some acts, especially those committed by corporations, may not violate the criminal law but may nevertheless cause a great deal of harm to the environment and human health. As a result, green criminologists argue that these behaviors should be treated as if they were criminal (Clinard and Yeager 1980; Lynch 1990; Frank and Lynch 1992; Reiman and Leighton 1998; Burns and Lynch 2004). As an example, consider that research suggests that corporations are able to *legally* exceed permitted levels of air pollution by using loopholes in environmental law, and reporting excessive emissions as "upset events" (Jarrell and Ozymy 2010; Ozymy and Jarrell 2011; 2012). Using this legal loophole, these upset emissions events are not counted against a corporation's pollution permit requirements. Such events, which may also be purposefully planned as "accidents" to promote the financial interests of a corporation and to keep within pollution permit limits, can have

immediate and cumulative negative health effects on those residing in nearby communities, or even longer-range geographic or time effects if the accident involves large emissions into the environment. Indeed, upset events often involve large releases of concentrated toxic chemicals in a short amount of time (although some may last for weeks), unlike emissions from routine operations, and represent the release of highly concentrated pollutants that can have serious health implications. Upset events are just one of many examples of behaviors that are harmful to the environment and humans that are not considered criminal behaviors in law but which nevertheless produce severe public health consequences. In fact, green criminologists would argue that many environmental crimes are rarely depicted as "crime" in law despite the fact that many researchers suggest that environmental crime causes more illness, injury, and death than street crime (Burns and Lynch 2004; Burns *et al.* 2008).

The term and concept of "green criminology" were first introduced by Michael J. Lynch (1990), who suggested that green criminology examine "environmental destruction as an outcome of the structure of modern industrial capitalist production and consumption patterns" (ibid.: 1). Others have modified and extended this definition in various ways. Bierne and South refer to green criminology as "the study of those harms against humanity, against the environment, and against non-human animals committed by both powerful institutions and also by ordinary people" (2007: xiii). South (2007: 244) adds that green criminology "aims to provide a new perspective on the unjust exploitation of natural resources, ecosystems, humans and animals, and the consequences of this in terms of health, welfare, and rights for all affected by such actions." Emphasizing a political economic approach, Lynch and Stretesky (2003; 2007) suggest that green criminology should explore the impact of capitalism, the influence of corporations, and the political and economic nature of law-making. Others suggest that green crimes are a "holistic social problem" (Hall 2012: 373) and should be understood from a "social harm" perspective (Hillyard and Tombs 2004). White (2011) has extended this idea further, and identifies eco-global crimes against the environment as organized, transnational forms of environmental crime.

In a general sense, green crimes includes the study of a wide range of behaviors such as: the abuse and exploitation of ecosystems, natural resources and animals; corporate pollution of land, water, and air; monopolization of natural resources; disposal of toxic waste in environmental medium; the use of pesticides; global warming; habitat destruction; logging and deforestation; mountaintop mining; illegal animal trade; bio-piracy and genetic engineering; and the unequal distribution of toxic hazards as examples. Green criminologists examine the nature and distribution of pollution, disposal of toxic waste, destruction of habitats, disproportionate exposure to environmental harm, deficiencies in environmental regulation, corporate malfeasance, unequal enforcement of environmental laws, and related topics (see Bullard 1983; Pearce and Tombs 1998; Lynch and Stretesky 2003; Lynch and Stretesky 2007; White 2007).

Measuring green crimes and victimization

The scope of green crimes and victimization is admittedly difficult to measure (Burns and Lynch 2004). Green crimes involve widespread victimization and unlike conventional street crime, are more difficult to measure. Although nations gather and report statistics related to street crimes, there are virtually no uniform or national statistics on the distribution of environmental crimes. Thus, measuring green crime and victimization offers significant challenges for green criminologists.

Many nations and international law agencies (e.g., the United Nations or INTERPOL) keep track of, study and publish data on street crimes, making it fairly easy to identify the official volume of crime in the world. There is, however, no similar, single source of information on

green or environmental crimes. Rather, researchers must aggregate those data from separate sources each time they wish to discuss the scope of green crime.

In the USA, for example, numerous agencies maintain separate databases on environmental crimes and victimization (Burns and Lynch 2004). Counting these crimes may involve aggregating a variety of federal, state and local environmental crime data sources. The lack of an accessible, standardized measure of environmental crime is a two-fold problem. First, it means researchers will often define these crimes differently, and second, that they must collect data from numerous agencies every time they want to discuss the scope of environmental crime. This is not a restriction street crime researchers face. Despite these problems, it is still useful to collect such data to compare the scope of green crime and victimization to street crime, because even though such efforts likely underestimate green crimes and victimizations, those measures provide an indication of how much more widespread green crime and victimization are than street crime. We illustrate this point below.

In the USA, street crime victimization can be estimated from several sources, and the most widely used is the National Crime Victimization Survey, which estimates street crime victimizations, excluding homicides, from interviews conducted with residents of 50,000 households. On average, the NCVS estimates that there are approximately 5.5 million violent victimization incidents annually in the USA. That seems like a lot of crime, but that may simply be because there is no relevant comparison of other forms of violent victimization such as violent green crimes. We limit our comparison to violent NCVS victimizations because they are the appropriate comparison for green crimes since all green crimes involve violence to victims in the form of exposure to toxins and pollutants, or in more serious cases, when they result in diseases, illnesses or death.

As a comparative measure, we take the number of green victimizations we estimate for the 67 million Americans who live within 2.5 miles of an officially recognized or known hazardous waste site (US EPA 2011), which represents an appropriate distance for measuring the population most directly affected through contact with the substances stored in a hazardous waste site. These 67 million people under-represent the proportion of the population impacted by secondary emissions from hazardous waste sites because a number of such sites are unknown. Our estimate will under-represent the extent of this single form of green victimization.

To make our estimates comparable, we also need to adjust the NCVS's estimate to reflect violent victimization for these 67 million people, which comes to approximately 1,182,500 violent street victimizations. This population is exposed to multiple sources of exposure to hazardous waste that occur through several types of medium (air, land, water). To be conservative, we estimate that these 67 million people experience an average of 3 green victimizations a day during the year – or nearly 73.4 *billion* green victimizations for this population in a single year. This group is, therefore, 62,000 times more likely to be victimized by a green crime than street crime. To be sure, that is a *great deal of victimization from green crimes*. However, it is an incomplete picture, which underestimates the extent of green victimization incidents for this group because it leaves out other sources of green victimization.

We can extend our measure of green victimization for this group by including other, non-overlapping measures where green victimizations result from the violation of law, and only summarize our estimates instead of detailing their derivations. For example, with respect to air pollution, we estimate that the population of 67 million under examination experiences 63,387,360,000,000 green victimizations due to air pollution exposure, far outnumbering the 1,182,500 NCVS violent victimizations for this group. We can create the same estimate for water pollution exposure, which for this population would produce an additional 80,400,000 green victimizations for our study group. Adding these green victimizations together, the people

in our study population are 53.6 *million times more likely to experience a green victimization than a street crime victimization*. While this is a huge difference, we must point out we have likely underestimated the extent of green violence, and have only included three of its sources in making this comparison to street crime.

Consequences of green crimes

As noted, green crimes are responsible for widespread environmental devastation and harm to humans and animals. According to Bullard *et al.* (2009: 286), "an estimated 40 percent of deaths around the world can now be attributed to various environmental factors, especially organic and chemical pollutants." Approximately 40 million people, one-sixth of the US population, live in close proximity to one or more hazardous waste sites (Cope 2002). Contaminated drinking water, untreated human waste, and air pollution account for more than 7 million deaths each year, approximately 15 percent of annual deaths globally (Bullard *et al.* 2009: 286). In urban environments, "brown" issues (i.e. air pollution, water pollution, pesticides, oil spills, disposal of toxic waste) are of particular concern (White 2007). In the United States, insufficient attention is focused on the production and use of safe alternatives to controlling pollution, and corporations often deny or ignore their role in causing death and illness (Lynch and Stretesky, 2001). Adverse health effects from exposure to air pollution are well documented (Dominici *et al.* 2004; Moore *et al.* 2008; Puett *et al.* 2008; Litt *et al.* 2007; Peng *et al.* 2009). Childhood and adult respiratory illnesses increase with exposure to air emissions (Moore *et al.* 2008; Peng *et al.* 2009), as does heart disease (Peters *et al.* 2005; Puett *et al.* 2008).

Major examples of green crimes

In this section, we provide several examples of major environmental crimes that cause significant damage to the environment, humans and other species. There are a number of examples that could be presented, and we restrict our examples to some well-known incidents representative of the kinds of green harms of concern to green criminologists.

1   December 2, 1984, a poisonous gas leak at the Union Carbide plant in Bhopal, India, killed 4,000 people instantly and 14,000 over the course of several years from the long-term effect of exposure to toxins. This is considered the world's worst industrial accident, though the conditions leading up to this event cannot be described as accidental (Lynch *et al.* 1989). A long legal dispute followed the incident, and numerous civil and criminal cases remain pending in the USA and India. In June, 2010, seven former employees of the Bhopal plant were convicted on criminal charges in India, and were sentenced to two years in prison and $2,000 in fines each. These former employees have not been extradited by the USA to face punishment.
2   March 23, 2005, an enormous fire and explosion occurred in the isomerization unit at the BP Texas City Refinery, the third largest oil refinery in the USA. Fifteen people were killed and 170 were injured. BP had cut the refinery budget by 25 percent in both 1999 and 2005, leading to safety problems. For example, some of the equipment responsible for the explosion had been installed in the 1950s and was never updated. The explosion and fire at the facility exposed the local population to concentrated environmental pollutants.
3   April 20, 2010, an explosion rocked the Deepwater Horizon drilling rig owned by British Petroleum (BP) in the Gulf of Mexico, resulting in 11 deaths, 17 injuries and causing a massive oil spill affecting millions of people along the Gulf Coast. There is some question

as to whether the oil spill has ever been completely capped and sealed. The long-term environmental effects of the dispersants used to break up the oil spill are unknown. In the aftermath of the spill, numerous harms followed: closing of fishing and shrimping industries; decline in tourism; a significant "kill zone" for aquatic species; death of sea grass beds especially in Louisiana; extensive pollution of salt water marsh areas; doubling of the death rate of dolphins and whales; tar balls that continue to wash up in a 500-mile stretch of the Gulf have also been found to be contaminated with vibro vulnificus, a deadly bacteria that causes cholera.

4   October, 2011. Greenpeace labeled the Canadian sand-tar excavation project "the biggest crime in history." The Canadian sand tar area holds the second largest oil reserve in the world, behind Saudi Arabia's underground oil reserves. In sand tar, oil is trapped within sand deposits, and requires excavating and processing the soil to remove the oil. This process completely destroys the environment (to see the results, enter "Canadian Sand Tar Project" into a Google image search). At stake is the health of the Canadian boreal forest. In North America, the boreal forest stretches from Alaska to the Atlantic Ocean in Canada, and is the location of 25 percent of the world's remaining forest reserve. The composition of the boreal forest, rich in organic matter, makes it one of the world's largest carbon sinks. Thus, destruction of the boreal forest to access oil produces three forms of carbon dioxide pollution: (1) from the destruction of the forest and liberation of sequestered carbon; (2) from the excavation of the oil sands and their processing; and (3) from the refinement and burning of the oil derived from the oil sands. Well-known NASA Scientist, James Hansen, has commented that the volume of carbon pollution produced in this endeavor will add so much carbon dioxide pollution to the world that he has characterized the project as a "game over" endeavor from which the world cannot recover.

5   Mountaintop Removal Mining (MRM) or Mountaintop Mining (MTM). MRM is a widespread and controversial mining process used to reach coal seams by blowing the tops off of mountains. The waste from the mountaintop is bulldozed into adjacent valleys, blocking the flow of river and stream headwaters, and creating large plateaus where mountains once were found, and creating flooding problems. Chemical wastes that result from processing the coal on site are stored in large waste lagoons, that present local environmental problems from flooding and the release of toxins into the environment. Federal studies by the US government indicate that these mining activities cause serious environmental damage across the environmental spectrum. In the USA, the US EPA estimates that 2,200 miles of mountaintops have already been cleared using MTM techniques in just the Appalachian mountain range alone.

6   Kingston Coal Ash Spill. December, 2008. The earth dam for an 84-acre coal ash slurry lagoon containing 5.4 million cubic yards of coal ash broke, covering affected areas with as much as 6 feet of coal ash pollution. The spill will take years to clean: six months after the spill had occurred, the government estimated that only 3 percent of the spill had been remediated. The spill affected local residents, rivers, wildlife, and forest. A similar spill occurred a decade earlier in Martin County, Kentucky, that was estimated to be 30 times the size of the *Exxon Valdez* oil spill.

Green research

Although green research has increased dramatically in the past decade, this research primarily appears in disciplines more "critical" of environmental destruction than criminology. There has been a particular neglect of green criminological research by American criminologists (Lynch

and Stretesky 2007). Before we discuss green research, we will provide a brief overview of the environmental movement that has contributed to our understanding of green crimes, policies, and movements.

The environmental movement

Environmentalism in the nineteenth century was characterized by the "exploitative capitalist paradigm" (Taylor 2000). Toward the turn of the twentieth century, environmentalists cautioned that with rapid urbanization and industrialization, our nation must focus on preserving nature and protecting species for the enjoyment of later generations. Leaders of the "romantic environmental paradigm", including Rosseau, Muir, Marsh, and others, challenged people to protect the wilderness and live harmoniously with nature (Taylor 2000). During the 1960s, however, environmental problems affecting human health were becoming increasingly apparent. Rachel Carson's book *Silent Spring* (1962) highlighted industrial and government practices with respect to the use of pesticides and other chemicals. Citizen groups grew in number and fought for more governmental involvement in the regulation of environmental hazards. The "new environmental movement" evolved from the social fervor of the 1960s (Taylor 2000) and involved legal–scientific groups and the creation of the Natural Resources Defense Fund (NRDC), the Sierra Club Legal Defense Fund (SCLDF), and the Environmental Defense Fund (EDF) (Cole 1992). In early 1970, Congress authorized the creation of a federal agency to oversee federal anti–pollution efforts and administer regulatory and environmental protection legislation: the Environmental Protection Agency (EPA).

Although the "new environmental movement" (Taylor 2000) can be credited with aiding in the creation and implementation of federal environmental legislation aimed at preserving nature and regulating pollution, their efforts were not intended to achieve equitable justice. The "new environmental movement", comprised mainly of college–educated, white, middle-class activists and legal scholars with a growing enthusiasm for outdoor recreation, was more concerned with resource conservation than with human environmental hazards and more inclined to strive for small systematic changes rather than radical political and social changes. The "environmental justice paradigm" (ibid.) involved activists who are most directly affected and more severely affected by environmental problems (Cole 1992). Mainstream environmentalists are primarily concerned with aesthetic and recreational considerations; are overwhelmingly white and middle class, use litigation for problem solving; and typically pinpoint a single bad actor as the cause of an environmental problem. In contrast, grassroots activists are often fighting for health and home; are primarily poor and working-class people of color; often have a greater distrust of the law and more experience with non-legal strategies; they adopt a social justice orientation that calls for structural level changes to address the deeper problems of poverty, crime, unemployment, and environmental destruction.

Environmental regulation

In addition to drawing attention to the scope of green crimes, green criminologists have also paid significant attention to examining traditional environmental violations of law. As an example, we report the results of a handful of such studies below.

Self-policing has become an important mechanism used to monitor the occurrence of environmental crimes. Essentially, self-policing requires law-breakers to report when they violate the law instead of required environmental law enforcement agencies finding those violations. Stretesky (2006) examined the self-policing of companies that disclosed environmental

violations to the EPA in comparison to companies that violated environmental laws but did not disclose their violations. His results indicated that EPA inspections and enforcement actions did not increase self-policing behavior, suggesting that the EPA has little power to increase self-policing of environmental violations. Such studies suggest that self-policing is an inefficient method for controlling environmental law violations.

Other green criminologists have examined whether the class and race characteristics of a location affect the kinds of penalties applied to violators of environmental laws. Lynch, Stretesky, and Burns (2004a) examined whether petroleum refineries that violated environmental laws in black, Hispanic, and low-income areas received different fine amounts than refineries that violated environmental laws in White and more affluent communities. The authors found that "black and low-income communities appear to receive less protection (via the deterrence goal of monetary penalties) from the EPA than areas with high concentration of White and high-income residents" (ibid.: 436–437). In a similar study examining petroleum refinery violations from 2001–2003, the authors found that refineries in Hispanic and low-income zip codes received lower penalties than refineries located in non-Hispanic and more affluent zip codes (Lynch *et al.* 2004b). The authors conclude that penalty disparities are not the result of the seriousness of the violation, number of past violations, facility inspection history, facility production or EPA region but are the result of unequal protection of environmental laws for low-income and minority communities.

O'Hear's (2004) analysis of environmental crime sentencing revealed that environmental defendants are treated more leniently than other federal defendants and that even in cases that lead to incarceration, defendants usually receive probation and/or terms of incarceration less than six months. Judges appear to view environmental defendants as less culpable than other criminal defendants, undermining the seriousness of environmental crimes. Judges are likely inexperienced to some extent in presiding over environmental crime cases; O'Hear (ibid.) notes that judges, on average, come across an environmental defendant only once every six years. Brickey's (2001) analysis of 330 hazardous waste prosecutions revealed that nearly two-thirds of cases involved more than one environmental statute and that many cases involved non-environmental crimes such as conspiracy and making false statements, supporting the idea that only the most serious environmental cases lead to criminal prosecution.

Green victimization

Environmental victimization is complex in that it can be direct and indirect, cause immediate harm and long-lasting harm, it can be individual or collective, it may involve routine practices or "accidents," and the victims include the environment, humans, and animals (White 2011). Often, environmental crime victims may not even know that they are victims as the harm does not always manifest immediately and it is challenging to determine who caused the harm (Boyd 2008; Skinnider 2011; Hall 2012). Victims' rights advocacy and legislation in the 1980s and 1990s led to the creation and implementation of the Crime Victims' Rights Act (CVRA), which was signed into law in 2004 as part of the Justice for All Act of 2004 (JFAA). While more attention is now given to victims of traditional "street" crimes, criminal justice victims' rights advocates have generally ignored victims of corporate crimes (Moore and Mills 1990; Stretesky and Lynch 1999; Fattah 2010; Hall 2012). The common image of a victim is a victim of murder, rape or robbery rather than a victim of a white-collar, corporate, or environmental crime (Friedrichs 2010). "Traditionally, harmful environmental practices have not been viewed with the same moral repugnance as crimes against person or property" (Skinnider 2011: 19).

Environmental justice

It is well established in the sociological and criminological literature that low-income people of color are more likely to be exposed to environmental risks than other groups (Bullard 1983; U.S. General Accounting Office 1983; United Church of Christ 1987; Mohai and Bryant 1992; Stretesky and Lynch 1999). Environmental justice (EJ) assumes that every individual, regardless of race, ethnicity, class, or gender, has the right to be free from environmental destruction and victimization, and deserves equal protection from pollution under the law (Bullard, 1994). In contrast to this assumption, the environmental justice literature supports the premise that minorities and the poor face a disproportionate share of environmental burdens including hazardous waste, toxic facilities, chemical pollution, etc. (Bullard 1983; U.S. General Accounting Office 1983; United Church of Christ 1987; Lavelle and Coyle 1992; Mohai and Bryant 1992). The origins of the EJ movement can be traced to Warren County, North Carolina, and the siting of a PCB-contaminated landfill in a predominantly African-American neighborhood (McGurty 2000). Organized protests resulted in the first government-sponsored studies pertaining to environmental justice (Lynch and Stretesky 2007). The General Accounting Office (1983) found both racial and income disparities in all of the EPA's Region IV hazardous waste sites. Dr. Robert Bullard, a pioneer of the environmental justice movement and author of one of the first environmental justice case studies, found that garbage dumps in Houston were disproportionately located in African-American communities (Bullard 1983). In 1987, the United Church of Christ's Commission for Racial Justice presented its groundbreaking study, *Toxic Waste and Race*, in the United States. The study concluded that commercial hazardous waste facilities and uncontrolled toxic sites were disproportionately located in communities of color. Furthermore, the report stated that 3 out of every 5 African-American and Latino residents across the United States lived in communities with uncontrolled toxic waste sites (UCC 1987). Eight years later, in an update of the 1987 study, researchers found even greater racial disparities and similar results were noted in a 20-year update in 2007.

Clean-up efforts at National Priority List sites are quicker and fines imposed on polluters are much higher in predominantly white communities than in minority communities (Lavelle and Coyle 1992; Sarokin and Schulkin 1994). Penalties for hazardous waste law violations were 500 percent higher in white communities and it took communities of color 20 percent longer to be listed as priority clean-up sites under CERCLA than white communities (Lavelle and Coyle 1992). "There is a racial divide in the way the U.S. government cleans up toxic waste sites and punished polluters. White communities see faster action, better results, and stiffer penalties than communities where Blacks, Hispanics, and other minorities live" (ibid.). An analysis of state environmental enforcement found that states perform less enforcement in poor counties (Konisky 2009).

Corporate environmental crime

Legal research has demonstrated that when it comes to prosecution of environmental crime "it is small businesses that generally bear the brunt of state intervention . . . those most responsible for the vast majority of environmental violations, namely the large corporations, are . . . the least likely to suffer prosecution except in extraordinary circumstances" (White 2010: 373). Many of the actions that cause such widespread human and environmental harm result from willful acts of negligence that negatively affect human health and produce a multitude of environmental victims (Lynch *et al*. 2002).

> The problem is learning to accept that when companies dump chemicals into rivers, streams, and landfills, or alongside roadways, they do so purposefully and with knowledge that the likely results of their actions will include injury and death for those exposed to their waste products. These are not accidents – they are planned actions no less serious than assaults or killings.
>
> (Stretesky and Lynch 1999: 169)

Industry has learned to deal effectively with environmental crime and justice legislation, mandates, and communities. During the 1970s and 1980s, as more and more laws established industrial rules and regulations, industry was faced with a vast bureaucracy and expensive clean-up costs. To challenge environmental justice legislation and mandates, corporations have utilized a wide range of techniques including: the "greenwash" and "spin" of environmental justice claims (Stauber and Rampton 1995) and "environmental blackmail" (meeting suggested standards will force the industry to move, costing the communities jobs). Industry has spent millions of dollars on PR campaigns to protect their image and promote their new "green" attitudes. Each year, Earth Day is sponsored by the worst polluters in the business. Grassroots activists have been called "insane," "half-cocked nut cases," "extremists," and "opportunists" (Roberts and Toffolon-Weiss 2001). Corporations are also fighting for "voluntary standards" and are spending billions of dollars on no-holds-barred lobbying and on PR campaigns that present their new, greener image (Lynch and Stretesky 2001).

Environmental toxins that affect behavior and crime

Exposure to toxins influences behavior in terms of increased levels of aggression and criminal offending. Exposure to chemicals, pesticides, and heavy metals such as lead, cadmium, and mercury, affect brain development and cognitive development, which in turn affects behavior (Denno 1990; Bellinger *et al.* 1992; Binns *et al.* 2007). Lead exposure has been linked to conduct orders and/or aggressive behavior (Needleman *et al.* 1996; Chen *et al.* 2007) as well as delinquency and criminal behavior (Denno 1990; Dietrich *et al.* 2001; Needleman *et al.* 2002; McCall and Land 2004; Stretesky and Lynch 2001; 2004). Since these environmental toxins have health and behavioral effects, minority and lower-class neighborhoods are also more likely to experience a disproportionate share of negative health and behavioral outcomes. Studies have long suggested that air pollution can adversely impact behavior (Evans and Jacobs 1981). Previous scientific literature, for example, has established that a number of different environmental toxins affect human behavior. Many of these toxins include heavy metals, though there is also an indication that endocrine-disrupting pollutants can also affect behavior (Colborn *et al.* 1997). Green criminologists have tested some of these assertions with respect to crime.

In a series of articles, Stretesky and Lynch (2001; 2003; 2004) examined the relationship between environmental lead levels and the distribution of crime, as well as racial variations in the distribution of lead pollution. Lead pollution is a particularly serious problem for children, as lead has its most detrimental affects during development. Prior research had shown these detrimental effects on children, and some of that research also indicated that minority children were much more likely to be impacted by exposure to environmental lead pollution than whites. Those studies, however, have been undertaken in a limited number of locations, and there remains a question concerning how widespread such relationships might be. To address that issue, Stretesky and Lynch (2003) examined the proximity of lead to elementary schools in Tampa, Florida, and whether proximity to lead pollution varied by the racial and class composition of each school. They found that distance to lead pollution was indeed impacted by the race and

class characteristics of elementary school children, and schools with a higher percent minorities and lower income were found to be significantly closer to lead hazards. Based on this finding and prior literature, Lynch and Stretesky (2007: 258) have argued that lead exposure has numerous detrimental consequences because proximity to lead pollution may

> affect learning ability, alter behavior in ways that delay school progress and maturation, perhaps leading to poor school performance, produce an increased likelihood of dropping out, and a diminished ability to obtain a well-paying, satisfying job, or enter a legitimate career path.
>
> (ibid.: 258)

In other studies, Stretesky and Lynch have confirmed the relationship that medical researchers have found between lead and crime at the individual level also exists at the structural level. Using biological methods and sampling such as obtaining lead measures from blood level, bone and teeth, medical researchers have demonstrated that children who are more likely to engage in delinquency, are also significantly more likely to have elevated body lead levels. The question is whether that pattern is strong enough to persist at higher levels of aggregation, and for other kinds of offenses. Stretesky and Lynch's research supports the lead–crime connection using data across all US counties for the crimes of homicide, and aggregated property and violent crime.

A Public Citizen study (2005) supports these contentions in relation to other detrimental affects of exposure to toxins. In their 2005 study, Public Citizen assessed the relationship between school attendance rates in Texas public schools near refineries, and air pollution upset emissions events at nearby petroleum refineries. Schools were found to have dramatically decreased rates of attendance following an upset event. This has significant implications for children. Not only are children more susceptible to heavy doses of toxic pollutants (a condition that upset events represent), but as prior research indicates, exposure to such events is likely to be unevenly distributed, having a great likelihood of affecting minorities and the poor. Boston Physicians for Social Responsibility (2000) found that more than half (53 percent) of all toxic chemical emissions reported to the federal *Toxic Release Inventory* are known or suspected as developmental and neurological toxins.

The media and green crimes

Lynch, Nalla, and Miller (1989) analyzed media coverage of the Union Carbide lethal gas leak in Bhopal, India, which resulted in the immediate deaths of over 2,000 people. The authors compared articles and pictorial representations of the event as depicted in American and Indian magazines. American magazines portrayed the event as an "accident" or as a disaster and labeled Union Carbide as a victim. Conversely, Indian magazines labeled the event as a crime and portrayed Union Carbide as the negligent offender. Similarly, Lynch, Stretesky, and Hammond (2000) emphasize that most environmental problems and disasters (i.e. pollution, hazardous waste dumping/siting) are described in the news media as accidents. In addition, the authors suggest that it is common to depict environmental pollution as the "price we pay for technology" (Lynch *et al.* 2000: 115). Lynch *et al.* (ibid.) found that only 8 (1.5 percent) of 544 cases of chemical crimes in Tampa were actually reported in the *Tampa Tribune*. Further-more, while there were only 47 homicides in Tampa in 1995, there were 88 articles on these particular homicides and 4,089 articles concerning homicide in general. Overall, the study found that there was no discussion of corporate negligence in news media coverage of environmental crime in Tampa.

Jarrell (2007) examined print news media coverage of federal penalties assessed against the petroleum refining industry. While there are many federal petroleum refining industry violations, only a limited number receive media attention. This lack of media coverage suggests that this crime is considered less important despite the harm to the environment and human health produced by petroleum refining industry violations. Lack of attention by the news media may lead to public misunderstanding and ignorance of the causes and consequences of environmental crime. An analysis of media coverage of major Clean Air Act indictment and trials involving a CITGO petroleum refinery in Corpus Christi found similar results to Jarrell's (2007) media content analysis of petroleum refining industry violations. Human health concerns were either ignored or glossed over; the offenders were given the opportunity to defend themselves liberally in most articles while the victims were rarely included or quoted in the articles; and CITGO's actions were often referred to as regulatory issues rather than criminal behaviors.

The treadmill of production and green crime

As noted by Lewis and Henkels (1998: 126), "it is no longer a secret that economic development in the United States has generated as a by-product an enormous amount of pollution and hazardous waste." 'Treadmill of production' (ToP) is an analogy used to describe how the economy drives society's continuous march toward ecological destruction (Schnaiberg 1980). That framework provides a context for understanding environmental crime. The notion that the treadmill is driven by the capitalistic tendency to constantly expand is consistent with Lynch's (1990) call for a green criminology rooted in political economic analysis. We provide an example of the relevance of treadmill theory green criminology by drawing upon events that took place in Warren County, North Carolina, during the 1980s. We demonstrate how treadmill theory can be used to frame the study of environmental crime, deviance, and victims.

Schnaiberg laid out his theory of treadmill of production (ToP) in his book, *The Environment: From Surplus to Scarcity* (1980), which details the increased role chemical technology plays in enhancing productivity by making the extraction of natural resources, their processing, and their transformation into commodities more efficient, thereby increasing profits. This process began to transform the American economy following WWII. Even today the American Chemistry Council (2011: 2) reports that

> Chemistry transforms raw materials into the products and processes that make modern life possible. America's chemical industry relies on energy derived from natural gas not only to heat and power our facilities, but also as a raw material, or "feedstock," to develop the thousands of products that make American lives better, healthier, and safer.

In Schnaiberg's view, the increase in productivity promoted by chemically-aided production came at a cost – increased ecological disorganization and destruction. Specifically, chemical technology, when combined with the expansionist tendencies and ideology of capitalism, represents a significant threat to the biosphere. This is the case because economic systems interfere with the natural functioning of ecological systems.

As Schnaiberg (1980: 13) suggests, nature has its own production function that creates biological material through nature's lifecycle of birth, growth, death, and decomposition. As production takes place in nature, two laws of thermodynamics must be followed. First, energy can be transformed, but not created or destroyed. Second, as energy is transformed, it becomes less organized (Schroeder 2000). In short, some amount of ecological disorganization occurs

through nature's production process. This is a relatively slow process in nature. Human economic activity, especially the chemical treadmill of capitalist production and consumption, interferes with this natural cycle and its pace, causing it to accelerate significantly. In this way, the ToP causes a rapid expansion of ecological disorganization.

Capitalism is the major culprit in speeding up ecological disorganization. The owners of production extract, sell, buy and use natural resources at an ever increasing pace to expand the capitalism system and profit. To enhance profits, capitalists employ technological innovations that reduce costs by saving on labor expenses (Magdoff and Foster 2011). At the same time, this increases ecological disorganization through two processes: ecological withdrawals, and ecological additions.

Ecological withdrawals are the harms the ToP produces when using chemical technologies to extract resources. These technologies make it easier to extract raw materials and increase extraction rates, and at the same time decrease the costs of extracting raw materials. Under the ToP, however, ecological withdrawals driven by these chemically intensive extraction processes harm the ecology and damage its ability to reproduce itself. Numerous examples of this process exist. For example, gold is now excavated using chemical mining technology and high pressure water streams that dig large craters into the earth to unearth gold deposits and in the process destroy local ecological units. In the USA, coal is now widely mined using mountaintop removal mining techniques, which involve the use of high-power explosives to blow the tops off mountains to get to coal seams faster. In the Appalachian region of the USA alone, it is estimated that more than 470 mountaintops and more than 300,000 acres of hardwood forest have been destroyed by this process. The waste from mountaintop mining has also buried creek, stream and river headwaters, and changes their course, sometimes resulting in significant flooding.

In addition to ecological withdrawals, the ToP creates significant ecological additions. In the USA, for example, an average of 5.3 billion pounds of toxic waste has been added to the environment each year. These toxic pollutants have numerous consequences for human, non-human species and the environment. Exposure to these toxins can, for example, drive up rates of illness and disease, promote learning disabilities, and even affect gender assignment and preferences. Exposure to some of these chemicals have also been linked to the distribution of crime.

Schnaiberg's (1980) description of the relationship between the economy and the ecology can be used to classify green crimes according to their role in the production process. First, there are those crimes that occur because natural resources are extracted from the ecosystem. These crimes may involve the extraction of timber, oil, minerals, plants, fish and other wildlife. Second, there are those crimes that result from adding hazardous and toxic substances to the ecology. These crimes may involve the dumping of hazardous waste, the release of harmful chemicals, and the disposal of unwanted products. Because economic production is the driving force behind ecological withdrawals and additions, economic production also shapes social reactions to these behaviors, and affects the kinds of law produced to control these harms, and the enforcement of those laws and the social inequality that results from ecological withdrawals and additions. Thus, the economy impacts the environment and shapes the types of harmful behaviors society is willing to allow that might otherwise be treated as deviant and criminal. Moreover, the negative consequences of ecological withdrawals and additions are not equally distributed among the social classes. It is well documented that minorities and the poor are more likely to be victims of the types of harm that result from production. To better illustrate these points and demonstrate the importance of treadmill of production for criminology, we draw upon the case of Warren County, North Carolina.

Warren County, North Carolina

Warren County, North Carolina, provides an excellent example of the way ecological with-drawals and additions can impact crime and justice. Stretesky (2008) argues that the Warren County environmental crimes were the result of changes in production that led to the illegal disposal of PCB waste. The story of Warren County begins with the discovery of the class of chemicals known as polychlorinated biphenyls (or PCBs). PCBs do not exist in nature but are created by humans through manufacturing by a process of chlorinating oils (Barbalace 2003). The creation of PCBs in the early 1900s had important production implications as noted by Barbalace (ibid.: 1):

> First manufactured by Monsanto (the only American company to manufacture PCBs) in 1929, PCBs were quickly acclaimed as an industrial breakthrough . . . All in all, they seemed to be the perfect oil for use in dielectric fluids, and as insulators for transformers and capacitors. Not only were PCBs hailed for their role in preventing fires and explosions, they were actually required by fire code. Uses for PCBs quickly expanded to include hydraulic fluids, casting wax, carbonless carbon paper, compressors, heat transfer systems, plasticizers, pigments, adhesives, liquid cooled electric motors, fluorescent light ballasts, and the list goes on.

In short, PCBs materials were extracted from the environment, combined through manu-facturing, and used to facilitate efficient energy transfers and the further extraction of natural resources from the environment (e.g., coal, for example). The use of PCBs was significant to the economy and to the expansion of production (Risebrough *et al.* 1968). Over time, PCBs became less important to production because of changes in mining technology and the decreased use of transformers and capacitors. In addition, PCBs were discovered to be highly toxic to the ecosystem and, by the 1960s scientists were reporting that PCBs were a global threat (ibid.). There was considerable political activism surrounding environmental hazards such as PCBs and environmental organizations pushed hard for their ban (Colborn *et al.* 1997). Eventually, the United States Congress banned PCB production (but not their use) in 1979 (Schwarzman and Wilson 2009).

   The ban of PCB production is not the end of the story, however. While PCBs were no longer critical to manufacturing production and natural resource withdrawals, they still persis-ted in the environment where they were causing significant harm when released in the form of ecological additions (Colborn *et al.* 1997). Moreover, the use of PCBs persisted and many closed transformers continue to use PCBs to this day. The potential market in recycled PCB oil from transformers created one of the most costly environmental crimes in North Carolina history. One company, Ward Transformer, was in the business of purchasing, refurbishing, and reselling high voltage transformers. In the course of business, Ward Transformer had a need to dispose of the PCB–laced oil that was contained in the used transformers that they purchased for resale. In response to the public danger, Congress placed restrictions on PCB disposal through the Toxic Substances Control Act (15 U.S.C. §§ 2601–2629). As a result of the new and costly regulations PCB disposal fees increased. The Act paved the way for the creation of PCB entrepreneurs who could buy and sell the hazardous chemicals. One entrepreneur, Robert Burns, created a company called Transformer Sales Company that could store PCB oil for later resale to various transformer companies at a significant profit (*United States of America v. Robert Earl Ward Jr.*, 676 F.2d 94). Burns hoped his company would make him the "PCB King."

Burns made a deal with Ward to dispose of the PCBs that Ward Transformer had stockpiled while buying transformers for approximately $1.70 per gallon (*United States of America v. Robert Earl Ward Jr.*, 676 F.2d 94). Ward planned on transporting the PCBs back east to his warehouse where they would be eventually packaged and resold. The deal stipulated that after the work was completed that Burns would use the profit from the transaction to repay Ward nearly $50,000. Unfortunately Burns found out that the transportation costs associated with moving the hazardous waste from Ward Transformer to Transformer Sales was prohibitively expensive and resulted in a significant economic loss (*United States of America v. Robert Earl Ward Jr.*, 676 F.2d 94). Thus, Burns confronted Ward to confess that he would not be able to repay his debt given the miscalculation in transportation costs (*United States of America v. Robert Earl Ward Jr.*, 676 F.2d 94). The two men then devised a plan to dump the PCBs illegally at a nearby military facility. That plan did not work and only resulted in the equipment becoming stuck in the sand and betraying obvious signs that a crime had taken place. Thus, Ward and Burns turned to a more secretive method of disposal when they modified a truck at Ward's facility. The modified truck had a manual valve that could be operated to release the used PCB transformer oil from the right side of the truck. The truck could then be driven around the state at approximately 30 miles per hour while a passenger in the truck operated the valve and released a steady stream of PCBs along the roadside (Burns *et al.* 2008). Burns employed his two sons to drive the truck along rural roads in North Carolina and dump the PCBs. Unfortunately, for Ward, Burns, and the two boys, the PCBs killed the roadside vegetation, which eventually led to their detection (*United States of America v. Robert Earl Ward Jr.*, 676 F.2d 94). The contaminated soil was tested by the authorities in North Carolina and found to be highly toxic. In all, Ward, Burns and his sons contaminated nearly 243 miles of rural country road in North Carolina (Stretesky 2008). While the production of PCBs was not defined as criminal prior to the ban, changes in production and pressure from the public redefined the disposal and use of these chemicals. When the law finally caught up with the harm the chemicals caused, it created a market that led to their illegal disposal. In the end, both Ward and Burns were sent to prison for their acts (*United States of America v. Robert Earl Ward Jr.*, 676 F.2d 94).

The contaminated soil along the North Carolina roadside was ultimately removed, only to be shipped to a specially designated and newly created PCB landfill in Warren County, North Carolina. The landfill was dubbed the 'Cadillac of landfills' and placed in the town of Afton which was more than 84 percent black (Bullard 1990). The community where the landfill was located was largely African-American and poor (ibid.). The result was a significant number of protests and the accusation of environmental racism (McGurty 2000). These protests are sometimes described as the watershed event that launched the environmental justice movement, though there are many such similar events and a myriad of causes that have led to the movement as a whole (Cole and Foster 2001). Thus, the waste stream that had been created through chemical technology had found its way to the most marginalized community through the path of least political resistance (Shelley and Stretesky 2008). This represents an environmental injustice and demonstrates how the treadmill process harms those members of society who have the fewest social, political and economic resources. Although citizen groups within the community protested and opposed the landfill, in the end the landfill was sited in Warren County (Bullard 1990). Thus, the lack of enforcement practices associated with the TSCA in the case of Ward Transformer intensified environmental injustice by moving PCB waste streams into a marginalized community. This type of disposal not only occurs within the United States, as the Warren County case demonstrates, but also occurs when the USA ships its waste overseas where the residents of developing countries often become the victims of illegal disposal practices (White 2008). For instance, consumers who believe that they are properly disposing of computer

equipment through green recycling programs are likely unaware that those computers often find their way into dumps in poor countries where they are sifted through by children who are exposed to environmental hazards. Unfortunately, for the residents of Warren County, the PCBs have begun to leak from the landfill and poison the community (Bullard 2004).

As this case study of Warren County demonstrates, the treadmill of production theory helps frame the crime and injustice in terms of the political economy. The need for production under capitalism created what Pearce and Tombs (1998) have described as "toxic capital" that led to the proliferation of PCBs across the globe with little concern for the health consequences or the ecosystem (Risebrough *et al*. 1968). When the legitimacy of law was questioned by scientists and protested by environmental groups, PCB production was eventually banned. However, the PCB ban did not prevent the disposal of these hazardous chemicals into the environment. Rather, the market for PCBs made their disposal more dangerous by moving it underground and unregulated. In addition, in an attempt to protect the residents of North Carolina from the dangerous products of the chemical revolution, the PCBs were collected and then concentrated in the most economically and disadvantaged community in the state where they continue to cause environmental problems for the community residents.

Warren County and green criminology

Events like Warren County play out every day across different levels of governance. For instance, the treadmill theory points out that the rates of natural resource extraction have decreased in developed countries where the cost of natural resources is prohibitive because the transaction costs of extracting those resources are too high (Gould *et al*. 1996; Gould *et al*. 2008). As a result, the damage associated with natural resource extraction is occurring mostly in developing countries, as they become the targets of multinational companies that are attempting to find deals on natural resources that can be used in production. For example, the chief economist of the World Bank, Joseph Stiglitz, suggests that "it is not hard for a country rich in natural resources to find investors abroad willing to exploit those resources, especially if the price is right" (Mabey and McNalley 1999: 27). While developed countries extract natural resources from less developed countries, they also dispose of hazardous waste in those same countries (Gould *et al*. 2008). This pattern of withdrawals and additions allows production to continue to increase within a legal structure that does not prevent such harm since many developing countries do not have the laws or enforcement resources to prevent the environmental damage done in the name of production.

Future research

The volume of work that remains to be done on the issue of green crime and victimization, its devastating consequences, and methods for controlling this problem is, at this point, essentially endless. Despite the importance of these issues, increased evidence of the effects of processes such as global warming, and ever present scientific reminders of the harms caused by chemical pollution and toxic waste, traditional criminology continues to ignore these problems as if they were non-existent and instead commands that we rivet our attention on the street offender and their victims. While street crime is certainly harmful, as we have shown earlier, the harms it produces pale in comparison to those caused by green crimes. Thus, one area of green criminology that requires attention is the critique it offers of traditional criminology. Less attention has addressed this point than legitimizing green criminology. In the broader picture, or in relation to the findings of science, it is not green criminology that must be legitimized. Rather, it is the

traditional criminologist who must be excused for their ignorance in excluding green crimes as an important aspect of the crime problem.

Conclusion

As noted throughout this chapter, green crimes are global in nature, universally affecting every living entity on our planet and disproportionately affecting the poor, minorities, and vulnerable populations such as women and children. The causes of green crimes and harms are rooted in global capitalism and political economies. Policies, laws, mandates, declarations, and the like are not adequate responses to the large-scale problem of green harm that threatens nations, states, cities, communities, workers, animals, and eco-systems. The emphasis on laws and policies as a response to the problem fits well within the existing power structure. Laws and policies often look very good on paper but in practice, these policies and laws are often inadequate at best. Recognition and acknowledgment of the problem are a step in the right direction. However, a long-term vision is needed which is not viable in a world that is infatuated with short-term gratification. Green crimes and green harms are massive social problems that can only be understood in the context of the larger political economy and through the analysis of concentration of power. A traditional criminal justice response, through regulatory agencies, is not sufficient to address green crimes and green harms. Regulatory agencies are stymied by the political process, are often in bed with industry, and in many nation-states, are as corrupt as the offenders that commit such crimes. An emphasis on social and green justice will manifest in a variety of ways but must begin with the "mobilization of opinion" (White 2011: 138). The public must see green crimes as "real" crimes and that green harms are a major social problem affecting our basic survival.

Green crime, unlike street crime, which has declined across the face of the globe in advanced nations over the past two decades, present a continuous and expanding problem. We have already made this point in our collective works on numerous occasions, and do not expect that in making this observation once more that we will uproot the criminological traditional, persistent and steadfast focus on street offending. Yet, we find that we must once again make that point in an effort to persuade other criminologists to take up the study of green crime and victimization. There is little to be lost in doing so – after all, criminological theories of crime are not very efficient and are quite bad at explaining crime, and certainly have not themselves been the cause of crime declining, or even much relied upon to affect policy discourse on crime. At the same time, there is much to be gained in taking up a green position such as aiding in the battle against environmental destruction, fighting against environmental injustice, and protecting the next generation from harms they will inherit from us.

Discussion questions

1   What is green criminology? What are some examples of green crimes? Why is it important to study green crimes?
2   Why is it challenging to measure green crimes? Given these challenges, how do we measure green crimes?
3   Green crimes cause extensive victimization. Describe the consequences of green crimes and the ways in which people are victimized by green crimes.
4   How do environmental toxins affect human behavior?
5   What is the "treadmill of production" and how does this framework provide a context for understanding green crimes?

Websites

Carbon Dioxide Information Analysis Center: http://cdiac.ornl.gov/.
Center for Health, Environment, and Justice: http://chej.org/.
Environmental Health News: http://www.environmentalhealthnews.org/.
Environmental Protection Agency: http://www.epa.gov/.
International Green Criminology Working Group: http://greencriminology.org/.

References

American Chemistry Council (2011) *Shale Gas and New Petrochemicals Investment: Benefits for the Economy, Jobs, and US Manufacturing*, available at: http://www.americanchemistry.com/ACC-Shale-Report (accessed 10 August 2012).

Barbalace, R.C. (2003) *The Chemistry of Polychlorinated Biphenyls*, available at: http://Environmental Chemistry.com/yogi/chemistry/pcb.html/_(accessed 9 August 2012).

Bellinger, D. C., Stiles, K. M. and Needleman, H. L. (1992) "Low-Level Lead Exposure, Intelligence and Academic Achievement: A Long-Term Follow-Up Study," *Pediatrics*, 90, 855–861.

Bierne, P. and South, N. (eds.) (2007) *Issues in Green Criminology: Confronting Harms Against Environments, Humanity, and Other Animals*, Portland, OR: Willan Publishing.

Binns, H. J., Campbell, C. and Brown, M. J. (for the Advisory Committee on Childhood Lead Poisoning Prevention) (2007) "Interpreting and Managing Blood Lead Levels of Less than 10 G/Dl in Children and Reducing Childhood Exposure to Lead: Recommendations of the Centers for Disease Control and Prevention Advisory Committee on Childhood Lead Poisoning Prevention," *Pediatrics*, 120, e1285–e1298.

Boston Physicians for Social Responsibility (2000) *In Harm's Way: The Toxic Threat to Child Development*, Boston: Greater Boston Physicians for Social Responsibility (GBPSR).

Boyd, C. C. (2008) "Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work?" *William and Mary Environmental Law and Policy Review*, 32(2): 483–512.

Brickey, K. (2001) "Charging Practices in Hazardous Waste Crime Prosecutions," *Ohio State Law Journal*, 62: 1077–1124.

Brown, P., Morello-Frosch, R. and Zavestoski, S. (eds.) (2011) *Contested Illnesses: Citizens, Science and Health Social Movements*, Berkeley, CA: University of California Press.

Bullard, R. (1983) "Solid Waste Sites and the Houston Black Community," *Social Inquiry*, 53: 273–284.

Bullard, R. (1990) *Dumping in Dixie: Race, Class, and Environmental Quality*, Boulder, CO: Westview Press.

Bullard, R. (1994) *Unequal Protection: Environmental Justice and Communities of Color*, San Francisco: Sierra Club Books.

Bullard, R. (2004) "Environmental Racism: PCB Landfill Finally Remedied by No Reparations for Residents," available at: http://www.ejrc.cau.edu/warren%20county%20rdb.htm (accessed 9 August 2012).

Bullard, R., Johnson, G. S. and Torres, A. O. (2009) "Addressing Global Poverty, Pollution, and Human Rights," in R. D. Bullard (ed.) *The Quest for Environmental Justice: Human Rights and the Politics of Pollution*, San Francisco: Sierra Club Books, pp. 279–297.

Burns, R. G. and Lynch, M. J. (2004) *The Sourcebook on Environmental Crime*, New York: LFB Publishers.

Burns, R. G., Lynch, M. J. and Stretesky, P. B. (2008) *Environmental Law, Crime, and Justice: An Introduction*, New York: LFB Scholarly Publishing.

Carson, R. (1962) *Silent Spring*, Boston: Houghton Mifflin Company.

Chen, A., Cai, B., Dietrich, K., Radcliffe, J. and Rogan, W. (2007) "Exposure, IQ, and Behavior in Urban 5–7 Year Olds: Does Lead Affect Behavior Only by Lowering IQ?" *Pediatrics*, 119, e650–e658.

Clinard, M. B. and Yeager, P. C. (1980) *Corporate Crime*, New York: Free Press.

Colborn, T., Dumanoski, D. and Meyers, J. P. (1997) *Our Stolen Future*, New York: Plume.

Cole, L., and Foster, S. (2001) *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, New York: New York University Press.

Cope, G. (2002) "Bush Administration Is Lax on Toxic Clean-Ups," *The Progressive*, 7 March.

Denno, D. W. (1990) *Biology and Violence: From Birth to Adulthood*, Cambridge: Cambridge University Press.

Dietrich, K. N., Douglas, R. M., Succop, P. A., Berger, O. G. and Bornschein, R. L. (2001) "Early Exposure to Lead and Juvenile Delinquency," *Neurotoxicology and Teratology*, 23, 511–518.

Dominici, F., McDermott, A. and Hastie, T. (2004) "Improved Semi-parametric Time Series Analysis of Air Pollution and Mortality: A Statistical Review," *Journal of American Statistical Association*, 468: 938–948.

Evans, G. W. and Jacobs, S. V. (1981) "Air Pollution and Human Behavior," *Journal of Social Issues* 37(1): 95–125.

Fattah, E. (2010) "The Evolution of a Young, Promising Discipline: Sixty Years of Victimology, a Retrospective and Prospective Look," in S. Shoman, P. Knepper and M. Kett (eds.) *International Handbook of Victimology*, Boca Raton, FL: CRC Press.

Frank, N. and Lynch, M. J. (1992) *Corporate Crime, Corporate Violence*, New York: Harrow and Heston.

Friedrichs, D. O. (2010) *Trusted Criminals*, Belmont, CA: Wadsworth.

Gibbs, C. and Simpson, S. S. (2009) "Measuring Corporate Environmental Crime Rates: Progress and Problems," *Crime, Law and Social Change*, 51: 87–107.

Gould, K.A., Schnaiberg, A. and Weinberg, A.S. (1996) *Local Environmental Struggles: Citizen Activism in the Treadmill of Production*, Cambridge: Cambridge University Press.

Gould, K. A., Pellow, D. and Schnaiberg, A. (2008) *The Treadmill of Production: Injustice and Unsustainability in the Global Economy*, Boulder, CO: Paradigm.

Hall, M. (2012) "Environmental Victims: Challenges for Criminology and Victimology in the 21st Century," *Journal of Criminal Justice and Security*, 13(4): 371–391.

Hillyard, P. and Tombs, S. (2004) "Beyond Criminology," in P. Hillyard, C. Pantazis, S. Tombs and D. Gordon (eds.) *Beyond Criminology: Taking Harm Seriously*, London: Pluto Press.

Jarrell, M. L. (2007) *Environmental Crime and the Media: News Coverage of Petroleum Refining Industry Violations, New York*, New York: LFB Scholarly Publishing LLC.

Jarrell, M. L. (2009) "Environmental Crime and Injustice: Media Coverage of a Landmark Environmental Crime Case," *Southwest Journal of Criminal Justice*, 6(1): 25–44.

Jarrell, M. L. and Ozymy, J. (2010) "Excessive Air Pollution and the Oil Industry: Fighting for Our Right to Breathe Clean Air," *Environmental Justice*, 3(3): 111–116.

Konisky, D. (2009) "Inequities in Enforcement? Environmental Justice and Government Performance," *Journal of Policy Analysis and Management*, 28(1): 102–117.

Lavelle, M. and Coyle, M. (1992) "Unequal Protection: The Racial Divide in Environmental Law," in R. Hofrichter (ed.) *Toxic Struggles: The Theory and Practice of Environmental Justice*, Philadelphia, PA: New Society Publishers, pp. 136–143.

Lewis, S. and Henkels, D. (1998) "Good Neighbor Agreements: A Tool for Environmental and Social Justice," in C. Williams (ed.) *Environmental Victims: New Risks, New Injustice*, London: Earthscan.

Litt, J. S., Wismann, A., Resnick, B. and Dawson, R. S. (2007) "Advancing Health and Environmental Disease Tracking: A 5-Year Follow-Up Study," *American Journal of Public Health*, 97: 456–463.

Long, M. A., Stretesky, P. B., Lynch, M. J. and Huss, S. (forthcoming) "Crime in the Coal Industry: Implications for Green Criminology and Treadmill of Production Theory," *Organization & Environment*, DOI:10.1177/1086026612452266.

Lynch, M. J. (1990) "The Greening of Criminology: A Perspective on the 1990s," *The Critical Criminologist*, 2(3): 1–4, 11–12.

Lynch, M. J. and Stretesky, P. (2001) "Toxic Crimes: Examining Corporate Victimization of the General Public Employing Medical and Epidemiological Evidence," *Critical Criminology* 10: 153–172.

Lynch, M. J. and Stretesky, P. B. (2003) "The Meaning of Green: Contrasting Criminological Perspectives," *Theoretical Criminology* 7: 217–238.

Lynch, M. J. and Stretesky, P. B. (2007) "Green Criminology in the United States," in P. Bierne and N. South (eds.) *Issues in Green Criminology: Confronting Harms Against Environments, Humanity, and Other Animals*, Portland, OR: Willan Publishing.

Lynch, M. J. and Stretesky, P. B. (forthcoming) *Exploring Green Criminology: Toward a Green Revolution in Criminology*, Farnham: Ashgate Publishing.

Lynch, M. J., Nalla, M. K. and Miller, K. W. (1989) "Cross-Cultural Perceptions of Deviance: The Case of Bhopal," *Journal of Research in Crime and Delinquency*, 26: 7–35.

Lynch, M. J., Stretesky, P. B. and Hammond, P. (2000) "Media Coverage of Chemical Crimes, Hillsborough County, Florida, 1987–97," *The British Journal of Criminology* 40: 112–126.

Lynch, M. J., Stretesky, P. B. and McGurrin, D. (2002) "Toxic Crimes and Environmental Injustice: Examining the Hidden Dangers of Hazardous Waste," in G. W. Potter (ed.), *Controversies in White Collar Crime*, Cincinnati, OH: Anderson.

Lynch, M. J., Stretesky, P. B. and Burns, R. G. (2004a) "Determinants of Environmental Law Violation Fines Against Oil Refineries: Race, Ethnicity, Income and Aggregation Effects," *Society and Natural Resources*, 17(4): 343–375.

Lynch, M. J., Stretesky, P. B. and Burns, R. G. (2004b) "Slippery Business: Race, Class and Legal Determinants of Penalties Against Petroleum Refineries," *Journal of Black Studies*, 34(3): 421–440.

Mabey, N. and McNally, R. (1999) *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development*, World Wildlife Fund. Available at: http://www.oecd.org/dataoecd/9/48/2089912.pdf (accessed 10 August 2012).

Magdoff, F. and Foster, J. B. (2011) *What Every Environmentalist Needs to Know about Capitalism*, New York: Monthly Review Press.

McCall, P. L. and Land, K. C. (2004) "Trends in Environmental Lead Exposure and Troubled Youth, 1960–1995: An Age-Period Cohort-Characteristic Analysis," *Social Science Research*, 33, 339–359.

McGurty, E. M. (2000) "Warren County, NC, and the Emergence of the Environmental Justice Movement: Unlikely Coalitions and Shared Meanings in Local Collective Action," *Society and Natural Resources*, 13(4): 373–387.

Mohai, P. and Bryant, B. (1992) "Environmental Racism: Reviewing the Evidence," in B. Bryant and P. Mohai (eds.) *Race and the Incidence of Environmental Hazards: A Time for Discourse*, Boulder, CO: Westview Press, pp. 163–175.

Moore, E. and Mills, M. (1990) "The Neglected Victims and Unexamined Costs of White Collar Crime," *Crime and Delinquency*, 36(6): 408–418.

Moore, K., Neugebauer, R., Lurmann, F., Hall, J., Brajer, V., Alcorn, S. and Tager, I. (2008) "Ambient Ozone Concentrations Cause Increased Hospitalizations for Asthma in Children: An 18-Year Study in Southern California," *Environmental Health Perspectives*, 116: 1063–1070.

Needleman, H., Riess, J., Tobin, M., Biesecker, G. and Greenhouse, J. (1996) "Bone Lead Levels and Delinquent Behavior," *Journal of the American Medical Association*, 275: 363–369.

Needleman, H. L., McFarland, C., Ness, R. B., Fienberg, S. E. and Tobin, M. J. (2002) "Bone Lead Levels in Adjudicated Delinquents: A Case Control Study," *Neurotoxicology and Teratology*, 24, 711–717.

O'Hear, M. (2004) "Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime," *The Journal of Criminal Law and Criminology*, 95: 133–176.

Ozymy, J. and Jarrell, M. L. (2011) "Upset over Air Pollution: Analyzing Upset Event Emissions at Petroleum Refineries," *Review of Policy Research*, 28(4): 365–381.

Ozymy, J. and Jarrell, M. L. (2012) "The Underreported Story of the Year: Upset Events, Regulatory Drift, and the Regulation of Air Emissions at Industrial Facilities in the United States," *Environmental Politics*, 21(3): 451–466.

Pearce, F. and Tombs, S. (1998) *Toxic Capitalism: Corporate Crime and the Chemical Industry*, Aldershot: Ashgate.

Peng, R., Bell, M., Geyh, A., McDermott, S., Zeger, S., Samet, J. and Dominici, F. (2009) "Emergency Admissions for Cardiovascular and Respiratory Diseases and the Chemical Composition of Fine Particle Air Pollution," *Environmental Health Perspectives*, 117: 957–963.

Peters, A., Von Klot, S., Heier, M., Trentinaglia, I., Cyrys, J., Hormann, A., Hauptmann, M., Wichmann, H. E. and Lowel, H. (2005) "Particulate Air Pollution and Nonfatal Cardiac Events," *Respiratory Report of Health Effects Institute*, 124: 1–66.

Public Citizen (2005) "Industrial Upset Pollution: Who Pays the Price?" available at: http://www.citizen.org/documents/08.01.05%20Industrial%20upsets%20report.pdf (accessed 1 March 2010).

Puett, R., Schwartz, C. J., Hart, J. E., Yanosky, J. D., Speizer, E., Suh, H. H., Paciorek, C. J., Neas, L. and Laden, F. (2008) "Chronic Particulate Exposure, Mortality, and Coronary Heart Disease in the Nurses' Health Study," *American Journal of Epidemiology*, 168: 1161–1168.

Reiman, J. and Leighton, P. (1998) *The Rich Get Richer and the Poor Get Prison*, Boston: Allyn and Bacon.

Reuters (2012) "Geithner Says U.S. Economy Showing Signs of Expansion," *New York Times*. Available at: http://www.nytimes.com/2012/03/16/business/geithner-says-us-economy-showing-signs-of-growth.html (accessed 9 August 2012).

Risebrough, R. W., Rieche, P., Peakall, D. B., Herman, S. G. and Kirven, M. N. (1968) "Polychlorinated Biphenyls in the Global Ecosystem," *Nature*, 220: 1098–1102.

Roberts, T. J. and Toffolon-Weiss, M. (2001) *Chronicles from the Environmental Justice Frontline*, New York: Cambridge University Press.

Sarokin, D. A. and Schulkin, J. (1994) "Environmental Justice: Co-Evolution of Environmental Concerns and Social Justice," *The Environmentalist*, 14: 121.

Schelly, D. and Stretesky, P. B. (2009) "An Analysis of the 'Path of Least Resistance' Argument in Three Environmental Justice Success Cases," *Society and Natural Resources*, 22(4): 369–380.

Schnaiberg, A. (1980) *The Environment: From Surplus to Scarcity*, New York: Oxford University Press.

Schroeder, D. V. (2000) *Introduction to Thermal Physics*, New York: Addison-Wesley Longman.

Schwarzman, M. R. and Wilson, M. P. (2009) "New Science for Chemicals Policy," *Science*, 326: 1065–1066.

Situ, Y. and Emmons, D. (2000) *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment*, Thousand Oaks, CA: Sage.

Skinnider, E. (2011) *Victims of Environmental Crime: Mapping the Issues*, Vancouver: The International Centre for Criminal Law Reform and Criminal Justice Policy.

South, N. (2007) "The 'Corporate Colonization of Nature': Bio-Prospecting, Bio-Piracy, and the Development of Green Criminology," in P. Bierne and N. South (eds.) *Issues in Green Criminology: Confronting Harms Against Environments, Humanity, and Other Animals*, Portland, OR: Willan Publishing.

Stauber, J. C. and Rampton, S. (1995) *Toxic Sludge Is Good for You! Lies, Damn Lies, and the Public Relations Industry*, New York: Common Courage Press.

Stretesky, P. B. (2006) "Corporate Self-Policing and the Environment," *Criminology* 44(3): 671–708.

Stretesky, P. B. (2008) "The Neglect of Race and Class in Environmental Crime Research," in M. J. Lynch and R. Paternoster (eds.) *Racial Divide: Racial and Ethnic Bias in the Criminal Justice System*, New York: Criminal Justice Press, pp. 241–260.

Stretesky, P. B. and Lynch, M. J. (1999) "Corporate Environmental Violence and Racism," *Crime, Law and Social Change*, 30: 163–184.

Stretesky, P. B. and Lynch, M. J. (2001) "The Relationship Between Lead and Homicide," *Archives of Pediatric and Adolescent Medicine*, 155(5): 579–582.

Stretesky, P. B. and Lynch, M. J. (2003) "Environmental Hazards and School Segregation in Hillsborough, 1987–1999," *Sociological Quarterly*, 43(4): 553–573.

Stretesky, P. B. and Lynch, M. J. (2004) "The Relationship between Lead and Crime," *Journal of Health and Social Behavior*, 45(2): 214–229.

Stretesky, P. B., Long, M. A. and Lynch, M. J. (forthcoming) *The Treadmill of Crime: Political Economy and Green Criminology*, London: Routledge.

Taylor, D. E. (2000) "The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses," *American Behavioral Scientist*, 43: 508–580.

United Church of Christ (1987) *Toxic Wastes and Race: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites*, New York: United Church of Christ.

US EPA (2011) *Beneficial Effects of the Superfund Program*, OSWER Publication # 9200-1-104, Washington, DC: US EPA.

U.S. General Accounting Office (1983) *Siting of Hazardous Waste Landfills and Their Correlations with Racial and Economic Status of Surrounding Communities*, Washington, DC: U.S. Government Printing Office.

White, R. (2007) "Green Criminology and the Pursuit of Social and Ecological Justice," in P. Bierne and N. South (eds.) *Issues in Green Criminology: Confronting Harms Against Environments, Humanity, and Other Animals*, Portland, OR: Willan Publishing.

White, R. (2008) *Crimes Against Nature: Environmental Criminology and Ecological Justice*, Cullompton: Willan.

White, R. (2010) "Prosecution and Sentencing in Relation to Environmental Crime: Recent Socio-Legal Developments," *Crime, Law, and Social Change*, 53: 365–381.

White, R. (2011) *Transnational Environmental Crime: Toward an Eco-Global Criminology*, London: Routledge.

Zilney, L. A., McGurrin, D. and Zahran, S. (2006) "Environmental Justice and the Role of Criminology: An Analytical Review of 33 Years of Environmental Justice Research," *Criminal Justice Research*, 31(1): 47–62.

20

What is to be done about environmental crime?

Rob White

Introduction

The question 'What is to be done?' implies that there is a problem and that the problem needs to be dealt with in some way. The task of this chapter is to explore this question in relation to environmental crime. However, the definition of the problem and the solutions to it (both current and proposed) are contentious and variable. To address issues pertaining to what ought to be done in regards to environmental crime, the starting point, therefore, is to clarify the terms and terrain upon which discussion and debate rest. This is partly a matter of defining 'harm'; it is also partly a matter of identifying who the main protagonists are and who is going to drive action (and of which sort) in this area.

Accordingly, the first part of the chapter maps out the conceptual basis for thinking about and acting upon environmental harm. The aim of this section is not to describe and provide specific examples of environmental crimes and environmental harms, since these are dealt with elsewhere in this volume. Rather, the aim is to indicate differences in the conceptualisation of environmental crime, based upon different types of legal, ecological and justice criteria. These different approaches, in turn, have implications for the types of actions that are seen to be legitimate and appropriate responses to environmental crime. Moreover, the main targets for regulatory, enforcement and activist attention will also vary depending upon how the causes of environmental crime are conceived. In short, how we respond to environmental crime is intrinsically a political process, one that involves contests over morals, values and perspectives which determine how diverse groups construct the problem and what to do about it.

The tensions associated with how the problem is socially and legally constructed re-emerge in subsequent discussions of institutional and activist interventions in this area. For example, if the state is implicated in the source of the problem (via state–corporate collusion in environmentally destructive activities), then this has ramifications for strategies designed to diminish environmental harms. Again, there are complexities here that need to be teased out since, for instance, the 'state' itself is not monolithic and is in its own right a site of social struggle (over policies as well as enforcement practices). From this perspective, the specific roles of non-state actors in lobbying, regulation and enforcement around environmental issues is especially important. But these roles likewise have different facets, and may well be both multiple and paradoxical in relation to the state. Effective intervention around environmental crime, as demonstrated in this chapter, frequently demands action in collaboration with *and* against the

state. In this regard, the social, political and ecological context is vital in assessing the merits or otherwise of specific types of action.

The chapter assumes that, at present, much of the work being done in response to environmental crime is driven or guided by governments and states. The chapter therefore explores the nature of these state practices, first, by examining the scope and dynamics of environmental regulation, and second, through perusal of developments in the area of environmental law enforcement. Cutting across these discussions is acknowledgement of the growing role of non-government organisations (NGOs) in addressing environmental crime, both through formal and informal links with 'official' enforcement agencies and through activism outside the purview and control of the state.

Green criminology and the nature of the problem

Green criminology refers to the study by criminologists of environmental harms (that may incorporate wider definitions of crime than that provided in strictly legal definitions), environmental laws (including enforcement, prosecution and sentencing practices) and environmental regulation (systems of civil and criminal law that are designed to manage, protect and preserve specified environments and species, and to manage the negative consequences of particular industrial processes) (White 2008; 2011).

The key focus of green criminology is environmental crime. This is conceptualised in several different ways within the broad framework of green criminology. For some writers, environmental crime is defined narrowly within strict legal definitions – it is what the law says it is. For others, environmental harm is itself deemed to be a (social and ecological) crime, regardless of legal status – if harm is done to environments or animals, then it is argued that this ought to be considered a 'crime' from the point of view of the critical green criminologist.

The definition of environmental harm is therefore associated with quite diverse approaches to environmental issues, stemming from different conceptual starting points (White 2008). These are summarised in Table 20.1.

Many of these harms are acknowledged as offences in both domestic legislation and via international agreements. Furthermore, the transboundary nature of environmental harm is evident in a variety of international protocols and conventions that deal with such matters as the illegal trade in ozone-depleting substances, the dumping and illegal transport of hazardous waste, trade in chemicals such as persistent organic pollutants, and illegal dumping of oil and other wastes in oceans (Hayman and Brack 2002; White 2011). Overall, the distinction between sustainable/non-sustainable is increasingly important in terms of how harm is being framed and conceived.

Specific types of harm as described in law include things such as illegal transport and dumping of toxic waste, the transportation of hazardous materials such as ozone-depleting substances, the illegal traffic in real or purported radioactive or nuclear substances, the proliferation of 'e'-waste generated by the disposal of tens of thousands of computers and other equipment, the safe disposal of old ships and airplanes, the illegal trade in flora and fauna, and illegal fishing and logging.

However, within green criminology there is also a more expansive definition of environmental crime or harm that includes (White 2011):

- transgressions that are *harmful to humans, environments and non-human animals*, regardless of legality per se; and
- environmental-related harms that are facilitated by *the state*, as well as *corporations and other powerful actors*, insofar as these institutions have the capacity to shape official definitions of environmental crime in ways that allow or condone environmentally harmful practices.

Table 20.1 Three perspectives on conceptualising environmental harm

Legal perspectives

Legal conceptions of harm informed by laws, rules and international conventions. Key issue is one of *legality*, and the division of activities into legal and illegal categories

*   Illegal taking of flora and fauna – which includes activities such as illegal, unregulated and unreported fishing, illegal logging and trade in timber, and illegal trade in wildlife
*   Pollution offences – which relate to issues such as fly-tipping (illegal dumping) through to air, water and land pollution associated with industry
*   Transportation of banned substances – which refers to illegal transport of radioactive materials and the illegal transfer of hazardous waste

Ecological perspectives

Ecological conceptions of harm informed by notions of well-being and holistic understandings of the interrelationship between species and environments. Key issue is one of *sustainability*, and the division of social practices into benign and destructive from the point of view of ecological sustainability

*   Problem of climate change – in which the concern is to investigate those activities that contribute to global warming, such as the replacement of forests with cropland
*   Problem of waste and pollution – in which the concern is with those activities that defile the environment, leading to things such as the diminishment of clean water
*   Problem of biodiversity – in which the concern is to stem the tide of species extinction and the overall reduction in species through application of certain forms of human production, including use of genetically modified organisms

Eco-justice perspectives

Justice conceptions of harm informed by notions of human, ecological and animal rights and egalitarian concerns. Key issue is weighing up of different kinds of harm and violation of rights within the context of an *eco-justice* framework

*   Environment rights and environmental justice – in which environmental rights are seen as an extension of human or social rights so as to enhance the quality of human life, now and into the future
*   Ecological citizenship and ecological justice – in which ecological citizenship acknowledges that human beings are merely one component of complex ecosystems that should be preserved for their own sake via the notion of the rights of the environment
*   Animal rights and species justice – in which environmental harm is constructed in relation to the place of nonhuman animals within environments and their intrinsic right to not suffer abuse, whether this be one-on-one harm, institutionalised harm or harm arising from human actions that affect climates and environments on a global scale

The definition of environmental crime is, therefore, contentious and ambiguous. Much depends upon who is defining the harm, and which criteria are used in assessing the nature of the activities so described (for example, legal versus ecological, criminal justice versus social justice) (see Situ and Emmons 2000; Beirne and South 2007; White 2008).

Green criminology therefore provides an umbrella under which to theorise and critique both *illegal* environmental harms (that is, environmental harms currently defined as unlawful and therefore punishable) and *legal* environmental harms (that is, environmental harms currently condoned as lawful but which are nevertheless socially and ecologically harmful). How harm is conceptualised is thus partly shaped by how the legal–illegal divide is construed within specific research and analysis.

Within the spectrum of ideas and activities associated with green criminology are several different analytical frameworks. Some of these pertain to eco-philosophy, that is, to ways in which the relationship between humans and nature can be conceptualised. Academic work in this area might include consideration of gendered views of the natural and social worlds (Lane 1998; Plumwood 2005), exploration of anthropocentric, biocentric and ecocentric perspectives (Halsey and White 1998) through to postmodern versions of a constitutive green criminology (Halsey 2004). Less abstractly, however, most environmental criminology can be distinguished on the basis of who or what precisely it is that is being victimised. This is represented and highlighted in the three approaches that together constitute an eco-justice perspective, with their varying focus on humans, eco-systems and animals.

While the link between and among green criminologists is the focus on environmental issues, important theoretical and political differences are nonetheless becoming more apparent over time. For example, some argue that green criminology must necessarily be anti-capitalist and exhibit a broad radical orientation (Lynch and Stretesky 2003). Others, however, construe the task as one of conservation and natural resource management, within the definitional limits of existing laws (Herbig and Joubert 2006; Gibbs *et al.* 2010). Still others promote the idea that the direction of research should be global and ecological, and that new concepts need to be developed that will better capture the nature and dynamics of environmental harms in the twenty-first century (White 2011).

Typically there are differences within green criminology around issues pertaining to the distinction between 'harm' and 'crime'. These differences do not stem solely from disputes over the legal–illegal divide, however. There are also profound disagreements with regard to victimisation and varying conceptions of justice. For instance, there may be differences *within* a particular area of work, such as debates over 'animal rights' versus 'animal welfare' in the case of concerns about species justice (Francione 2010). There are also disagreements in terms of priorities, values and decision-making *between* particular areas of green criminology (Beirne 2011; White forthcoming). This is evident, for example, in debates over multiple land-use areas. This kind of dispute can involve those who argue that human interests should come first (from the perspective of environmental justice), or that specific ecological niches be protected (from the perspective of ecological justice), even if some animals have to be killed or removed from a specific geographical location. From the point of view of species justice, however, significant questions can be asked regarding the intrinsic rights of animals and the duty of humans to provide care and protection for non-human species.

Indeed, language intrinsically shapes how 'harm' and 'value' are constructed in regards to (specific groups of) humans, specific biospheres and specific non-human animals. For example, from a conservation criminology perspective (see, for example, Gibbs *et al.* 2010; Herbig and Joubert 2006) the language used in referring to animals tends to be anthropocentric and instrumental. Thus, animals are categorised in terms of 'wildlife' and 'fisheries'. Environmental laws and laws specifically about animals likewise tend to define animals in ways that describe their existence and 'value' through reference to human conceptions and human uses (Sankoff and White 2009). By contrast, those criminologists who write primarily about animal rights and animal welfare issues describe such anthropocentric descriptions as a form of 'speciesism' (see Beirne 2007; Sollund 2008). From this perspective, it is the suffering of non-human animals – whether construed as wild, domestic or commercial – that is of central concern, not whether the suffering stems from illegal criminal acts or not (since much animal suffering is linked to legal activities such as abattoirs and factory farms that rely upon animals as food sources). Accordingly, the language employed is informed by animal-centred rather than human-centred considerations.

A major factor that influences the study of environmental harm, therefore, relates to the specific interests that count the most when conceptualising the nature and seriousness of the harm. For example, when criminalisation does occur, it often reflects human–centred (or anthropocentric) notions of what is best (e.g., protection of legal fisheries, legal timber coups) in ways that treat 'nature' and 'wildlife' simply and mainly as resources for human exploitation. The intrinsic value of specific ecological areas and particular species tends to be downplayed or ignored.

Differences within green criminology are not only apparent at the level of theoretical focus and orientation. They are also manifest when it comes to responding to environmental crime or harm. For many green criminologists, for example, the biggest threats to environmental rights, ecological justice and non-human animal well-being are system-level structures and pressures that commodify all aspects of social existence, that are based upon the exploitation of humans, non-human animals and natural resources, and that privilege the powerful over the interests of the vast majority. It is for this reason that assessment of environmental injustice requires critical scrutiny of how states themselves intervene with regard to specific environmental harm issues. This view is not shared equally among green criminologists, however. In the end, how these questions are addressed has major implications for how responses to environmental harm will be framed.

Intervention and the state

Differences in opinion over the nature of global political economy, and over the tactics and strategies most likely to bring about desired social and ecological transformations, manifest in different approaches to how responses to environmental harm are construed. Thus, there are several ways in which to frame the issues pertaining to environmental regulation and the prevention of environmental harm (White 2008). One approach is to chart existing environmental legislation and provide a sustained socio–legal analysis of specific breaches of law, the role of environmental law enforcement agencies, and the difficulties of and opportunities for using criminal law against environmental offenders. Another approach places emphasis on social regulation as the key mechanism to prevent and curtail environmental harm, including attempts to reform existing systems of production and consumption through a constellation of measures and by bringing non-government and community groups directly into the regulatory process. A third approach presses the need for transnational activism, with an emphasis on fundamental social change. What counts is engagement in strategies that will challenge dominant authority structures and those modes of production that are linked to environmental degradation and destruction, negative transformations of nature, species decline and threats to biodiversity. Social movements are seen to be vital in dealing with instances of gross environmental harm.

By its very nature, the development of green criminology as a field of sustained research and scholarship will incorporate many different approaches and strategic emphases. For some, the point of academic concern and practical application will be to reform aspects of the present system. Critical analysis, in this context, will consist of thinking of ways to improve existing methods of environmental regulation and perhaps to seek better ways to define and legally entrench the notion of environmental crime. For others, the issues raised above are inextricably linked to the project of social transformation. From this perspective, analysis ought to focus on the strategic location and activities of transnational capital, as supported by hegemonic nation-states on a world scale, and it ought to deal with systemic hierarchical inequalities. Such analysis opens the door to identifying the strategic sites for resistance, contestation and struggle on the part of those fighting for social justice, ecological justice and animal rights. The emphasis on social reform or social transformation is not, however, necessarily mutually exclusive. They can feed into each other, and occur simultaneously.

There are major political divisions within the broad spectrum of green criminological work (and indeed within green political movements), and these have major implications for whether action will be taken in collaboration with capitalist institutions and state authorities, or whether it will be directed towards radically challenging these institutions and authorities. In practice, many green criminologists and NGOs in fact do both. How they do so, however, is contingent upon the immediate local context and wider international developments. What has generally been lacking in the field of green criminology, however, is a conscious and systematic theorisation of the state and of state power. For present purposes, it is useful, therefore, to outline a few propositions that guide the discussions to follow.

Transgressions against particular groups of people, specific environments and other species occur as a 'natural' consequence of systemic pressures and elite choices. Exploitation of both the human and the non-human is built into the very fabric of dominant constructions of economic prosperity and national interest. In a nutshell, sectional class interests and the interests of state elites are privileged over and above both universal human interests (such as for an ecologically sustainable environment) and the particular needs and rights of specific population groups, non-human species and biospheres. There is thus a close relationship between state power and class power. Wealth, power and influence are not pluralised, but are increasingly concentrated in fewer and fewer hands, typically in the form of the transnational corporation. The state is not independent of the general power relations of a society, and therefore the exercise of state power generally reflects the interests of those who have the capacity to marshal significant economic resources (e.g., large mining companies, agricultural corporate giants).

Nonetheless, there is a relative autonomy to state power insofar as the nation-state must rule in favour of the system-as-a-whole (which periodically means intervention in the affairs of specific companies). Likewise, for the sake of the wider political economy, the nation-state has an interest in maintaining a modicum of public order (which may require addressing the most obviously harmful social and environmental practices of private business). But the effectiveness of the state in most Western countries rests, in part, upon maintaining the illusion of neutrality, impartiality and plurality, and sustaining this through implementation of basic safeguards for individual human rights, baseline welfare and educational provision, democratic elections and environmental protection. Where these collapse, the result is dictatorship and more blatant self-serving activity on the part of state and corporate elites.

Concepts such as justice, rights and equality are given substance in and through their location within the global capitalist mode of production. Thus, different countries exhibit different versions of what these mean in practice. Moreover, it is the nature of class and other political struggles in particular circumstances and in particular places that gives material definition to 'rights' at any one point in time. Dominant power structures are hegemonic (at an international scale, at the level of the nation-state); however, they are not monolithic. Accordingly, resistance to state and class power in the context of global capitalism is also an integral part of the social and ecological dynamic of exploitation.

What gets socially defined as environmental 'harm' or as a 'risk' is also contingent upon the capacity of sectional interests, first, to garner consensus about how to interpret what is happening, and, second, to secure measures for generalising and implementing action against what is deemed to be 'harmful' behaviour, primarily via the state. Material differences in social power, and in social and ecological interests, mean that state action is skewed in the favour of powerful individuals and companies. Most of the harm they do, therefore, is not defined as such. Moreover, harm can be rendered invisible to the extent that it is externalised to more vulnerable population groups that do not have the social power to match that of the powerful.

Nevertheless, recent years have seen greater legislative and judicial attention being given to the rights of the environment *per se*, and to the rights of certain species of non-human animals to live free from human abuse, torture and degradation. This reflects both the efforts of eco-rights activists (e.g., conservationists) and animal rights activists (e.g., animal liberation movements) in changing perceptions, and laws, in regards to the natural environment and non-human species. It also reflects the growing recognition that centuries of industrialisation and global exploitation of resources are transforming the very basis of world ecology, for example, global warming threatens us all, regardless of where we live or our specific socio-economic situation. The work of green criminology and of NGOs, among others, has contributed to these shifts in orientation toward the pursuit of social and ecological justice.

Environmental regulation and law enforcement

Regardless of ambiguities and controversies surrounding what is or ought to be an environmental crime, there is nonetheless activity in the areas of environmental regulation and law enforcement, particularly in relation to violations of civil and criminal laws that are designed to prevent harm from occurring, and involving official and unofficial responses to instances of environmental degradation.

Intervention on environmental harm occurs within a complex legislative environment that incorporates different laws, regulations, conventions and guidelines that relate to local, national, regional and international jurisdictions. Many different issues and trends are covered, relating to air, land and water use, biodiversity, the transport and use of hazardous waste, and carbon emissions (White 2011). Much of the formal state intervention involves regulatory engagement rather than criminal justice proceedings. Moreover, not all harms are criminalised or subject to state prohibition, leaving a space for non-state actors to partake in activities that challenge the lack of state intervention in protecting certain environments (e.g., campaigns against deforestation) or species (e.g., anti-whaling campaigns).

Environmental regulation

It is rare that the state uses coercion solely or even as the key lever of compliance with regard to environmental laws. Rather, a wide variety of measures are used, frequently in conjunction with each other, as a means of dealing with environmental harm. Likewise, a range of agencies is assigned the task of ensuring compliance and enforcing the law vis-à-vis environmental protection.

The environmental regulation approach emphasises regulatory strategies that might be utilised to improve environmental performance, including 'responsive regulation' (Ayres and Braithwaite 1992; Braithwaite 1993) and 'smart regulation' (Gunningham and Grabosky 1998). These approaches attempt to recast the state's role by using non-government, and especially, private sector participation and resources in fostering regulatory compliance in relation to the goal of 'sustainable development'. Increasingly important to these discussions is the perceived and potential role of third-party interests, in particular, non-government environmental organisations, in influencing policy and practice (Gunningham and Grabosky 1998; Braithwaite and Drahos 2000; O'Brien *et al.* 2000).

The main concern of this kind of approach is with reform of existing methods of environmental protection. The regulatory field is made up of many different stakeholders and participants. These include, for example, businesses, employees, government agencies, communities, shareholders, environmentalists, regulators, the media, trade customers, financial institutions,

consumers, and the list goes on. The role and influence of various people and agencies are shaped by factors such as resources, training, information, skill, expertise and legislation. These are also affected by the type of regulation that is the predominant model at any point in time.

It has been observed, for example, that the broad tendency under neo-liberalism has been toward de-regulation (or, as a variation of this, 'self-regulation') when it comes to corporate harm and wrongdoing (Snider 2000). In the specific area of environmental regulation, the general trend has been away from direct governmental regulation and toward 'softer' regulatory approaches. The continuum of regulation, from strict regulation through to no regulation, is illustrated in Table 20.2 (White 2008). Measures include Environmental Impact Assessments (EIAs) and Environmental Management Systems (EMSs) through to voluntary adoption of good environmental practices.

Two models stand out when it comes to regulation in general and environmental regulation in particular. The first is Ayres and Braithwaite's notion of 'enforced self-regulation' (1992). This is based upon a regulatory pyramid. The usual pyramid of sanctions has an extensive base with the emphasis on persuasion that rises to a small peak of harsh punishment. In the case of business transgressions, to take an example, the progression up the pyramid might include persuasion, a warning letter, a civil penalty, a criminal penalty, licence suspension, and licence revocation. By combining different forms of regulation, Ayres and Braithwaite (1992) reconstitute the usual regulatory pyramid such that the bottom layer consists of self-regulation, the next layer is enforced self-regulation (via government legislation), the next layer is command regulation with discretionary punishment, and at the top, command regulation with nondiscretionary punishment.

Building upon the insights of these and other writers, Gunningham and Grabosky (1998) argue that what is needed is 'smart regulation'. This basically refers to the design of regulation that still involves government intervention, but selectively and in combination with a range of market and non-market solutions, and of public and private orderings. The central thesis of 'smart regulation' is that recruiting a range of regulatory actors to implement complementary combinations of policy instruments, tailored to specific environmental goals and circumstances, will produce more effective and efficient policy outcomes. Essentially this means incorporating into the regulatory field the full schedule of regulatory options, from direct regulation associated with command and control approaches through to voluntary schemes and economic incentive approaches (see Gunningham and Grabosky 1998).

A number of issues arise in relation to how measures linked to the enforced self-regulation pyramid and smart regulation are utilised in practice. Questions can be asked regarding the standards of what is deemed to be acceptable; the flexibility required in devising appropriate safeguards and strategies at local/site level; how to enact total management planning; what constitutes adequate monitoring; who is to do what about enforcement and compliance; what penalties and consequences are to consist of; how a plurality of instruments rather than a

Table 20.2 Environmental regulatory field

Strict regulation		*No regulation*
Command and control	Self-regulation strong codes of practice	De-regulation weak codes of practice
Licences and permits	Standard setting	Voluntarism
Setting of standards	Industry-based compliance	Property rights
EIAs	EMS	Incentive-based

single approach is to be coordinated; how to deal with a culture of reluctance to use punitive measures against corporate misconduct; the general corporate immunity from prosecution and penalty; and why and how the extent of regulation varies according to the size of the firm.

What detailed examination of particular forms of regulation shows, and what explorations of different approaches to environmental regulation acknowledge, is that how regulation is carried out in practice, and whose interests are reflected in specific regulatory regimes, are basically an empirical question. That is, regulatory performance cannot be read off from an abstract understanding of regulation theory as such. Nevertheless, environmental regulation models directly influence the scope and possibilities of environmental regulation as it is translated into practical measures at the ground level. The adoption of particular environmental models thus helps to shape the methods and behaviour of regulators. In ideal terms, the two key models of regulation discussed here would incorporate a range of actors and measures in order to 'keep things honest', presumably in ways that would be to the advantage of all stakeholders.

However, the continuing degradation of the environment today is linked to the dominant regulation and enforcement framework itself, one that puts the stress on self-regulation and de-regulation. This is reflected in state policies and practices. For instance, very often the preference on the part of state authorities is for education, promotion and self-regulation rather than imposition of directive legislation and active enforcement and prosecution (White 2008). Yet, to be effective those in charge of regulation and enforcement must be willing to utilise the 'big stick' and to monitor compliance systematically and diligently. For example, persistent and continuous inspections, accompanied by substantive operational powers (including use of criminal sanctions), can in fact lead to rapid positive changes in polluting practices (see Commission for Environmental Cooperation 2001; White 2011).

Snider (2000) describes how, in Canada, despite policy directives specifying 'strict compliance', a permissive philosophy of 'compliance promotion' has reigned. A recent review of enforcement practices in the Department of the Environment in Northern Ireland echoed these sentiments:

> The means of achieving greater compliance has become very complex and bureaucratic and should be reviewed to achieve a more streamlined and consistent approach across the DOE family. Inspectors found a 'prosecution as a last resort' approach is widely applied across the DOE family as various compliance measures are first applied. However, a more determined and direct enforcement approach is required for deliberate breaches, more serious crimes and for persistent and/or hard core offenders.
>
> (Criminal Justice Inspection Northern Ireland 2007: x)

Given the tone of mainstream regulation literature (that offers a theoretical justification for enlisting private interests through incentives and inducements), it is hardly surprising that persuasion is favoured at the practical level. Close examination of self-regulation models, however, finds evidence of regulatory failures, and this, in turn, indicates that governments cannot totally abdicate responsibility when a regulatory problem requires a state response (see Priest 1997–98). Certain conditions are necessary if self-regulation, as such, is going to offer an effective form of regulation. The trend, however, is for governments to shed regulatory functions and responsibilities and to rely upon the rhetoric and savings afforded by self-regulation (including at the international level, as illustrated by the powerful role of the International Standards Organisation in driving government policy responses vis-à-vis environmental regulation).

It is essential to consider the financial and political environment within which regulators are forced to work. For example, while never before in history have there been so many laws

pertaining to the environment, it is rare indeed to find extensive government money, resources and personnel being put into enforcement and compliance activities. Rather, these are usually provided in the service of large corporations, as a form of state welfare designed to facilitate and enhance the business climate and specific corporate interests. The fiscal crisis of the state, as manifest in massive budget cuts in Greece, Italy, Spain, Portugal, Ireland, Britain, and the United States, also brings with it a crisis in the regulatory field. Environmental Protection Agencies struggle with inadequate monies and de-moralised officers as departmental belts are tightened and priorities are placed elsewhere.

Environmental policing

Environmental harm, as construed by law enforcement agencies, is basically about the violation of national and international laws put in place to protect the environment. What is legally deemed to be 'bad' or criminal, therefore, is the main point of attention, whether this is illegal trade in wildlife and plants, or pollution of the air, water and land.

Many jurisdictions have specialist agencies to tackle particular sorts of crime. An Environmental Protection Agency (EPA), for example, may be given the mandate to investigate and prosecute environmental crimes. The police may play only an auxiliary role in relation to the work of these agencies. In other circumstances and for other purposes, members of the police service may be especially trained as law enforcement officers in defined areas of work.

The nature of environmental crime poses a number of challenges for effective policing and hence prosecution. Environmental crimes may have local, national, regional and global dimensions. They may be difficult to detect (as in the case of some forms of toxic pollution undetectable to human senses). They may demand intensive cross-jurisdictional negotiation, and even disagreement between nation-states, in regards to specific events or crime patterns. Some crimes may be highly organised and involve criminal syndicates, such as illegal fishing. Others may include a wide range of criminal actors, ranging from the individual collector of endangered species to the systematic disposal of toxic waste via third parties.

These various dimensions of harm pose particular challenges for environmental law enforcement, especially from the point of view of police interagency collaborations, the nature of investigative techniques and approaches, and the different types of knowledge required for dealing with specific kinds of environmental harm. Moreover, many of the operational matters pertaining to environmental harm are inherently international in scope and substance.

It needs to be emphasised that dealing with environmental harm will demand new ways of thinking about the world, the development of a global perspective and analysis of issues, trends and networks, and a commitment to the 'environment' as a priority area for concerted police intervention. The challenges faced by police in affluent countries of the West will be even more difficult for their counterparts in Third World countries, in countries undergoing rapid social and economic changes, and in countries where coercion and corruption are generally unfettered by stable institutional controls. A scoping analysis of law enforcement practices and institutions in Brazil, Mexico, Indonesia and the Philippines, for example, found common problems across the different sites (Akella and Cannon 2004). These included:

1   poor interagency cooperation;
2   inadequate budgetary resources;
3   technical deficiencies in laws, agency policies, and procedures;
4   insufficient technical skills and knowledge;
5   lack of performance monitoring and adaptive management systems.

These challenges are global in application, although the specific nature of the challenge will vary depending upon national and regional context. Basically the message is that more investment in enforcement policy, enforcement capacity and performance management is essential, regardless of jurisdiction.

Nonetheless, it is important to acknowledge that the field of environmental law enforcement has expanded rapidly in recent years and involves a wide number of agencies and organisations worldwide. While the specific role of police in this area varies greatly – from active engagement through to auxiliary support – there is no doubt that environmental law enforcement will continue to grow in importance over the coming years (White 2007). In part, this is due to the pressures on ecological well-being manifest in areas such as threats to biodiversity or in relation to the huge problems posed by disposal of toxic and other forms of waste. Challenges for police are also evident in regards to events and trends associated with climate change, such as natural disasters that are increasing in intensity and frequency, or the social dislocations stemming from climate-induced migration (Bergin and Allen 2008; White 2011). Criminality and lawlessness are never far from the surface in relation to catastrophic events, and these, in turn, are influenced by patterns of global warming.

All of these factors point in the direction of major institutional change if environmental law enforcement is to progress toward a more meaningful and powerful level of intervention. The work of the Environmental Crime section of Interpol is relevant to the present discussion. For Interpol, the key horizon issues relate to:

- crimes that speed up climate change;
- crimes that exhaust essential natural resources;
- crimes that impact the security of multiple nations;
- bio-security and misuse of protected areas;
- theft of natural resources.

These kinds of crimes inevitably pose special challenges for environmental law enforcement agencies and regulators. This is because environmental crimes very often transcend state or national borders. From the outset, then, they demand collaboration across jurisdictional lines. The capacity of perpetrators to move across borders, and to use differences between jurisdictions to their advantage, has to be matched by the flexibility of law enforcement agencies in undertaking enforcement tasks. This requires collaboration and coordination as core attributes of enforcement.

The special challenge for agency responses to transnational environmental harms is that many different jurisdictions have to be mobilised simultaneously around the same aims and objectives. Enforcement practices in these circumstances must be inclusive, comprehensive and well organised. This is achievable provided there is enough consensus and political support among partner nation-states. Some of the issues that influence the manner and dynamics of global governance include the scale at which regulation and enforcement takes place (e.g., a local council in York, the nation-state of Britain, the regional group of the European Union, the international sphere of Interpol); the type of collaboration, networks and partnerships established in a particular area; the extent of harmonisation of laws, enforcement practices and communication strategies; and the sort of NGO involvement allowed, encouraged and/or resisted in particular jurisdictional contexts.

Different people may understand the term 'collaboration' as meaning different things. For instance, there are many diverse agencies engaged in some form of environmental law enforcement. Some of these are engaged in both regulation and enforcement, and individual agencies may be charged with either or both. Agencies dealing with environmental matters work in and

across different jurisdictions and deal with a myriad of issues. In countries like Australia, many different agencies, at many different levels, deal with environmental crimes. This is illustrated in Table 20.3 which outlines different tiers of governance involving various bodies engaged in environmental law enforcement.

More generally, the central mandate of an agency tends to be driven by the specific type of crime. For example, Environmental Protection Agencies (or their equivalent) often focus on 'brown' issues pertaining to pollution and waste. Forestry Commissions or National Parks Authorities (or equivalent) tend to concentrate on 'green' issues and so deal with matters of conservation, animal welfare and land use. Bodies such as the Royal Society for the Prevention of Cruelty to Animals (or equivalent) are charged with the responsibility to intervene in cases of harsh treatment of, particularly, domesticated animals (such as companion animals or those destined to be food). A Customs service typically investigates trade in illegal fauna and flora, as well as the international shipment of toxic wastes and banned substances. Police services may have a general duty to protect animals and monitor the environment, while in some cases being vested with the lead role in wildlife offences. The regulation and policing of fisheries may involve specific fisheries management authorities and specially trained fisheries officers. Health departments may be the key authorities when it comes to the management and disposal of radioactive and clinical waste. Park rangers could be tasked with the job of preventing the poaching of animals from national parks and private reserves. The list of agencies that have some role in environmental law enforcement is extensive.

Who precisely is going to deal with which type of crime is partly a function of the alleged offence, since this will often dictate the agency deemed to be responsible for a particular area – whether this is drug enforcement, counter-terrorism or environmental crime. Specialist agencies

Table 20.3 Agencies at different tiers: dealing with environmental law enforcement, Australia

Geo-political scale	Examples at the operational level
Local councils	Urban and metropolitan councils
	Regional or rural (shires)
State	Environmental Protection Agencies
	Local Government Association
	State Police services
	Royal Society for the Prevention of Cruelty to Animals (RSPCA)
	Parks and Wildlife
National	Australian Fisheries Management Authority
	Australian Federal Police
	Australian Customs Service
	Office of Consumer Affairs
	Department of Sustainability, Environment, Water, Population and Communities
National/State bodies	Australian Crime Commission
	National Pollution Inventory
	The Australasian Environmental Law Enforcement and Regulators Network (AELERT)
International	Interpol
	International Network of Environmental Enforcement and Compliance (INECE)

Source: White (2011).

and specialist police can also wear more than one hat. For example, in the United States, 'conservation police' (a term that broadly refers to fish and wildlife officers, wildlife management officers, game wardens, park rangers, and natural resources police) have authority to deal with both conventional crime as well as environmental crime. This means that in addition to investigation and enforcement of laws relating specifically to fish and wildlife issues, their activities can incorporate more generalist policing concerns, including those involving things such as drug law enforcement and human trafficking (Shelley and Crow 2009).

Within a particular national context, there may be considerable diversity in law enforcement agencies and personnel, and there is a myriad of bodies that in some way or another are charged with policing functions (see Haberfeld and Cerrah 2008). For example, in the United Kingdom, there are specialist policing bodies such as state security services (e.g., MI5 and MI6), regulatory authorities such as the Environment Agency, municipal police such as Royal Parks Police, as well as the usual Home Office police – all of whom may be called upon to play a role in combating crime (Crawford 2008). Periodically these kinds of agencies might be brought together in the form of environmental crime task forces, as in some instances in the United States, which may also include participation from non-law enforcement agencies (Dighe and Pettus 2011).

Police will have quite different roles in environmental law enforcement depending upon the city or state/province or region within which they work, and the agency within which they are employed. In a federal system of governance, for example, such as in the USA, Canada and Australia, there will be great variation in enforcement practices depending upon whether the police operate at the local municipal level (such as the Toronto Police Service), the provincial or state level (Ontario Provincial Police) or the federal level (Royal Canadian Mounted Police). In dealing with specific crimes and particular sorts of criminality, lines of authority will be dictated by inter-jurisdictional protocols (such as federal laws over-riding local laws; national security legislation that supersedes state laws) and in some instances court decisions (that establish the limits of legal encroachment by diverse authorities).

Looking farther afield, who is doing what is further complicated by geographical proximity of countries, as is the case in Europe, which facilitates the transfer of crime problems across national borders. This can be compounded by political arrangements, such as a common European passport and currency that make it easier to move within the boundaries of the European Union as a whole. From a domestic policing perspective, this means that there is a need for both vertical connections within any particular national context (around particular crime issues), and horizontal connections with relevant agencies outside of that specific country (given the relative ease of cross-over into other jurisdictions). In some instances, as with the Task Force on Organised Crime in the Baltic Sea Region (which includes representatives from Denmark, Estonia, the European Commission, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden), specific organisational structures are set up in order to share intelligence, in this instance, on environmental crime, and to develop cooperative enforcement structures to deal with offenders.

At the international level, agencies such as Interpol are central players in global environmental law enforcement. In 2010, at the 79th Interpol General Assembly, the Chiefs of Police from 188 countries adopted an Environment Enforcement Resolution. This resolution acknowledges that:

> Environmental law enforcement is not always the responsibility of one national agency, but rather, is multi-disciplinary in nature due to the complexity and diversity of the crime type which can encompass disciplines such as wildlife, pollution, fisheries, forestry, natural resources and climate change, with reaching effect into other areas of crime.
> (Interpol and United Nations Environment Programme 2012: 2)

Reflecting concern over environmental issues, a summit of International Chiefs of Environmental Compliance and Enforcement was held in March 2012. This forum provided an opportunity for national leaders of environment, biodiversity and natural resources agencies to meet and discuss action around issues such as investigative assistance and operational support, information management, capacity building standards and effective networks, as well as attend commodity-specific side-meetings covering fisheries, forestry, pollution and wildlife. A summary of the event (Interpol and UNEP 2012: 2) pointed out that:

- Particular concern was expressed from many delegates on the scale of environmental crime and the connection with organised transnational crime, including issues of smuggling, corruption, fraud, tax evasion, money laundering, and murder.
- The interconnectivity of environmental crime with other forms of criminal activity requires cooperation and collaboration across all levels of law enforcement in order to combat and prevent the illegal activities.
- The current scale of environmental crime involves very similar approaches, means and severity as other forms of crime, but is aggravated and exacerbated further by the direct serious implications it has on the development goals of many countries.
- Particular concern is raised on the sheer scale of environmental crime including, but not limited to, illegal logging and deforestation, illegal fisheries and smuggling of toxic waste, and the severe implications of this not only on the environment, but also on human security and economic development.

It is not only issues which have been highlighted in such summits, but operational policies and practices as well. This is reflected in efforts to link up agencies and personnel across jurisdictions and across substantive enforcement areas.

Several different consortiums have been forged internationally to deal with specific types of environmental crime. For instance, the International Consortium on Combating Wildlife Crime is comprised of five inter-governmental organisations working to bring coordinated support to the national wildlife law enforcement agencies and to the sub-regional and regional networks that act in defence of natural resources: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Secretariat, Interpol, the United Nations Office on Drugs and Crime (UNODC), the World Bank, and the World Customs Organization (WCO). This group is chaired by the CITES Secretariat (CITES 2012).

On another front, Project Leaf (Law Enforcement Assistance for Forests) is an Interpol and United Nations Environment Programme (UNEP) climate initiative consortium that is directed against illegal logging and related crimes. According to Interpol (2012), the objectives of this Project are to do the following:

- Form National Environmental Security Task Forces (NESTs) to ensure institutionalized cooperation between national agencies, Interpol NCBs (National Central Bureau), and international partners.
- Conduct operations to suppress criminality, disrupt trafficking routes, and ensure the enforcement of international and national legislations on sustainable forestry.
- Expand the project through awareness raising, making a real contribution to global emissions goals, the protection of biodiversity, and preventing environmental destruction.

A NEST is a task force of a firmly established team of experts who work together to address specific issues. They are comprised of senior criminal investigators, criminal analysts, training

officers, prosecutors, financial specialists, forensic experts and others, drawn from police, customs, environmental and other specialised enforcement agencies, and also involving non-government and regional organisations as appropriate.

Different kinds of crimes demand different sorts of responses. They also require resources and organisational considerations relevant to that particular type of crime. For example, in dealing with pollution, organisations need to be cognisant of the following issues (Dobovsek and Pracek 2010: 148):

- choosing the investigators, who have enough technical knowledge for this work;
- providing investigators with equipment for safe work in contaminated areas;
- training of investigators for this kind of work;
- offering regular health checks of investigators;
- choosing the accredited laboratories for sampling and analyzing the traces;
- establishing friendly relations between intervention services, environmental mobile laboratories and investigators;
- developing standard procedures in investigating the polluted area, which first assures safe work and then everything else, which is connected with the pre-trial proceedings.

These prescriptions are not unique to Slovenia, but are applicable to many other countries as well.

Environmental policing thus is carried out in the light of both considerable variations in policing functions and agencies, and in relation to different levels of government. To put it differently, those who do environmental 'policing' work may not be *the* police, and the police are not necessarily involved directly in all types of environmental law enforcement work. Environmental law enforcement includes officials working for local municipal councils (and rural shire councils) through to those working on behalf of Interpol in Thailand. It also includes a wide range of NGOs that operate in various official and unofficial capacities. For instance, animal welfare may be deemed to be the official responsibility of organisations such as the Royal Society for the Prevention of Cruelty to Animals (RSPCA) who then investigate and prosecute cases of animal abuse. Other NGOs, such as Greenpeace Amazon, may not have an 'official' role per se, but can nonetheless gather evidence of activities such as illegal logging which can then be passed on to relevant police and judicial authorities. Who precisely is going to deal with which type of crime is partly a function of the alleged offence, since this will often dictate the agency deemed to be responsible for a particular area – whether this is disposal of hazardous waste, trade in endangered species, illegal fishing or money laundering associated with trafficking of illegal forest products.

The plethora of players and laws demands an approach to environmental law enforcement and compliance that necessarily must be collaborative in nature. Dealing with global environmental harm will demand extraordinary efforts to relate to each other across distance, time, language and cultural borders; to understand specific issues; to coordinate actions; to enforce international laws and conventions; and to gather and share information and intelligence. These are domestic policing issues as well as international ones.

Among the many issues pertaining to the proliferation of agencies dealing with environmental crime is that each may be driven by different aims and objectives, different methods of intervention, with different powers, and exhibiting different levels of expertise and collaboration with others. Another issue relates to the need to distinguish between organisational affiliation (which may be formal and policy-oriented) and inter-agency collaboration (which refers to actual operational practices and linkages). In some cases, there is a clear need for capacity building in

order for collaboration and, especially, for rapid response, to be successfully institutionalised as part of normal agency practice. There can also be agency differences in defining and interpreting just what the crime is and how it should be responded to – as in the case of breaches versus crime, customs offences versus fisheries offences, and so on.

In addition to questions of resources, staffing, recruitment of the right people, and training, an important factor that impacts upon agency performance is how well it interacts with other relevant agencies in the field. Related to organisational matters, the dynamics of environmental crime are such that new types of skills, knowledge and expertise need to be drawn upon as part of the law enforcement effort. For example, crimes related to toxic waste and pollution require the sophisticated tools and scientific know-how associated with environmental forensics (Murphy and Morrison 2007; Dobovsek and Pracek 2010; White 2012a). Investigatory methods and powers, particularly in relation to the gathering of suitable evidence for specific environmental crimes, will inevitably be shaped by state and national laws and regulations, and influenced by regional and international conventions and protocols. The availability of local expertise, staff and resources will determine how investigation is carried out in practice.

On the positive side, it is notable that training packages are starting to be produced in the specific area of environmental law enforcement. For example, in South Africa, a recent training manual for law enforcement agencies provides an outline of the key legal principles of environmental law, the types of environmental crime, issues relating to criminal prosecution (including consideration of strict liability and vicarious liability), environmental inspection and investigation, the gathering of evidence (including different types of evidence), and factors relevant to prosecution and the nature of the trial process (Akech and Mwebaza 2010). Agencies such as Interpol provide an active forum in which criminal investigators from around the globe meet to discuss issues such as determining the role of organised crime in specific types of criminal enterprises (e.g., people smuggling), and developing training and enforcement actions to combat particular sorts of criminal activity (e.g., illegal oil pollution into oceans, seas and inland waterways).

At a practical level, a productive strategy for harmonisation of enforcement efforts is to focus on consistency in delivering regulatory and enforcement tasks, rather than focusing on uniform legislation as such. For instance, international networks of law enforcement officers (for example, Interpol and organisations such as the International Network of Environmental Enforcement and Compliance) provide invaluable forums for the exchange of information and knowledge transfer about 'best practice' and 'what works' in which situations. Participation in common training programmes and attendance at conferences and workshops provide opportunities to enhance overall law enforcement capabilities as well as contributing to shared understandings and values in regards to specific types of criminal activity. Importantly, the use of regional case studies and reference to local experiences both reaffirms the importance of acknowledging specific jurisdictional differences as well as creating opportunities for the adoption of a more balanced view of what constitutes the most productive law enforcement approaches and strategies.

Specific forms of criminal law enforcement will require collaboration between different nation-states and different environmental law enforcement services. The development of capabilities in the specific area of transnational law enforcement is necessary, and inevitable, given world trends. This includes the 'soft skills' of interpersonal communication that enhance cooperation between groups. An important part of this process is the development of a shared consciousness of issues and a sense of what represents justice among enforcement personnel. Understanding the complexities of global issues is a vital step in forging a transnational value system that will be protective of collective social interests, ecological well-being and human rights (see Interpol and UNEP 2012). The risks, harms and threats posed by and accompanying climate change

add further impetus to think creatively about the near and over the horizon challenges when it comes to environmental law enforcement. Climate change has massive implications for policing, and recent commentary has suggested that it will profoundly affect the core business of policing, not just the work of those directly engaged in environmental law enforcement (Bergin and Allen 2008).

Fighting transnational crime will frequently and increasingly demand a worldwide response. The role and capacity of domestic law enforcement agencies are an essential component in how responses to harms of a global nature will be framed and implemented. Most intervention occurs locally, even where national and international law enforcement agencies are called in and directly involved. In the end, to be effective, agencies need to be able to harness the cooperation and expertise of many different contributors and to liaise with relevant partners at the local through to the international levels. A 'joined-up' approach also means that links can be made between different forms of crime as well as between different agencies, and different parts of the world. For instance, illegal fishing (an important environmental crime) has been tied to trafficking of persons, smuggling of migrants and the illicit traffic in drugs. This is due to the influence of transnational organised crime in the fishing industry worldwide (United Nations Office on Drugs and Crime 2011). International cooperation is also necessitated by the sophistication and transnational nature of the crimes as well. In response, the International Monitoring, Control and Surveillance Network has been formed and is dedicated to prevent and deter illegal, unreported and unregulated fishing. It has participation from over 50 countries.

NGO engagement in environmental law enforcement

The dearth of adequate controls and regulatory actions within official criminal justice and state offices on matters pertaining to environmental harm is a problem of considerable proportions. To put it simply, not enough is being done to detect, prevent, prosecute and respond to environmental crime (see White 2011). Accordingly, it is very often transnational environmental activists who have stepped into the breach, exposing instances of ecological and species harm, providing details of poor regulation and enforcement practices, and contributing both formally and informally to crime reduction and prosecution processes. As increasingly important players in the world of environmental protection, conservation and management, environmental activists frequently have to both confront powerful social, economic and political interests, and to work with and alongside powerful groups, organisations and state apparatus.

For example, at the Interpol Conference on International Environmental Crime in Lyon, France, in September 2010, there were representatives from both official environmental law enforcement agencies, and from a wide range of non-governmental agencies such as Greenpeace Amazon. From the discussions, it was clear that while government agencies may be constitutive of the official networks, they frequently lack adequate resources and staff. Conversely, the NGOs are not only actively engaged around environmental issues, but they are often well resourced. As a consequence, there are now different types of partnerships emerging. In one instance, there is direct sharing of resources, as in the case of an American NGO funding individual staff within Interpol's Environment Crime section. In another instance, NGOs are directly engaged in sharing evidence collected through their own independent investigations (into illegal wildlife trade or illegal logging, for example) with trusted authorities in places such as Brazil. There is also the interesting case of a criminal syndicate trading in illegal wildlife in Russia that was in fact headed up by senior police. This made it difficult for other state police to intervene. The ring was eventually busted with the assistance of NGO activists posing as buyers and secretly filming the transactions.

Environmental activism involves many different individuals, groups, and organisations, with diverse aims and missions, employing a wide variety of tactics and strategies. Key international NGOs include:

1   Friends of the Earth
2   Greenpeace
3   World Wide Fund for Nature
4   Sea Shepherd
5   Bird Life International
6   the Climate Action Network
7   the Biodiversity Action Network
8   the Humane Society International
9   the Sierra Club
10 the Environmental Investigation Agency
11 the Basel Action Network
12 the Environmental Justice Foundation.

The list of organisations like these extends into the hundreds (and indeed, the thousands), and ranges from local neighbourhood action groups through to transnational or global NGOs.

The focus of activists varies greatly (White 2008). 'Brown' issues tend to be defined in terms of urban life and pollution (e.g., air quality), 'green' issues mainly relate to wilderness areas and conservation matters (e.g., logging practices), and 'white' issues refer to science laboratories and the impact of new technologies (e.g., genetically modified organisms). There is generally a link between environmental action (usually involving distinct types of community and environmental groups), and particular sites (such as urban centres, wilderness areas or seacoast regions). Groups are also demarcated by particular notions of justice, including those relating to environmental justice (e.g., specific human communities), ecological justice (e.g., protection and conservation of particular ecosystems) and species justice (e.g., animal rights and welfare).

Contemporary regulation theory stresses the importance of 'third parties' in the regulatory process. That is, it is important that official government agencies involved in regulatory activities – those pertaining to compliance and enforcement of rules and laws – recruit non-government and community-based agencies to the regulatory project (see Ayres and Braithwaite 1992; Gunningham and Grabosky 1998; Braithwaite and Drahos 2000). This approach acknowledges that there are many different stakeholders who have an interest in regulation. These include, for example, businesses, employees, government officials, communities, shareholders, environmentalists, the media, financial institutions, and so on. It is argued that governments should provide a space for non-government participation and resources in fostering regulatory compliance. Between the regulator (government) and the regulated (industry, citizen) are third parties (community members) who can contribute to improved regulatory performance through monitoring and other forms of activity. The involvement of local residents in neighbourhood watch schemes, for example, provides an illustration of third party policing.

Such considerations are also vital when it comes to environmental crime. This is because of the complex nature of environmental harms covering many different issues relating to air, land and water use, biodiversity, the transport and use of hazardous waste, and carbon emissions, and which, in turn, demand expertise across a wide range of areas and extensive networks of surveillance. It is also due to the generally poor level of resources, meagre budgets and low staff numbers devoted to environmental protection and law enforcement activities by governments, especially given the scope and scale of the problems.

In this context, NGOs can and do play a significant role in investigating and exposing environmental harm and offender wrongdoing. However, the issues and limitations associated with NGO interventions mirror those of government agencies. For example, in each case, there is a need for new and sophisticated skills of investigation, and a strong sense of collective mission in regards to dealing with environmental harm. Moreover, effective collaboration has to be a hallmark of any engagement in this area because of the plethora of agencies, stakeholders and organisations generally involved, and the fact that much environmental crime crosses borders and involves local, national, regional and international laws, regulations and conventions (White 2011). Come what may, it is increasingly clear that government and non-government agencies and actors need to work together in a wide range of ways for the sake of better environmental governance generally (see, for examples, Environmental Investigation Agency 2008).

NGOs can have both formal and informal roles in environmental regulation and law enforcement. So-called 'wildlife' NGOs such as the RSPCA may be granted official status and legal rights in regards to investigation and prosecution of animal abuse. Local environmental groups may be given a supplementary regulatory role, officially supported and partially funded by the state, for example, to monitor water quality at the regional or municipal level. For those agencies and groups contracted to do this kind of work, issues of resources, specialist equipment and staff/volunteer training are important, as are questions concerning the effectiveness of NGO participation in securing good regulatory outcomes.

Other organisations and agencies may combine key activities so as to include campaign work as well as direct 'policing' related activities. For example, Greenpeace engages in both public campaigns (that may occasionally push the limits of the law) as well as collecting evidence of ecological wrongdoing that can be used in a court of law to prosecute environmental offenders. The specific role of agencies such as the Environmental Investigation Agency may be to investigate environmental crimes and to channel resources into protection and prosecution across a range of environmental areas (including, for example, pollution issues as well as illegal trade in endangered species). Other NGOs may have a more specific mandate, whether it is to expose the social and ecological harms associated with e-waste (as with the Basel Action Network) or illegal trafficking of animals (such as the Freeland Foundation).

Environmental activism deals with acts and omissions that are already criminalised and pro-hibited, such as illegal fishing or illegal dumping of toxic waste. But it also comes to grips with events that have yet to be designated officially as 'harmful' but that show evidence of exhibiting potentially negative consequences. It thus deals with different kinds of harms and risks, as these affect humans, local and global environments, and non-human animals. Not surprisingly, very often the target for action, and the object of change, is the state. In part, this is because much environmental destruction globally is supported by particular nation-states in collusion with powerful corporations. This can take the form of acts of commission or of omission (see Kauzlarich *et al.* 2003). For example, some acts of harm are perfectly allowable, and receive the approval of state authorities (e.g., clearfell logging). Other acts are illegal, but without adequate state resources, are in effect allowed to occur as a matter of course (e.g., disposal of hazardous waste). Specific types of transnational environmental crime are basically linked in some way to the nature and extent of state intervention (or non-intervention), which in turn depends on the geographic location and political-economic importance of the specific activities in question. In response to these trends, NGOs use both confrontational and conciliatory tactics in pursuing their objectives.

For NGOs involved in environmental law enforcement activities, there are two separate sets of practical issues: those that parallel those of conventional official environmental law enforcement agencies; and those that stem directly from the status and ideological orientation of the NGO itself (Table 20.4) (for elaboration, see White 2012b).

Table 20.4 NGOs compared with official environmental law enforcement

Issues in common

Expertise: skills related to gathering evidence for the purposes of court, knowledge and marshalling of forensic and other technical knowledge, investigatory skills

Training: needs to be continuous, with training resources constantly up-dated and refreshed, in the light of the complexities and changing nature of environmental crime, as well as innovations in crime detection, investigation, networking and technological development

Morale: what happens in the public sphere and governmental domain affects the morale and work activities of all those engaged in environmental enforcement law activities, and this can influence the confidence of activists in formal system outcomes, including court outcomes

Collaboration: forge links between police and non-police environmental enforcement agencies, and between official and NGO agencies, with appropriate rules of engagement

Areas of divergence

Legality and social constructions of harm: NGOs may be among the biggest critics of existing rules and conventions and this puts NGOs at loggerheads with those whose official environmental law enforcement brief is dictated by international and national laws with which the NGOs may disagree

Illegal actions in support of a cause: Some NGOs justify taking illegal action on behalf of environmental and animal rights issues, based on the premise that many presently legal activities constitute a crime against nature and this can make collaboration between NGOs and official environmental law enforcement agencies complicated, at the very least, if not impossible

Intervention powers: For NGO investigators, legally mandated powers of investigation will vary (e.g., RSPCA versus Greenpeace), as will their legal standing in relation to questioning witnesses, initiating prosecutions and collecting evidence

Displacement of roles: in some countries the active engagement of NGOs around environmental matters is accompanied by the displacement of a formal authority role on the part of governments, especially where NGOs end up doing what should be done by formal state agencies, aided and abetted by the same governments that find it cheaper and easier to have NGOs do the work than funding such activities themselves

Accountability: this is partly determined by ideology and ideals (e.g., save whales, save forests) and one's record of activism in relation to these ideas; while acting outside the usual restrictions of law and bureaucratic structures offers a degree of 'real-world' flexibility in responding to actual environmental harms, it also will engender difficulties in forming alliances with official environmental law enforcement agencies and their personnel

Source: White (2012b).

There are many ways in which transnational environmental activist groups can work with official agencies and personnel to achieve similar goals, including sharing of intelligence and joint efforts to gather evidence against wrongdoers. On the other hand, in countries and regions where legal and illegal logging is built into the fabric of state–corporate collusion, it may well be the policing of anti-logging activists that predominates. The specific status and role of NGOs will thus vary depending upon immediate social and political circumstances.

Hence, there are a number of issues, problems and dilemmas that shape the precise role and contribution of NGOs to environmental law enforcement. Acknowledgement of these by both sides, plus a willingness to engage in dialogue with various stakeholders, would provide space in which to build upon the positive aspects of NGO engagement, and to minimise the potential conflicts between NGO and official agencies in their pursuit of social and ecological justice.

Conclusion

We conclude with the observation that environmental regulation and enforcement frequently only find effective purchase within particular jurisdictions and national contexts. Thus, for example, new forms of intervention, such as 'environmental enforcement sweeps', are now being applied where a specific community faces multiple environmental burdens. Such sweeps involve the use of administrative, civil, and criminal enforcement tools in tandem to address the problems in a comprehensive fashion (Dighe and Pettus 2011). Factory pollution, for example, might be responded to by examination of the permit compliance history of companies, investigation of violations of different environmental laws, and involvement of multiple agencies alongside community input. This model seems to present an ideal method of responding to environmental problems. Whether or not resources are put into this kind of intervention, however, is ultimately dictated by political and economic considerations.

A major problem here is that the key actors involved in environmental crimes tend to be global creatures able to take advantage of different systems of regulation and legal compliance, and at the local level they are so big that they have disproportionate political clout. In addition, very often it is nation-states themselves that are implicated in the perpetuation of environmental harm in their pursuit of economic success. Indeed, from the point of view of ecological considerations and eco-justice (see Table 20.1), many of the most destructive and unjust environmental activities are entirely legal. Accordingly, to respond to these requires that activists and NGOs take action outside the usual parameters of criminal and environmental law. Diminishment of biodiversity and systemic contributions to global warming, for instance, warrant forms of community engagement that challenge rather than support existing regulatory and enforcement regimes.

As this chapter has demonstrated, there are many different limitations but also opportunities for enhanced environmental regulation and law enforcement in a period witnessing the continued and growing destruction of environmental well-being on a global scale. For this to occur, there is a need for action in favour of environmental protection and ecological justice, the fostering of stronger enforcement capabilities, closer collaboration across agencies and state/non-state sectors, and the establishment of robust networks of environmental law enforcement officers and regulators. There is also a necessity for government and non-government agencies and actors to work together in a wide range of ways and contexts for the sake of better environmental governance generally.

In the end, a common problem is the lack of political will and financial resources being directed to environmental protection. Thus, while formal environmental law enforcement agencies and the like struggle along with meagre budgets and low staff numbers, and NGOs do what they can to highlight environmental degradation and species harm, there is still much that needs to be done. For this to occur, the 'environment' must come to the fore as an issue of significant public interest and public standing. It is the politics of the environment, therefore, that ultimately determines the extent and effectiveness of environmental regulation and law enforcement. This, too, demands work both within and against the state.

Discussion questions

1   Environmental harm is facilitated by the state as well as corporations and other powerful actors. What are the implications of this for definitions of and responses to environmental crime?
2   Which agencies and actors are involved in environmental law enforcement activities in your particular jurisdiction and/or country?

3   Transnational activism and the work of NGOs are important in efforts to combat environ-
     mental crime. How and why is this the case?
4   What is 'the state', and why is it important to work both with and against the state around
     environmental issues?
5   What are the key limiting factors in the pursuit of environmental and social justice?

Websites

Australian Institute of Criminology, see 'environmental crime': www.aic.gov.au.
Environmental Investigation Agency: www.eia–international.org.
INTERPOL (see 'environmental crime'): www.interpol.int.
United Nations Environment Programme, see 'Division of Environmental Law and Conventions':
     www.unep.org.
United Nations Interregional Crime and Justice Research Institute: www.unicri.it.
United Nations Office on Drugs and Crime, see 'environmental crime': www.unodc.org.

References

Akech, M. and Mwebaza, R. (2010) *Enforcement of Environmental Crime Laws: A Framework Training Manual
     for Law Enforcement Agencies*, Pretoria: Institute for Security Studies.
Akella, A. and Cannon, J. (2004) *Strengthening the Weakest Links: Strategies for Improving the Enforcement of
     Environmental Laws Globally*, Washington, DC: Center for Conservation and Government.
Ayres, I. and Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*, New York:
     Oxford University Press.
Beirne, P. (2007) 'Animal Rights, Animal Abuse and Green Criminology', in P. Beirne and N. South
     (eds) *Issues in Green Criminology: Confronting Harms Against Environments, Humanity and Other Animals*.
     Devon: Willan Publishing.
Beirne, P. (2011) 'Animal Abuse and Criminology: Introduction to Special Issue', *Crime, Law and Social
     Change*, 55: 349–357.
Beirne, P. and South, N. (eds) (2007) *Issues in Green Criminology: Confronting Harms Against Environments,
     Humanity and Other Animals*, Cullompton: Willan Publishing.
Bergin, A. and Allen, R. (2008) 'The Thin Green Line: Climate Change and Australian Policing', ASPI
     Special Report – Issue 17, Canberra: Australian Strategic Policy Institute.
Braithwaite, J. (1993) 'Responsive Business Regulatory Institutions', in C. Coady and C. Sampford (eds)
     Business Ethics and the Law, Sydney: Federation Press.
Braithwaite, J. and Drahos, P. (2000) *Global Business Regulation*, Cambridge: Cambridge University
     Press.
Commission for Environmental Cooperation (2001) *Special Report on Enforcement Activities: Report Prepared
     by the North American Working Group on Enforcement and Compliance Cooperation*, Montreal: CEC.
Convention on the Illegal Trade in Endangered Species (CITES) (2012) 'The International Consortium
     on Combating Wildlife Crime', available at: http://www.cites.org/eng/prog/iccwc.php, accessed
     6 September 2012.
Crawford, A. (2008) 'Plural Policing in the UK: Policing Beyond the Police', in T. Newburn (ed.) *Handbook
     of Policing*, 2nd edn, Cullompton: Willan Publishing.
Criminal Justice Inspection Northern Ireland (2007) *Enforcement in the Department of the Environment* [presented
     to the Houses of Parliament by the Secretary of State for Northern Ireland under Section 49(2) of the
     Justice (Northern Ireland) Act 2002], Belfast: CJINI.
Dighe, K. and Pettus, L. (2011) 'Environmental Justice in the Context of Environmental Crime', *United
     States Attorneys' Bulletin*, 59(4): 3–14.
Dobovsek, B. and Pracek, R. (2010) 'Solving Problems Related to Environmental Crime Investigations',
     in G. Mesko, D. Dimitijevic and C. Fields (eds) *Understanding and Managing Threats to the Environment
     in South Eastern Europe*, Dordrecht: Springer.
Environmental Investigation Agency (2008) *Environmental Crime: A Threat to Our Future*, London: EIA.
Francione, G. (2010) 'Abolitionist Approach to Animal Rights', in M. Bekoff (ed.) *Encyclopedia of Animal
     Rights and Animal Welfare*, vol. 1. Santa Barbara, CA: Greenwood Press.

Gibbs, C., Gore, M., McGarrell, E. and Rivers III, L. (2010) 'Introducing Conservation Criminology: Towards Interdisciplinary Scholarship on Environmental Crimes and Risks', *British Journal of Criminology*, 50: 124–144.

Gunningham, N. and Grabosky, P. (1998) *Smart Regulation: Designing Environmental Policy*, Oxford: Clarendon Press.

Haberfeld, M. and Cerrah, I. (eds) (2008) *Comparative Policing: The Struggle for Democratization*, Los Angeles: Sage.

Halsey, M. (2004) 'Against "Green" Criminology', *British Journal of Criminology*, 44(4): 833–853.

Halsey, M. and White, R. (1998) 'Crime, Ecophilosophy and Environmental Harm', *Theoretical Criminology*, 2(3): 345–371.

Hayman, G. and Brack, D. (2002) *International Environmental Crime: The Nature and Control of Environmental Black Markets*, London: Sustainable Development Programme, Royal Institute of International Affairs.

Herbig, F. and Joubert, S. (2006) 'Criminological Semantics: Conservation Criminology – Vision or Vagary?', *Acta Criminologica*, 19(3): 88–103.

Interpol (2012) *Environmental Crime Programme: Project LEAF*, Lyon, France: Interpol, available at: environmentalcrime@interpol.int.

Interpol Pollution Crime Working Group (2007) 'Arguments for Prosecutors of Environmental Crimes', *Advocacy Memorandum*, 5 June 2007.

Interpol and United Nations Environment Programme (2012) *Summit Report: International Chiefs of Environmental Compliance and Enforcement*, Lyon, France: Interpol and UNEP.

Kauzlarich, D., Mullins, C. and Matthews, R. (2003) 'A Complicity Continuum of State Crime', *Contemporary Justice Review*, 6(3): 241–254.

Lane, P. (1998) 'Ecofeminism Meets Criminology', *Theoretical Criminology*, 2(2): 235–248.

Lynch, M. and Stretesky, P. (2003) 'The Meaning of Green: Contrasting Criminological Perspectives', *Theoretical Criminology*, 7(2): 217–238.

Murphy, B. and Morrison, R. (eds) (2007) *Introduction to Environmental Forensics*, Amsterdam: Elsevier.

O'Brien, R., Goetz, A., Scholte, J. and Williams, M. (2000) *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements*, Cambridge: Cambridge University Press.

Plumwood, V. (2005) 'Gender, Eco-Feminism and the Environment', in R. White (ed.) *Controversies in Environmental Sociology*, Melbourne: Cambridge University Press.

Priest, M. (1997–98) 'The Privatization of Regulation: Five Models of Self-Regulation', *Ottawa Law Review*, 29(2): 233–302.

Sankoff, P. and White, S. (eds) (2009) *Animal Law in Australasia: A New Dialogue*, Sydney: The Federation Press.

Shelley, T. and Crow, M. (2009) 'The Nature and Extent of Conservation Policing: Law Enforcement Generalists or Conservation Specialists?', *American Journal of Criminal Justice*, 34(1): 9–27.

Situ, Y. and Emmons, D. (2000) *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment*, Thousand Oaks, CA: Sage.

Snider, L. (2000) 'The Sociology of Corporate Crime: An Obituary (or: Whose Knowledge Claims Have Legs?)', *Theoretical Criminology*, 4(2): 169–206.

Sollund, R. (2008) 'Causes for Speciesism: Difference, Distance and Denial', in R. Sollund (ed.) *Global Harms: Ecological Crime and Speciesism*, New York: Nova Science Publishers.

United Nations Office on Drugs and Crime (2011) *Transnational Organized Crime in the Fishing Industry*, Vienna: United Nations.

White, R. (2007) *Dealing with Environmental Harm: Green Criminology and Environmental Law Enforcement*, Briefing Paper No. 5, Tasmanian Institute for Law Enforcement Studies, Hobart: University of Tasmania.

White, R. (2008) *Crimes Against Nature: Environmental Criminology and Ecological Justice*, Cullompton: Willan.

White, R. (2011) *Transnational Environmental Crime: Toward an Eco-Global Criminology*, London: Routledge.

White, R. (2012a) 'Environmental Forensic Studies and Toxic Towns', *Current Issues in Criminal Justice*, 24(1): 107–121.

White, R. (2012b) 'NGO Engagement in Environmental Law Enforcement: Critical Reflections', *Australasian Policing: A Journal of Professional Practice and Research*, 4(1): 7–11.

White, R. (forthcoming) *Environmental Harm: An Eco-Justice Perspective*, Bristol: Policy Press.

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Part IX

Political and state violence

Struggles, conflicts, and transitions

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21

Redressing violence in Sub-Saharan Africa

Susanne Buckley-Zistel, Teresa Koloma Beck,
Friederike Mieth and Julia Viebach

In the 1990s and early 2000s, the majority of intrastate violent conflicts took place on the African continent. In many cases, the legacy of violence was redressed by transitional justice mechanisms such as truth commissions, tribunals or so-called traditional mechanisms. Since many parts of Africa are affected by structural and persistent socio-economic problems, in this chapter we assess the connection between transitional justice and development, or the absence thereof. The main question will be if it is necessary to include development aspects in processes of redressing past injustices. This will be done by comparing four countries which have experienced different forms of violence such as civil war, repression or genocide: Sierra Leone, Rwanda, South Africa and Mozambique.

The connection of transitional justice and development has increasingly been discussed in academic debates and advocacy work (see, for instance, Duthie 2008). In the words of Juan E. Méndez, former president of the think tank International Center for Transitional Justice, the connection can be explained as follows:

> Proponents of justice for atrocities cannot ignore the requirement of development for the whole country, nor expect that such requirements can be postponed until a later date while they settle accounts with the perpetrators. The holistic approach to justice pays attention to all different forms of victimization from the recent past; it should not limit itself to giving satisfaction to the direct victims of murder, imprisonment or torture.
>
> (Méndez 2010)

Institutions for development cooperation are also increasingly concerned with this nexus. For instance, the German Federal Ministry for Economic Cooperation and Development accorded special importance to the subject by organising a conference on the issue in January 2010,[1] while the German Civil Peace Service has been implementing relevant projects for some time. This also applies to other donors. A recent research revealed that in the last years, the notion of socio-economic development has come to be closer associated with the notion of justice. Between 1995 and 2005, for example, 5 per cent of developmental assistance for Rwanda and Guatemala was assigned to projects and institutions pertaining to transitional justice (Oomen 2005: 890). Thus, one can observe that in a number of post-conflict countries, development co-operation has come to be reformulated in legal terms.

In this chapter, the notion of development is understood in both a narrow sense as economic growth as well as in a wider sense as the improvement of life opportunities. Our objective is to analyse the relevance and appropriateness of connecting the redressing of violence through transitional justice with development by drawing on four case studies with very different forms and degrees of violence – Rwanda, Sierra Leone, South Africa and Mozambique – in order to obtain conclusions regarding this nexus. To that end, in the next section we will briefly present the concept of transitional justice as well as its potential links to development in order to provide a backdrop against which to discuss the case studies. Following this, we shall offer an analysis of each of the aforementioned cases, including the form of violence which took place and the consequences it led to, as well as the strategies chosen for coming to terms and redressing this past by means of transitional justice. The final section is dedicated to a critical evaluation of the question if and how connecting transitional justice and development is significant. We argue that while including structural violence and violations of economic, social and cultural rights should be addressed in transitional justice mechanisms, it is nevertheless important not to overload the concept in a way that propagates intervention by default. If transitional justice policies relating to development issues are to contribute to justice in a post-conflict society, they have to respond to the particular problems of a given context with specific institutions, programmes or initiatives.

Connecting transitional justice and development

The concept of transitional justice has been accentuated and differentiated since the 1990s. Yet, all the different approaches are based on the assumption that phases of transition from a period marked by violence, for example, a violent conflict or a repressive regime, to a more peaceful form of society are tightly bound to the establishment of justice (Elster 2004; Roth-Arriaza and Mariezcurrena 2006). A narrow definition of transitional justice is proposed by Rudi Teitel who defines it as 'a conception of justice associated with periods of political change characterised by legal responses to confront the wrongdoings of repressive predecessor regimes' (Teitel 2003: 9). Naomi Roth-Arriaza, by contrast, suggests a broader approach when she writes:

> At its broadest [transitional justice] involves anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations, from changes in criminal codes to those in high school textbooks, from creation of memorials, museums and days of mourning, to police and court reform, to tackling the distributional inequities that underlie conflict.
>
> (Roth-Arriaza and Mariezcurrena 2006: 2)

These definitions share the assumption that following violent conflicts or repressive regimes, coming to terms with human rights violations and war crimes is a necessity to make a clean break with past injustices (cf. Kayser-Wahnde and Schell-Faucon 2009). Currently, the following aims are summarised under this heading: disclosing of the truth about crimes, identifying perpetrators and holding them accountable, restoring the dignity of the victims, encouraging reconciliation and peaceful coexistence as well as preventing future human rights violations.[2] In order to achieve these goals, transitional justice includes a variety of mechanisms, such as creating justice by international, hybrid or national war tribunals, disclosing crimes and abuses through truth commissions, allocating reparations for victims of human rights crimes, providing compensation and rehabilitation, reforming institutions such as the police, the military and the judiciary, and dismissing corrupt and criminal personnel from public offices, as well as constructing memorial sites and museums to remember a violent past. It is significant that these measures may be combined according to the needs of a post-war or post-dictatorship context.

So how can we connect transitional justice and development? It should be noted from the outset that research into this nexus is still new and few general insights have been developed so far.[3] From the literature which does address the relationship between transitional justice and development we therefore derive a number of questions, which serve as a backdrop for the analysis of the case studies.

The first connection between transitional justice and development relates to the fact that in Sub-Saharan Africa violent conflicts frequently take place in so-called developing countries marked by poverty (De Greiff 2009). According to Jane Alexander (2003), poverty does not simply signify economic drawbacks, but also vulnerability and powerlessness which often indicate the marginalisation and discrimination of a part of the population by the central government. This is commonly manifested by poor economic development, bad housing, inadequate education and health services as well as by limited representation in state affairs. Where marginalisation has been deliberately employed, the term 'structural violence' may be used. This in turn is often the cause of discontent within marginalised segments of the population and may lead to the use of violence as a form of resistance, and thereby to violent conflict. Following this line of argument, unequal distribution of wealth and ensuing poor development can be a cause of violent conflicts. On this basis, Rama Mani (2002) suggests that the lack of distributive justice – manifested in poor development and concurrent with structural violence – should be dealt with in terms of transitional justice mechanisms. In other words, in this view, keeping a section of a population in poverty constitutes a crime which needs to be reckoned with by transitional justice.

Second, while unequal development and poverty can be seen as a cause of conflict, they are also often a consequence, as the occurrence of violence destroys the infrastructure, buildings and landscapes. Moreover, violent conflicts destroy social relationships and trust – including trust in state structures – which are crucial not only for personal well-being, but also for the political, social and economic development of a society. Yet, in order to encourage trust in structures it is necessary to promote more stability. This aspect is important as the latter is a key to improving life opportunities, which is part of a wider understanding of development (Alexander 2003). As has been described above, creating stability and trust is a professed goal of transitional justice and may be reached through measures such as criminal prosecution and truth-finding commissions (Duthie 2008). The question thus is if and how transitional justice can achieve these goals with view to a broader understanding of development.

The third connection between transitional justice and development is the prosecution of criminal acts relating directly to development (Duthie 2008). In contrast to political and civil rights (which are the conventional object of criminal persecution), these are designated as economic, social and cultural rights. Although human rights are generally viewed as indivisible, these two dimensions are often considered to be two different entities. Political and civil rights are mostly treated as 'negative obligations', such as the prohibition on torture, whereas economic, social and cultural rights, such as education, are treated as positive and costly obligations which cannot be claimed via legal processes (GTZ 2009). This is also reflected in international law which creates the foundation for many transitional justice mechanisms, especially criminal prosecutions. Here, political and civil rights are seen as basic liberties, whereas economic, social and cultural rights are considered as demands that are dependent on the respective state and the available resources (Arbour 2006). However, according to Louise Arbour (violent) conflicts such as those in South Africa, Guatemala and Darfur are an example that these rights cannot be so easily separated during and after conflicts since the infringement of economic, social and cultural rights can present a strategic and systematic method of warfare (ibid.: 9). The question is, hence, whether such crimes should be addressed directly by mechanisms of transitional justice.

In the remainder of this chapter, these relations between transitional justice and development – unequal development as a form of structural violence and thus a cause of conflict; successful development as a source for re-establishing social trust and trust in state structures; and the promotion of economic, social and cultural rights – will be discussed with view to four post-war societies. Based on this analysis, we will then return to the relevance and adequacy of connecting transitional justice and development from a more general perspective. Our analysis is solely concerned with measures applied nationally and internationally, and it is based on four very different cases – in order to avoid generalisations – which vary greatly in terms of both the causes and the extent of violence. Both Apartheid in South Africa as well as the genocide in Rwanda can be characterised as repression or unilateral (state and non-state) violence. In Mozambique and Sierra Leone, by contrast, violence took place in the context of civil wars, where different armed groups (state and non-state) fought against each other or against the population.

Rwanda

With the invasion of the Rwandan Patriotic Front (RPF) into Rwanda in 1990, a civil war broke out between exiled members of the Tutsi ethnic group and the Rwandan government army which, after four years, resulted in genocide. From April 1994 onwards, an estimated number of 800,000 Tutsis and politically moderate members of the Hutu ethnic group were killed within 100 days. The RPF eventually ended both the civil war and the genocide by military means.

In the face of the massive human rights abuses during the Rwandan genocide, far-reaching transitional justice measures were initiated. Those which stand out are the International Criminal Tribunal for Rwanda (ICTR) based in Arusha, Tanzania, and the local Gacaca village tribunals – both of which will be analysed in the following. The Gacaca tribunals finished their work in May 2012; a final report is due by end of 2012. After the closing of the Gacaca courts all appeal cases as well as new cases, e.g. by returning refugees, are being transferred to the national courts. The ICTR already has started to transfer cases to Rwandan national courts and is scheduled to complete its work by the end of 2012. In addition to these prominent transitional justice measures, numerous smaller projects were carried out in the areas of trauma counselling, support of victims organisations and memorialisation. Furthermore, a National Unity and Reconciliation Commission was established.

The genocide and its aftermath

The Rwandan genocide was the result of a long social and political process of politicising ethnicity. During colonisation by Germany and Belgium, and under the establishment of indirect rule, Tutsi were systematically and structurally favoured. Even before the arrival of colonial powers, there were horizontal inequalities between Hutu and Tutsi based on the ownership of land and feudalism, although it is disputed whether all Tutsi or only the then ruling Tutsi monarchy profited from these socio-political and economic structures (Prunier 1995; Uvin 1998; Pottier 2002). Nevertheless, the privileged position of Tutsi, their relative power and the redistribution of land in 1959 led to the so-called 'Social Revolution' in which Hutu rebelled against the dominance of Tutsi and colonial rulers, leading to the first pogrom against Tutsi and the flight of many into exile, as well as a reversal of power in favour of Hutu which would only be reversed by the end of the genocide in 1994.

The first Hutu Republic (1962–73) under Grégoire Kayibanda determined ethnicity as an essential feature of the system and discrimination against Tutsi was widespread. With the second Hutu Republic (1973–93) under Juvénal Habyarimana, ethnic hierarchies were reduced, yet not repealed, at least until the early 1990s when they were replaced by a quota system. Only in the course of the economic decline from the mid-1980s, and the invasion of the Tutsi rebel army in 1990 – comprised of returning representatives from the diaspora – as well as an externally imposed process of democratisation and liberalisation in the early 1990s, did ethnicity once more become a central factor in the mobilisation of the population and later the core subject matter of rhetoric legitimising the genocide. Prior to the genocide, and in the wake of the civil war, the fear of the population – fuelled by the government – of renewed dominance by the Tutsi and subsequent Hutu exploitation in the case of victory by the invading Tutsi militias took hold (Musahara and Huggins 2005). Recourse to the past political, social and economic marginalisation of Hutu was constructed as an appropriate instrument of propaganda for the extermination of the Tutsi, regardless of the fact that Hutu had hitherto benefited from the system in Rwanda for 30 years. Land scarcity, poverty and deprivation provided a fertile ground for the mobilisation of the population along ethnic lines who were then largely manipulated by the political elite (Mamdani 2001; Uvin 2001).

Although the genocide took place in the context of severe poverty, the prospect of acquiring and owning land through killing a Tutsi constituted only a limited incentive for participation in the massacres (Straus 2008). When Hutu appropriated the land of their neighbours, it was less the result of 'capturing prey' than opportunism. Nevertheless, the prospect of gaining land by murdering neighbours was deliberately used by authorities as a lure for participation in the killings (Des Forges 2002). Moreover, political leaders at the local level were often rewarded with land for their 'work' (Musahara and Huggins 2005). Many studies indicate though that mainly peer pressure, obedience to authorities and the fear of an invasion by the Tutsi-led RPF led people to kill Tutsi (Hatzfeld 2004; Straus 2008).

Today, as a result of the violence of the genocide, Rwanda is struggling with deep social division and mistrust. In addition, land scarcity and poverty have worsened, following the genocide due to the return of large numbers of Tutsi from the diaspora (who had been forced to leave the country in the course of the 'Social Revolution' in 1959) as well as the return of Hutu who had fled the Tutsi militia during the genocide, including many who were involved in killings during the massacres (Pottier 2004; Wyss 2006). Although the scarcity of land and its distribution through inheritance law mainly leads to family conflict, at times it also takes on an ethnic dimension through privileging individuals of victims' groups and returnees from the diaspora (almost all Tutsi) by the government within the context of the resettlement programme *Imidugudu* (Human Rights Watch 2001; Miller 2007). Though the government has launched numerous projects in the field of poverty reduction, food insecurity and impoverishment remain widespread. While a small political and economic elite profits from international investment projects and wide-ranging programmes in the development of the country, e.g. the banking, agriculture and business sectors, poverty remains part of the everyday struggle of the rural poor. Furthermore, significant parts of the country are now increasingly in the hands of a small political and economic (mostly Tutsi) elite, which continues to reinforce the discriminatory land policy, food insecurity, and poverty on the part of the rural poor (Wyss 2006). Thus, surveys suggest that around half of all forms of post-genocide violence in Rwanda is associated with poverty, although this cannot be measured along ethnic lines. Nevertheless, the National Unity and Reconciliation Commission emphasises that 'poverty stands, in the final instance, as an obstacle to the unity and reconciliation of the Rwandans' (NURC 2008: 131). In other words, the lack of development for some parts of the population might stand in the way of future peace.

Transitional justice in Rwanda

In today's Rwanda, and in much of the literature, the genocide is explained mainly by recourse to ethnicity, and issues regarding development (for example, land and resource distribution) are strictly separated from processes of dealing with the past. This is also reflected in the focus of the transitional justice mechanisms. For instance, in accordance with international legal conventions and other international tribunals, the ICTR does not consider economic, social and cultural rights, but rather focuses on offences by individuals under political and civil law. As of mid-2012, the ICTR has completed 72 cases, while four cases were transferred to national jurisdiction and 16 cases are still on appeal (ICTR 2012). According to the Tribunal's completion strategy, the entire process should be completed by the end of 2012, which means that residual mechanisms are put into place in order to try the last remaining cases and in order to trial appeal cases until at the latest the beginning of 2014 (UN Security Council 2012). It should also be noted that the ICTR is very expensive, posing the question whether its international financing could be put to better use in the extremely impoverished Rwanda (Des Forges and Longman 2006; De Greiff 2009). From the time of its foundation in 1994 until the year 2009 donor countries have invested around US$1.1 trillion in the ICTR (De Greiff 2009).

In contrast to the ICTR, the Gacaca tribunals are devoted to economic crimes during the genocide, even if only marginally. The village courts were established in 2002 on the basis of Rwandan cultural dispute resolution mechanisms with the aim of emptying the overcrowded prisons and relieving the national court systems as they faced the seemingly impossible task of prosecuting thousands of cases (Karekezi *et al.* 2004; Buckley-Zistel 2005). The stated aim of the village tribunals was to establish truth and in the long term to contribute to national reconciliation (National Service of Gacaca Jurisdictions 2010). Following the enactment of the Gacaca law in 2001, only certain categories of offenders – i.e. murder and property crime – fell under the jurisdiction of the gacaca tribunals, while leaders and masterminds were held accountable by national courts. Significantly, property crimes committed during the genocide were punished explicitly. The gacaca tribunals provide lists of victims who have experienced material losses or who are, as a result of physical injuries sustained, prevented from pursuing economic activities (§ 40 Organic Law setting up 'Gacaca Jurisdictions', 2001). Thus, reparations formed part of the gacaca justice, even though not in form of monetary compensation but in terms of manual labour in the fields or social work for the community (§ 16 Organic Law, Gacaca tribunals, 2004). One negative effect of this form of compensation was, however, that the households of the offenders lost valuable labour and men power, impacting on their own means to make ends meet in the face of severe poverty. This dilemma applied equally to the work of the gacaca tribunals which were supposed to reduce the number of people imprisoned on the accusation of having committed genocide but ended up increasing the number of inmates. Consequently, more Hutu households had to do without the corresponding labour (Buckley-Zistel 2005). As for the Rwandan government, it has so far refused to pay reparations to victims, since they regard themselves as liberators who terminated the genocide and do not want to take responsibility for the crimes of the previous regime that was responsible for the killings.

Transitional justice and development in Rwanda

In relation to the dimensions elaborated above, it can be stated that structural violence was not a direct cause of genocide in Rwanda. Although hate campaigns in the run-up to the genocide propagated discrimination and exclusion of Hutu by Tutsi, for over 30 years prior to this Hutu had determined the national politics, marginalising Tutsi over a long period of time. With respect

to the inclusion of economic, social and cultural rights, at least the Gacaca tribunals address this concern. However, since property crimes were a side effect of the violence, rather than economic, social and cultural crimes being a systematic strategy of genocide, their punishment is of little relevance to the transitional justice process (even though of tremendous importance to individuals who lost their property).

Ultimately, we must ask to what extent the use of transitional justice measures has contributed to the promotion of national reconciliation and greater trust in political institutions, as specified as a basic condition for improving development.[4] In the case of Rwanda, the direct effect of these measures in general and the Gacaca tribunals in particular has been counter-productive as it brings the legacy of the genocide back to the surface (Buckley-Zistel 2005). Moreover, the sincerity of the government with regard to dealing with the past is questioned by many, leading to mistrust in the government in particular and state structures in general. Instead of improved trust, in many places this leads to the contrary as trust in the government and its institutions as guarantors of future development remains limited.[5] In short, there are only tenuous links between transitional justice and development and – regarding the establishment of trust in state structures as a condition of development – rather with negative consequences.

Sierra Leone

The civil war in Sierra Leone lasted for about 11 years from 1991 to 2002. The decade was marked by periods of intense violence against the population, carried out by various armed groups, including the national army of Sierra Leone. As a result, approximately 50,000 people were killed and more than half of the population was temporarily displaced. In addition, different armed factions carried out amputations and forced civilians, including children, to fight (Lord 2000).

Since the end of the war, two transitional justice mechanisms have been established on a national level in the country; the Sierra Leone Truth and Reconciliation Commission, which carried out nationwide hearings in 2003 and 2004 and published its final report in 2004, and the Special Court for Sierra Leone, a hybrid tribunal, which was set up in 2002 to try those 'who [bore] the greatest responsibility for serious violations of international humanitarian law and Sierra Leone law' (Statute of the Special Court for Sierra Leone, Art. 1). The work of both institutions explicitly considered socio-economic issues. As such, a goal of the Truth and Reconciliation Commission was to uncover the full truth about the causes of the war, including economic aspects (Truth and Reconciliation Commission of Sierra Leone 2004a: 37; Carranza 2008; Duthie 2008). The mandate of the Special Court included offences such as pillage as crimes (Statute of the Special Court for Sierra Leone, Art. 3, 2002). Sierra Leone, therefore, differs from the other cases in this chapter in that socio-economic and developmental issues have been addressed directly in the context of transitional justice.

The civil war and its aftermath

The civil war in Sierra Leone was not fought along ideological fronts, such as political, ethnic, or religious lines, and therefore differs in many aspects from the three other contexts in this chapter. The war in Sierra Leone began when in 1991 fighters of the Revolutionary United Front (RUF) entered the country's eastern areas from Liberia with the aim of overthrowing a corrupt one-party government that had previously denied the population the advantages of any economic development (Richards 1996; Reno 2003; Keen 2005).

However, the victims of the rebellion were the civilians. Soon it became clear that the rebels lacked any coherent plan as they started to terrorise and capture civilians and as the conflict spread, villages were looted, houses burned, and people killed. Eventually the rebels started to take over control of the diamond mines in the eastern part of the country. The national army was sent to fight the rebels, but the underpaid soldiers started to loot and attack civilians as well. In some areas self-defence groups were formed to protect villages made up of civilians, however, also these groups employed brutal tactics similar to rebels and rogue army battalions.

In 1996, elections were held and soon after a peace accord was signed with the rebels. The months leading to the elections illustrated that the rebels' acts were also driven by a desire to be 'heard', as they started to amputate civilians' fingers in order to punish civilians for their will to vote. It has elsewhere been argued that if the war could be understood as a form of text, the rebels wanted to 'cut in on the conversation' (Richards 1996: xxiv), a view which illustrates the frustration of the fighters.

The elected government was soon ousted from power in 1997 by a group of soldiers who then invited the RUF to rule with them. Some ten months later, a West African peace force reinstated the government, leading to another amputation campaign by rebels and rogue soldiers. In January 1999, soldiers and rebels launched an attack on Freetown, the capital of Sierra Leone, which they dubbed 'No Living Thing'; during the 18 days that it took the peacekeeping force to fight back the attack, more than 6000 people died. Shortly after, a UN peacekeeping force was deployed to disarm all armed factions. Finally with the deployment of the British military, the fighting came to an end. The 1996 elected president, Ahmad Tejan Kabbah, announced peace in early 2002.

The cause of the war cannot be reduced to a single reason; nevertheless there are many links to the socio-economic situation in pre-war times. What is emphasised most strongly in the literature is: first, the country's dilapidated economy and infrastructure from years of bad governance; second, the supremacy of a small elite (composed of politicians and entrepreneurs) over the country's resources; third, a political system characterised by patronage and corruption as well as intolerance of oppositional movements; and, finally, a marginalised youth, particularly young men, who saw no prospects outside the established political networks. In the 1980s the situation further deteriorated when public institutions, such as schools and hospitals were neglected until they became practically inoperative, while the infrastructure was allowed to collapse. This is by no means an exhaustive description, however, it serves to highlight the complexity of factors before the war (Reno 2003; Keen 2005).

While the situation in Sierra Leone has certainly stabilised since the end of the civil war, many people continue to struggle with everyday problems. The 2012 cholera epidemic which claimed 280 lives (World Health Organization 2012) illustrates that, despite positive macro-economic developments – Sierra Leone may have more than 20 per cent growth rate in 2012 due to mining revenues (International Monetary Fund 2012) – simple issues such as hygiene education and the provision of clean water pose a serious problem for the government.

The country has furthermore witnessed two relatively peaceful and democratic elections in 2002 and 2007, the latter leading to a change of government. However, the outlook on the November 2012 elections is somewhat tense with many Sierra Leoneans fearing political violence. The main factors fuelling this fear are the extreme unemployment among young people combined with their disappointment about ongoing corruption (see IRIN News 2012), both popularly perceived to have been root causes that contributed to the civil war in the first place.

Transitional justice and development in Sierra Leone

The two most prominent transitional justice measures in Sierra Leone directly addressed some of the socio-economic aspects of the war. The Special Court for Sierra Leone was established in 2002 after President Kabbah sent a letter requesting a war crimes tribunal to the UN Security Council. The Court indicted a total of 13 persons, of which five belonged to the RUF, four were former army commanders, and three belonged to self-defence forces. These cases were tried in Freetown. The trial of Charles Taylor, indicted as a supporter of the RUF, was held in The Hague in the Netherlands. Including the recent judgment against Taylor, which is still in the appeals phase, nine persons have been sentenced, as three of the indicted passed away before or during the trial, while one remained missing (Special Court for Sierra Leone, n.d.). With the end of the Taylor trial, the Court is currently wrapping up its affairs in Freetown, however, it has, over the years, not received as much attention from the Sierra Leonean public as its donors had probably hoped.

The Special Court explicitly addressed economic crimes as crimes against humanity as it included the offence of pillage. This refers primarily to the illegal smuggling of diamonds carried out during the war by the RUF, as well as the other armed groups on a lesser scale. Especially in the trial of Charles Taylor, economic aspects were at the core of the case, as his connection to the RUF was in many ways economic. With this, the Special Court has acknowledged the economic dimension of the civil war (Carranza 2008: 325).

The Truth and Reconciliation Commission worked in two ways to accomplish its mandate. The Commission first held hearings in all districts of Sierra Leone in order to document what had happened during the war. Then, reconciliation ceremonies were held in all provinces, where some of the victims and perpetrators publicly repeated their stories and perpetrators were asked to show remorse. Already during these ceremonies it was clear that many people who confessed publicly also expected a compensation for their cooperation (Kelsall 2005: 371; Shaw 2007).

A final report of the Commission was published in 2004 and demonstrates how transitional justice institutions can address development issues. It explicitly documents economic crimes during the war, especially theft and destruction of property, as well as robbery (Truth and Reconciliation Commission 2004c: 489–491). Furthermore, it describes the role of politics of previous governments and the overall economic situation they created before the war as a breeding ground for many of the causes of the war. While the Commission distanced itself from the assumption that the war was a direct result of economic reasons, unequal distribution of resources was highlighted as playing a role both in fostering a climate of smuggling and corruption, as well as in marginalising great parts of the population (Truth and Reconciliation Commission 2004d: 4–21; Carranza 2008: 321; Duthie 2008).

The report goes on to point out that most of the factors leading to the war still exist, most dangerously the (socio-economic) marginalisation of youth. Also, politics of intimidation and corruption are allowed to continue:

> Corruption remains rampant and there is still no culture of tolerance in political discourse . . . the Commission did not perceive any sense of urgency among public officials to respond to the myriad of challenges facing the country.
>
> (Truth and Reconciliation Commission 2004b: 8)

The International Crisis Group similarly observed that both of the post-war governments so far seemed to have great difficulty in curbing corruption, with political rivalries and nepotism only getting worse (International Crisis Group 2008).

One of the recommendations of the report was that reparations should be paid to the victims of the civil war. Though rather late, the government, assisted by the UN, has responded at least partly to the recommendations and implemented a reparations programme from 2009 to 2012. Victims of five categories – orphans, widows, amputees, sexually abused women, and war wounded – were given a single payment (Suma and Correa 2009). While it should be noted as positive that the government addressed the recommendations, the way this reparations programme was implemented left a sour taste for those it was supposed to acknowledge. First, the amount of the payment (300,000 Sierra Leone Leones, which, in 2012, equals roughly 55 Euro[6]) was rather insignificant, even more so in the light of the recommendations of the Truth and Reconciliation Commission, which foresaw monthly pensions. It has been reported that some of the registered victims refused to pick up the amount. Second, the institution which was responsible for the implementation of the reparations is perceived to be among the most corrupt institutions of the country, so it surprised no-one when rumours started to circle that officials deleted those who had registered for the payment in order to put their own relatives on the list. Implementing partners were sometimes not informed when a next phase of the reparations would start so that at times some of the eligible people could not be informed adequately. Moreover, after the programme ended, there are still registered victims who have never received a payment. Third, in comparison to ex-combatants who had received both a higher amount and vocational training shortly after the war, the reparations for victims were too little, too late (Ottendörfer 2012; Sriram 2012).

Since in Sierra Leone development-related issues were directly addressed in the transitional justice process, the question arises at this point, to what effect? Did this inclusion contribute to the potential for structural, political and economic change, as well as to more equitable distribution of wealth? The quick answer is, no. While both transitional justice institutions at least acknowledged the economic aspects that led to and might have prolonged the conflict, with the Truth and Reconciliation Commission explicitly recommending that victims' economic, social and cultural rights should be addressed, the impact of these institutions at an everyday level has been disappointing. This is in large part due to the overall economic situation in the country that so far has not led to any felt improvement, especially in rural areas. Moreover, as demonstrated in the case of the reparations, instead of improving trust in structures and the government, prevailing corruption and poor implementation transformed a well-intended transitional justice measure into a mockery of victims' rights.

To most Sierra Leoneans, development means something very tangible: more jobs, less corruption, better infrastructure, electricity, clean water, and better health facilities. Even when development issues are raised in a report of a transitional justice institution, it does not automatically foster the necessary political will to tackle them. The Sierra Leonean case demonstrates very well that transitional justice mechanisms are limited both by the political leverage they can create as well as by the general economic situation of the countries they operate in.

South Africa

South Africa's Apartheid regime (1948–90) was based on the legally established segregation of the 'races' in the country. This institutionalised racism stripped the black population of their political and civil rights – as well as their economic, social and cultural rights – for example by establishing separate public facilities such as schools and health centres which were vastly inferior to the standards of those for white South Africans. Furthermore, any resistance within the country was immediately answered by state violence and arrests, with torture, extra-judicial killings and sexualised violence being widespread phenomena. Opposition groups like the African National

Congress (ANC) were prohibited and freedom of expression was limited. Over the years, riots and fights between police and demonstrators were common, as were grave human rights abuses from the side of security forces, yet also attacks on behalf of liberation movements. That at the beginning of the 1990s the Apartheid regime came to an end without violence, largely due to intensive negotiations, seemed like a small miracle to all observers.

Established after the first free elections in 1994, the South African Truth and Reconciliation Commission (1995–2002)[7] followed the aim of investigating politically motivated crimes during the Apartheid era and of contributing to national reconciliation between black and white South Africans. This included revealing the truth about crimes committed by the state and its security forces as well as by liberation movements. In the event of a full confession of guilt, the Commission was able to grant amnesty to perpetrators.

Apartheid and its aftermath

Racial segregation is a policy which specifically excludes, marginalises and discriminates against parts of the population. Its legal basis within the state is anchored in the assumption of the superiority of an identity group – in the case of South Africa of people with white skin colour – which postulates itself as the ruling race and not only revokes the political and civic rights of their putative inferiors, and restricts their access to public goods and services, but actively abuses them. In South Africa, this was manifested, among other things, in poor access to educational institutions and health care, inadequate housing, the exploitation of the cheap labour force, migrant work and the concomitantly disordered familial and societal relations. The National Party, which was in power from 1948, formalised and extended the policy of segregation, which had been in place in a less formal manner during the colonial period (Schäfer 2010). Thus, the population was divided according to 'race' into 'black', 'white', 'coloured', and 'yellow'. From 1958, citizenship was revoked for the black population and they were further degraded as citizens by assignment to one of the ten homelands, the so-called *Bantustans*, into which they were often forcibly resettled. Concurrently, Apartheid was based on extensive and frequently violent exploitation of black farm workers on the farms of the white owners, which established practices such as the whipping of young workers and the rape of female workers, so that physical violence against individuals came to form a cornerstone of society (Schäfer 2010).

After long negotiations, as well as national and international pressures, the Apartheid regime came to an end at the beginning of the 1990s. As the policy of segregation had led to the extreme impoverishment of the black community, there was much hope that their bleak situation would improve. To date, however, this has happened only moderately and selectively which leads to frustration among those who do not benefit materially from the new freedom (Saul 2001; Miller 2008: 284). In addition to the lack of redress of social injustices and the violation of economic, social and cultural rights as presented in the process of coming to terms with the past, as will be described below, the economic policy of the new South African government has a negative influence on equal (re-)distribution of wealth and it is argued that 'the results of this policy made victims of Apartheid into victims of neoliberalism' (Laplante 2008: 338).

Even reparations did not lead to an improvement in the economic situation of the poorest strata of the black population. The example of the victims' association, the Khulumani Support Group – whose members have brought a class action in the New York District Court against businesses for aiding and abetting serious violations of human rights and from profiting economically from the racist Apartheid Regime – is representative of the efforts of many to attain their rights (Medico 2009). Furthermore, the Truth and Reconciliation Commission recommended that the private sector donate a one-off payment of 1 per cent of its market value

towards compensation for the exploitation of cheap labour forces, but could not enforce this (Roth-Arriaza and Orlovsky 2009). A private enterprise Business Trust was nevertheless established to support particularly impoverished communities without, however, referring to this as reparations.

Transitional justice in South Africa

Among all the mechanisms of transitional justice, the Truth and Reconciliation Commission was without doubt South Africa's most prominent and extensive measure, one which set the world-wide tone for subsequent efforts towards redressing violence. During its term of operation, the commission heard about 21,000 witnesses, of which 2000 made public statements (USIP). In total, 7112 applications for amnesty were submitted, of which 846 were accepted and 5392 were rejected and the remainder were withdrawn. The final report, comprising some 3500 pages, concerned itself with the structural and historical background of the violence, and describes case studies and regional trends as well as the wider institutional and social environment of Apartheid. It concludes with a series of recommendations for the new government and the new South Africa, including detailed suggestions concerning reparation programmes as well as financial, symbolic and community reparations and the reformation of the society and the political system. Moreover it recommended that faith groups, the economy, the judiciary, the military, and the health system, as well as the media and education institutions should all work together to promote reconciliation. Lastly, the commission recommended that in cases where amnesty was denied, criminal prosecution should be pursued.

Physical violence directed at the individual, in particular, became the central reference point for transitional justice in the Commission. So, even though its statutes allowed for contextual investigations into the origin and dynamics of Apartheid, the commission quickly turned to a single object of investigation: the massive violations of human rights which were defined as physical abuse (Miller 2008). This focus on political and civil rights excluded aspects such as social justice, economic distribution, i.e. a systematic process of de-legitimising Apartheid. In other words, the Truth and Reconciliation Commission reduced Apartheid from a relationship between the state and social groups to one between the state and the individual (Mamdani 1997). The racial discrimination of whole population segments was, however, a central characteristic of the racial segregation and thus should be appropriately considered within historical reconstruction. By restricting violent crimes to the individual, the Commission failed to illuminate key aspects of Apartheid such as structural violence, economic discrimination and race-based privilege; neither structural violence nor economic, social and cultural rights were the subject of proceedings.

While the Truth and Reconciliation Commission referred to the responsibility of the colonial regime and the segregation policies of the National Party, the lack of time and the focus of the Commission limited to individual rights did not allow for a basic reconstruction of these societal and economic aspects – it allowed one day for hearings devoted to the role of the economy. Nevertheless, the final report includes a chapter on work relations and the abuse of cheap labour (Harwell and Le Billon 2009). Questions of land ownership were consciously avoided (Huggins 2009).

Transitional justice and development in South Africa

In sum, regarding South Africa, it can be argued that the political compromise made in the context of the fragile political situation after the demise of the Apartheid regime and around

the first free elections in 1994, as well as the promotion of national reconciliation that was upheld by the leaders of the time, undermined attempts to resolutely redress social and economic inequalities. With the end of the Truth and Reconciliation Commission, the chapter of historical reconstruction on the national level officially came to a close so that the enduring structures of discrimination and marginalisation – and the inadequate conditions of development of many black South Africans – were not considered. The opportunity to improve their life conditions by means of transitional justice was missed. Returning to the dimensions established above regarding the connection between transitional justice and development, in the case of South Africa, it can be stated that racial segregation led to extreme developmental deficits among marginalised groups and severely curtailed their economic, social and cultural rights. For the Truth and Reconciliation Commission not to take as its focal point the central function of Apartheid – in addition to avenging political and civil rights – can be seen as that institution's most significant failure. Closely connected to this is the question of the causes of conflict, which show significant features of structural violence and the conscious marginalisation of one part of the population. Here, the transitional justice mechanism embodied by the Commission failed to create 'justice'. In terms of the third aspect of our question, the trust in structures and the government as a basis for development 16 years after the end of Apartheid remains bleak, particularly for the black population. Here, however, the blame cannot be laid at the door of the past regime as the balance of power has shifted to the ANC, but rather at the liberalisation policies of the current government, and the rampant level of corruption. Although violence is only rarely motivated by black–white racism today,[8] South Africa possesses one of the highest crime rates worldwide.

Mozambique

South Africa's neighbour Mozambique plunged into violent conflict soon after the country had gained independence from Portuguese colonial rule. The civil war, which lasted from 1976 to 1992, was marked by severe violence. In the Western media, the name of the country became associated with images of child soldiers, mutilations and burnt down villages. Policy-making in the aftermath of the conflict, however, did not include measures to explicitly address this violent past: no truth commission was established, no tribunal installed, no one was formally held responsible. Transitional justice in a narrower sense was limited to an amnesty, enacted along with the peace accord without much public debate, which granted impunity for crimes committed during the war. After the signature of the General Peace Accord, war violence receded quickly, economic recovery set in and people came to live together peacefully. Eventually, the country came to be considered one of the few success stories in the post-Cold War peacebuilding. Yet, this peace seems to be frail, as another form of violence seems to be on the rise in the country: riots in urban and peri-urban areas, which are fuelled by the anger of the poor over perceived socio-economic injustices. In the context of the discussion presented in this chapter, the Mozambican case, hence, draws attention to the relationship between socio-economic development and post-conflict justice in the absence of formal measures addressing the violent past.

The civil war and its aftermath

Civil war in Mozambique broke out in the wake of the country's transition to independence. In 1975, the colonial power Portugal handed over state authority to the former liberation movement FRELIMO, which set up the post-independent country as a socialist single party

state. An ambitious modernisation project was launched which targeted social and economic development and was intended to create the symbolic and material basis of a post-colonial Mozambican nation (cf. Isaacman and Isaacman 1983: 145–170). Post-independence policies, however, spurred conflicts within the country as well as in the Southern African region, which eventually, escalated into a civil war. In this regard, three lines of conflict were decisive: first, a conflict among elites that had developed within the liberation movement and escalated upon independence. The latter produced dissidence within FRELIMO, which became an important basis for the formation of an insurgent armed group. The second conflict related to the balance of power in the Southern African region under the conditions of the Cold War, which was threatened by the installation of socialist governments in Angola and Mozambique after the end of Portuguese colonialism. Most affected by this turn of history was the already ailing minority-government in neighbouring Rhodesia,[9] which therefore pushed the formation of the rebel group RENAMO, which started to violently challenge FRELIMO power in Mozambique (Vines 1991; Cahen 2002). Hence, soon after the transition to independence, in 1976,[10] an internal armed conflict seized the country. The latter, however, would hardly have escalated into 16 years of civil war, without a third line of conflict coming into play: the social conflicts within the country spurred by post-independence policy-making. The social re-engineering project launched by the socialist government entailed a discursive and practical assault on accustomed ways of living and had marginalised so-called traditional elites. Especially in the rural and Northern parts of the country, this approach fostered resentment towards the new government, which eventually turned into support for the rebels and sustained the armed conflict for more than a decade (Geffray 1990; Dinerman 2004).

The war ended in 1992, after two years of strenuous negotiations between the government and RENAMO, with a General Peace Accord. At this time, the socio-economic situation in the country was precarious. In the course of the war, the larger part of the country's infrastructure had been severely damaged or destroyed. Especially in rural Mozambique, the war had continuously jeopardised livelihoods; the situation had been aggravated by recurrent natural disasters.[11] Some 1.7 million Mozambicans lived in refugee camps (UNHCR 2000: 112)[12] in neighbouring countries, at least twice as many were estimated to be internally displaced (ibid.: 148). In this situation, the General Peace Accord laid out the future course for the country. Not only did it bring an end to a long-lasting civil war, but it also replaced the socialist constitution[13] with a constitutional commitment to pluralism and democracy (Assembleia da República 2006). Since then the country has seen four national elections and a steady growth of the major macro-economic indicators (Hanlon and Smart 2008). There is a variety of parties, promoting programmes from social justice to human rights protection and ecological sustainability. Since the first free elections in 1994, the former rebel group RENAMO is the statistically most important opposition party with delegations in all provinces of the country. This multi-party system is flanked by a multitude of so-called civil society organisations and supported by a relatively diverse media environment. In an overall perspective, post-conflict transition in Mozambique appears to be successful.

Yet, as pointed out above, the peace achieved is a fragile one. War violence did not resurge, but collective violence periodically recurs since the late 1990s in the form of riots and other forms of popular violence.[14] Most prominent in this regard have been the urban riots, which paralysed the capital Maputo in 2008, 2009 and 2010. The recurrence of mob lynchings or collective aggressions against prominent figures within a given community are other features of this emerging picture (Hanlon, 2009). Observers of these developments have repeatedly pointed out that the roots of these violent events are to be found in the growing inequalities in the country and the poor living conditions of an increasing number of people (Hanlon 2009; Tvedten

et al. 2009: 20–21). These riots bear no outward relation to the political cleavages that once fuelled the civil war, but they can be traced back to the failure of post-war policy-making to create socio-economic justice in the post-war situation and thus to defuse socio-economic inequalities as a driver of violent conflict as discussed above. This relationship between post-conflict justice, socio-economic development and political stability will be explored in the following sub-section.

Transitional justice in Mozambique

As pointed out above, transitional justice in Mozambique had remained limited to an amnesty. The latter, however, never became the subject of public debates. It was enacted along with the General Peace Accord as Law no 15/92,[15] and in its 15 lines of text, it in fact merely reenacted a number of amnesties which had been issued since 1979 in an attempt to deal with RENAMO violence. Different from the cases discussed so far, the Mozambican post-conflict transition was marked by the absence of policies explicitly addressing the legacy of violence. The peace legislation, instead, revolved around the political architecture of the post-war state as well as DDR (disarmament, demobilisation and reintegration) and SSR (security sector reform) processes. This approach of casting a cover of silence over the violent past was directly related to the model of coexistence between FRELIMO and RENAMO conceived at the negotiation table. The latter was founded upon the principle of mutual recognition between the former opponents. Accordingly, the peace came to be discursively framed as being a 'victory without vanquished' (Sengulane 1994) and the political system of the immediate post-war situation was characterised by what Manning (2002) described as 'elite cohabitation'. Conventional transitional justice mechanisms, especially those designed to establish accountability and to facilitate retribution, risked jeopardising the delicate balance thus achieved. In this context, already the notion of an amnesty was challenging, as it criminalised the actions and actors in question.

Given this deliberate silence of official politics on past human rights violations, dealing with the past was left to the structures and processes in the realm of the everyday. It took place on the community level, in the framework of accustomed practices traditionally enacted to facilitate transition from crisis. In the academic literature, theses practices are commonly referred to as 'traditional rituals'. Among them are cleansing rituals, in which the person is washed of all evil and symbolically born anew; spirit exorcisms, in which the person is freed from the vengeful spirits of those who had died during the war; or funerals in which the dead are brought to final peace (Boia 1998; Nordstrom 1998; Englund 2006; Granjo 2006). Those practices had a significant impact on the individual as well as on the community level, as their common characteristic is to somehow leave the past behind and orient towards the future. For the individual, they provided a form for dealing with (potentially) traumatising experiences and thus supported what is commonly called mental health. On the community level, they facilitated the re-integration of returnees and the co-existence of former members of the opposing parties. In sum, these accustomed ritual practices facilitated reconciliation and, hence, contributed essentially to the pacification of the country. Yet, what these self-organising practices could not bring about was some form of post-conflict justice, as the latter is never the result of spontaneous self-organisation, but always the product of political processes. This failure of post-war policy-making to politically conceive the post-war state not only in terms of recognition and unity, but also in terms of post-conflict justice eventually led to new conflicts. The frustration over distributive inequalities and socio-economic injustices became the driver of riots and other forms of popular violence.

Transitional justice and development in Mozambique

The growing socio-economic disparities, however, are a side effect of the approach to post-war policy-making in the country, which focused on unity and mutual recognition, casting a cover of silence over past human rights violations. In the decade following the signature of the peace accord, this silence, which had initially served to guarantee a status of equal partnership between the former opponents, became an obstacle to transforming the administrative structures of the one-time single party state and to establish an independent or at least plural state bureaucracy. Instead, administrative powers remained concentrated in the hands of the former state-party FRELIMO, which turned its competitive advantage as an incumbent into successive election victories. FRELIMO's persistent control over the state apparatus facilitated the reproduction of elites and thus of patterns of socio-economic exclusion. Consequently, it affected the distribution of the gains of post-war development. The post-war transition, hence, betrayed the hopes for justice associated with the signature of the peace accord – justice not in the sense of some form of settlement between victims and perpetrators, but understood as the realisation of an inclusive society, in which opportunities are distributed equally.

In the context of the discussion developed in this chapter, the Mozambican case, hence, draws particular attention to the possible impact of transitional justice processes on the macro-structures of society. It points to the significance of the socio-economic dimension of post-conflict justice and, thus, underscores the importance of development in transitional justice processes. The incidents of popular violence described above show that the problem in Mozambique today is not a conflict between the former parties of the war; the latter has been quite successfully dealt with by the ritualised practices described above. The problem, which might endanger the stability of the post-war state is justice; it is the frustration of the poor and marginalised at growing socio-economic inequalities and destitute life conditions, which remain unaddressed by public policy-making.

Transitional justice and development?

As stated in the Introduction, this chapter presents an attempt to close the gap regarding the nexus between transitional justice and development from an empirical, comparative perspective. It discussed if and how development-related and socio-economic aspects have been redressed in the transitional justice mechanisms of four post-conflict societies. We assessed whether it is relevant and necessary to incorporate these aspects into transitional justice processes in developing countries. The analyses of Rwanda, Sierra Leone, South Africa and Mozambique reveal that inclusion depends on a variety of factors. Of significance are the origins as well as the form of the conflict, its historical context and the motivation of the parties involved. Besides, the availability of natural resources whose exploitation can be lucrative for militias or armies can play a major role. In addition to insights regarding the subject matter, the comparative analysis also points to the fact that empirical research is necessary when judging policy matters regarding transitional justice and beyond.

In sum, it can be stated that transitional justice institutions have different possibilities when addressing and amending socio-economic abuses. On the one hand, depending on the nature of the conflict, individual crimes such as theft or destruction of property can be legally prosecuted. Ruben Carranza emphasises that the pursuit of economic crimes in itself makes sense, as crimes against humanity and crimes of an economic nature are often associated with each other and/or are committed by the same persons (Carranza 2008). This is evident in the case of the Sierra Leonean tribunal, where economic crimes are cited as evidence alongside

crimes against humanity. Similarly the Truth Commission in Sierra Leone recorded that individuals were also harmed economically, such as through the destruction of houses and fields, and the theft of property. Traditionally inspired tribunals, such as the Gacaca tribunals in Rwanda, can have a redistributive effect in that they attempt to compensate the victims of economic damage with the labour of the perpetrators.

Moreover, some institutions, in particular truth commissions, have the potential to disclose the various dimensions of a conflict – including structural violence and discrimination – and thus can provide a basis for corresponding policies, for example, through recommendations. The South African Truth and Reconciliation Commission is a case in point. Although it examined only political and civil rights, it at least strived to make the structural nature of Apartheid visible in its sessions. The Truth and Reconciliation Commission in Sierra Leone further analysed the role of underdevelopment, corruption and special patrimonial structures before the outbreak of war. From this perspective, its report illuminates the causes of the conflict and the possible motivations of the parties and arrives at a differentiated picture exposing the ongoing structural problems, which demand action from the present government.

By including development-related issues, such as structural violence, trust and security or economic, social and cultural rights, in transitional justice processes, the function of transitional justice shifts from evaluating past events to promoting the redistribution of wealth and the creation of a more just society in a broader sense. This way, transitional justice might even become an engine of social and economic 'progress'. As Zinaida Miller argues: '[a] present without redistribution or a future inability to overcome longstanding national inequality would dilute the purposes and possible achievements of transitional justice institutions' (2008: 267).

This is based on the assumption that development issues such as the future redistribution of land and other forms of economic change cannot be separated from the examination of the past as they always form an aspect of the political or ethnic causes of conflict. In the words of Miller, 'it suggests that inequality is a question of time or development rather than the entrenched ideology of elites' (ibid.: 268). Therefore, she advocates linking the search for justice regarding violence with the search for distributive justice. The necessity of such an approach seems to be illustrated in particular by the case of Mozambique, where the absence of any measures confronting the violent past not only prevented quests for 'truth' and accountability, but in the long run also contributed to deepening socio-economic inequalities in the country.

The analysis of the cases, hence, highlights that transitional justice implies an idea of progress and change replacing repressive orders and regimes by a somehow better society. In political practice, these changes are frequently conceived as the transition to democracy and market economy, i.e. in terms of social change and development. From this perspective, it seems that there is a natural intimacy between development and transitional justice. Moreover, strong parallels between transitional justice and development can be observed when it comes to how the respective policies are implemented: both are typically state-centred and attempt to transform society along liberal ideals by means of social engineering. Moreover, both are frequently characterised by an external (both in the sense of international, as well as from outside the affected communities), technocratic top-down engagement. Yet, as Christopher Colvin has pointed out, despite these apparent parallels, there are significant differences between transitional justice and conventional development policies: transitional justice deals first and foremost with criminal offences of the past, with a focus on the individual. Development policies, by contrast, are future-oriented and relate to collective, structural issues, with the goal being a change of the material and social, rather than the legal world (Colvin 2008).

So does it make sense to address economic redistribution under the heading of transitional justice? Both transitional justice and development policies promote external interventions into

the constitution of a society (or community) with the intention of having a lasting effect. Nonetheless, such interventions do not always correspond to the realities and needs of the target groups which usually are but insufficiently integrated into planning processes. Therefore, in the first place, one should reconsider whether the Western-dominated, liberal constructs underlying these standards are just in terms of the local context. If compared to transitional justice activities in a narrower sense, transitional justice policies integrating socio-economic development objectives will be more far-reaching interventions into the structures of the society concerned. This should be kept in mind when developing policies connecting transitional justice and development. Against this backdrop, the association of transitional justice with social change in a broader sense, i.e. the second nexus elaborated at the beginning, appears to be particularly problematic. The analysis of the four cases suggests that especially in low and least developed countries, the prevention or elimination of structural violence as well as the protection and promotion of economic, social and cultural rights might be adequate additional objectives for transitional justice. Yet, attempts to use transitional justice as a vehicle for liberalistic socio-economic change in a broader sense should be regarded with caution.

Discussion questions

1   Do you think it is important to consider development aspects when redressing violent pasts?
2   Are social, economic and cultural rights as important as political and civil rights?
3   How far should the intervention of development actors in post-violence societies go?

Websites

Center for the Study of Reconciliation and Violence: http://www.csvr.org.za/.
International Center of Transitional Justice www.ictj.org.
Oxford Transitional Justice Research, University of Oxford: http://www.csls.ox.ac.uk/otjr.php.
Transitional Justice Institute, University of Ulster: http://www.transitionaljustice.ulster.ac.uk/.
Truth Commission Collection, United States Institute for Peace: http://www.usip.org/publications.

Notes

1 See New Horizons, 'Linking Development Cooperation and Transitional Justice for Sustainable Peace'. 27–28 January 2010, FriEnt, Dietrich-Bonhoeffer-Haus, Berlin.
2 See, for instance, the website of the International Center of Transitional Justice www.ictj.org.
3 See, for instance, de Greiff and Duthie (2009) and the special volume of the *International Journal of Transitional Justice* (2008).
4 For a criticism of gacaca tribunals, see, e.g., Karekezi *et al.* (2006).
5 This cannot be considered without an assessment of the general political situation of the country which is beyond the scope of this chapter.
6 It was further negotiated by the respective associations that amputees received an additional US$200, while sexually abused women were given the opportunity to access free training provided by UNIFEM.
7 According to its original mandate, the Truth and Reconciliation Commission should have ended in 1996, but was extended to 2002 due to its high work expenditure.
8 It is important to note, though, that a new form of 'racism' is emerging, taking on violent forms: between black South Africans and black immigrants from other countries of Sub-Saharan Africa.
9 Mozambique's new socialist leadership was not only overtly critical of Rhodesia's apartheid regime, but also began to harbour the anti-colonial movement ZANU under Robert Mugabe, which was threatening white minority power in the country. This political conflict was aggravated by the economic dependence of the resource-rich but landlocked country on Mozambican ports so as to gain access to world trade.

10 The year of the outbreak of the civil war in Mozambique remains disputed. While some authors affirm that the first intrusions into Mozambican territory started only in 1977, most note 1976 as the year of the war's inception. The latter view is also coherent with the dominant discourse in the country, in the framework of which 'the sixteen years war' ('*a guerra das dezasseis anos*') is a common epithet for the conflict.

11 In 1980 and 1981/82, droughts affected the south and the centre of the country; in 1983/84 and 1991–93, most parts of the country were affected.

12 During much of the 1980s, only Palestinian and Afghan refugees outnumbered the Mozambicans refugee population, the majority of whom lived in Malawi.

13 Technically, the constitution of the People's Republic of Mozambique of 1975 had been replaced by the constitution of 1990, which officially broke with state socialism, introducing a multi-party political system, universal suffrage, an independent judiciary, freedom of the press, the right to strike and a market economy. Yet, in the persisting war situation, this new constitution never gained practical relevance.

14 Up to now, there have been no systematic statistics on the issue, just scattered evidence analysed in the framework of qualitative research.

15 The General Peace Accord itself was voted in by the Assembly of the Republic the same day as Law 13/92.

References

Alexander, J. (2003) *A Scoping Study of Transitional Justice and Poverty Reduction*, London: GSDRC.

Arbour, L. (2006) *Economic and Social Justice for Societies in Transition*, New York: University School of Law.

Assembleia da República (2006) 'Acordo geral de paz de Moçambique. Lei No. 13/92, de 14 de Outubro', in L. B. Rodrigues, S. Alves and J. Nguenha (eds) *Constituição da República de Moçambique e Legislação Constitucional*, Coimbra: Almedina, pp. 225–272.

Boia, J. E. (1998) 'Die Geister können Schmerzen lindern. Traditionelle Riten in der Therapiearbeit mit ehemaligen Kindersoldaten in Mosambik', *Der Überblick*, 4: 52-57.

Buckley-Zistel, S. (2005) 'The Truth Heals? Gacaca Jurisdictions and the Consolidation of Peace in Rwanda', *Die Friedens-Warte. Journal of International Peace and Organization*, 80(1–2): 113–130.

Cahen, M. (2002) *Les bandits. Un historien au Mozambique, 1994*, Centre Calouste Gulbenkian.

Carranza, R. (2008) 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' *The International Journal of Transitional Justice*, 2/3: 310–330.

Colvin, C. G. (2008) 'Purity and Planning: Shared Logics of Transitional Justice and Development', *The International Journal of Transitional Justice*, 2/3: 412–425.

De Greiff, P. (2009) 'Articulating the Links Between Transitional Justice and Development. Justice and Social Integration', in P. De Greiff and R. Duthie (eds) *Transitional Justice and Development: Making Connections*, New York: SSRC, pp. 28–76.

De Greiff, P. and Duthie, R. (eds) (2009) *Transitional Justice and Development: Making Connections*, New York: SSRC.

Des Forges, A. (2002) *Kein Zeuge darf überleben. Der Genozid in Ruanda*. Hamburg: Hamburger Edition.

Des Forges, A. and Longman, T. (2006) 'Legal Responses to Genocide in Rwanda', in E. Stover and H. M. Weinstein (eds) *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge: Cambridge University Press, pp. 49–69.

Dinerman, A. (2004) 'Processes of State Delegitimization in Post-Independence Rural Mozambique: The Case of Namapa District, Nampula Province', *Journal of Historical Sociology*, 17: 123–184.

Duthie, R. (2008) 'Toward a Development-Sensitive Approach to Transitional Justice', *The International Journal of Transitional Justice*, 2/3: 292–309.

Elster, J. (2004) *Closing the Books: Transitional Justice in Historical Perspective*, New York: Cambridge University Press.

Englund, H. (2006) *From War to Peace on the Mozambique-Malawi Borderland*, Edinburgh: Edinburgh University Press.

Fanthorpe, R. (2001) 'Neither Citizen nor Subject? "Lumpen" Agency and the Legacy of Native Administration in Sierra Leone', *African Affairs*, 100(400): 363–386.

Geffray, C. (1990) *La cause des armes au Mozambique. Anthropologie d'une guerre civile*. Paris: Karthala Credu.

Granjo, P. (2006) 'Back Home: Post-War Cleansing Rituals in Mozambique', in B. Nicolini (ed.) *Studies in Witchcraft, Magic, War and Peace in Africa, Nineteenth and Twentieth Centuries*, Lewiston, NY: Edwin Mellen Press, pp. 277–294.

GTZ (2009) *What Do Transitional Justice Mechanisms Gain by Including Economic, Social and Cultural Rights Dimensions?* Eschborn: GTZ.

Hanlon, J. (2009) 'Mozambique: The Panic and Rage of the Poor', *Review of African Political Economy*, 119.

Hanlon, J. and Smart, T. (2008) *Do Bicycles Equal Development in Mozambique?* London: Currey.

Harwell, E. E. and Le Billon, P. (2009) 'Natural Connections: Linking Transitional Justice and Development Through a Focus on Natural Resources', in P. De Greiff and R. Duthie (eds) *Transitional Justice and Development: Making Connections*, New York: SSRC, pp. 282–331.

Hatzfeld, J. (2004) *Zeit der Macheten. Gespräche mit den Tätern des Völkermordes in Ruanda*. Gießen: Haland & Wirth im Psychosozial-Verlag.

Hazan, P. (2007) 'Das neue Mantra der Gerechtigkeit. Vom beschränkten Erfolg international verordneter Vergangenheitsbewältigung', *Der Überblick*, 43(1–2): 10–22.

Huggins, C. (2009) 'Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform, and Development', in P. De Greiff and R. Duthie (eds) *Transitional Justice and Development: Making Connections*, New York: SSRC, pp. 332–374.

Human Rights Watch (2001) 'Uprooting the Rural Poor in Rwanda, Summary', available at: www.hrw.org/reports/2001/rwanda/rwnvilg-01.htm (accessed 11 April 2010).

ICTR (2012) 'Status of Cases', available at: http://www.ictr.org/ENGLISH/cases/status.htm (accessed 17 October 2012).

International Crisis Group (2008) 'Sierra Leone: A New Era of Reform?' Africa Report No. 143, 31 July 2008, available at: http://www.crisisgroup.org (accessed 31 October 2009).

International Justice Tribune (2004) 'Truth Report Spares No Parties', available at: http://www.rnw.nl/int-justice/article/truth-report-spares-no-parties (accessed 22 February 2010).

International Monetary Fund (2012) 'Sierra Leone and the IMF', available at: http://www.imf.org/external/country/SLE/index.htm (accessed 5 April 2013).

IRIN (2004) 'Sierra Leone: Special Court Opens Its Doors Amid Controversies', available at: http://www.irinnews.org/report.aspx?reportid=49101 (accessed 22 February 2010).

IRIN (2012) 'Sierra Leone: Bracing for a "Watershed Election"', available at: http://www.irinnews.org/Report/96494/SIERRA-LEONE-Bracing-for-a-watershed-election (accessed 10 October 2012).

Isaacman, A. and Isaacman, B. (1983) *Mozambique: From Colonialism to Revolution, 1900–1982*, Boulder, CO: Westview Press.

Karekezi, A. *et al.* (2004) 'Localizing Justice: Gacaca Courts in Post-Genocide Rwanda', in E. Stover and H. M. Weinstein (eds) *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge: Cambridge University Press, pp. 69–85.

Kayser-Wahnde, U. and Schell-Faucon, S. (2009) 'Transitional Justice and Civilian Conflict Transformation', CCS Working Paper No. 10, Marburg: Zentrum für Konfliktforschung.

Keen, D. (2005) *Conflict and Collusion in Sierra Leone*, Oxford: James Currey.

Kelsall, T. (2005) 'Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone', *Human Rights Quarterly*, 27(2): 361–391.

Laplante, L. J. (2008) 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework', *The International Journal for Transitional Justice*, 2(3): 331–355.

Lenzen, M. (2009) 'Roads Less Traveled? Conceptual Pathways (and Stumbling Blocks) for Development and Transitional Justice', in P. De Greiff and R. Duthie (eds) *Transitional Justice and Development: Making Connections*, New York: SSRC, pp. 76–109.

Lord, D. (2000) 'Introduction: The Struggle for Power and Peace in Sierra Leone,' in D. Lord (ed.) *Paying the Price: The Sierra Leone Peace Process*, London: Conciliation Resources.

Mamdani, M. (1997) 'From Justice to Reconciliation: Making Sense of the African Experience', in C. Leys and M. Mamdani (eds) *Crisis and Reconstruction: African Perspective*, Uppsala: Nordic Africa Institute, pp. 17–25.

Mamdani, M. (2001) *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, Princeton, NJ: Princeton University Press.

Mani, R. (2002) *Beyond Retribution: Seeking Justice in the Shadows of War*, Oxford: Polity Press.

Manning, C.L. (2002) *The Politics of Peace in Mozambique: Post-conflict Democratization, 1992–2000*, Westport, CT: Praeger.

Medico (2009) 'Apartheid-Klage gegen deutsche Firmen in USA zugelassen', available at: www.medico.de/themen/vernetztes-handeln/apartheid/dokumente/apartheid-klage-gegen-deutsche-firmen-in-usa-zugelassen/3211/ (accessed 18 April 2010).

Méndez, J. E. (2010) 'FriEnt Panel Discussion on Justice and Development after War and Violent Conflict', available at: www.frient.de/downloads/Keynote_Speech_Mendez.pdf (accessed 1 March 2010).

Miller, Z. (2007) *Constructing Sustainable Reconciliation: Land, Power, and Transitional Justice in Post-Genocide Rwanda*, Cape Town: Institute for Justice and Reconciliation.

Miller, Z. (2008) 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice', *The International Journal of Transitional Justice*, 2(3): 266–291.

Musahara, H. and Huggins, C. (2005) 'Land Reform, Land Scarcity and Post-Conflict Reconstruction: A Case Study of Rwanda', in C. Huggins and J. Clover (eds) *From the Grounds Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*, Pretoria: ACTS Press/Institute for Security Studies, pp. 269–346.

National Service of Gacaca Jurisdictions (2010) 'Gacaca: Justice for All or Injustice for Some?' available at: http://www.inkiko-gacaca.gov.rw/En/EnObjectives.htm (accessed 20 March 2010).

National Unity and Reconciliation Commission (2008) *The Causes of Violence after the 1994 Genocide in Rwanda*, Kigali: National Unity and Reconciliation Commission.

Nordstrom, C. (1998) 'Terror Warfare and the Medicine of Peace', *Medical Anthropology Quarterly*, 12: 103–121.

Oomen, B. (2005) 'Donor-Driven Justice and its Discontents: The Case of Rwanda', *Development and Change*, 36(5): 887–910.

Ottendörfer, E. (2012) Discussion on reparations in Sierra Leone, phone call. Personal communication, 12 October 2012.

PBS (2003) *Truth and Justice*, available at: http://www.pbs.org/newshour/bb/africa/jan-june03/truth_&_justice_1-23.html# (accessed 13 April 2010).

Pottier, J. (2002) *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century*, Cambridge: Cambridge University Press.

Prunier, G. (1995) *The Rwandan Crisis: History of a Genocide*, New York: Columbia University Press.

Reno, W. (2003) 'Political Networks in a Failing State: The Roots and Future of Violent Conflict in Sierra Leone', *Internationale Politik und Gesellschaft*, 2(2): 44–66.

Richards, P. (1996) *Fighting for the Rainforest: War, Youth and Resources in Sierra Leone*, London: James Currey.

Roth-Arriaza, N. and Mariezcurrena, J. (2006) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge: Cambridge University Press.

Roth-Arriaza, N. and Orlovsky, K. (2009) 'A Complementary Relationship: Reparations and Development', in P. De Greiff and R. Duthie (eds) *Transitional Justice and Development: Making Connections*, New York: SSRC, pp. 170–213.

Saul, J. (2001) 'Cry for the Beloved Country: The Post-apartheid Denouement', *Review of African Political Economy*, 89: 429–460.

Schäfer, R. (2010) 'Gender in der südafrikanischen Wahrheits- und Versöhnungskommission', in S. Buckley-Zistel and T. Kater (eds) *Nach Krieg, Gewalt und Repression. Der schwierige Umgang mit der Vergangenheit*. Frankfurt: Suhrkampf.

Sengulan, E. D. (1994) *Vitória sem vencidos. A história do processo de paz para Moçambique do ponto de vista do Conselho Cristão de Moçambique*. Maputo: Conselho Cristão de Moçambique (CCM).

Shaw, R. (2007) 'Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone', *The International Journal of Transitional Justice*, 1(2): 183–207.

Smith, A. (2004) 'Sierra Leone: The Intersection of Law, Policy and Practice', in P. Romano, P. R. Cesare et al. (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford: Oxford University Press.

Special Court for Sierra Leone (2002) *Statute of the Special Court for Sierra Leone*, available at: http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176 (accessed 12 October 2012).

Special Court for Sierra Leone (n.d.) *Cases*, available at: http://www.sc-sl.org/CASES/tabid/71/Default.aspx (accessed 12 October 2012).

Sriram, C. L. (2012) 'Victim-Centred Justice and DDR in Sierra Leone', in C. L. Sriram et al. (eds) *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, London: Routledge, pp. 159–177.

Straus, S. (2008) *The Order of Genocide: Race, Power, and War in Rwanda*, Ithaca, NY: Cornell University Press.

Suma, M. and Correa, C. (2009) *Report and Proposals for the Implementation of Reparations in Sierra Leone*, available at: http://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf (accessed 10 October 2012).

Teitel, R. G. (2003) 'Transitional Justice Genealogy', *Harvard Human Rights Journal*, 16: 69–94.

Truth and Reconciliation Commission of Sierra Leone (2004a) *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Band 1*, Sierra Leone: Graphic Packaging Ltd. GCGL.

Truth and Reconciliation Commission of Sierra Leone (2004b) *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Band 2*, Sierra Leone: Graphic Packaging Ltd. GCGL.

Truth and Reconciliation Commission of Sierra Leone (2004c) *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Band 3a*, Sierra Leone: Graphic Packaging Ltd. GCGL.

Truth and Reconciliation Commission of Sierra Leone (2004d) *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Band 3b*, Sierra Leone: Graphic Packaging Ltd. GCGL.

Tvedten, I. *et al.* (2009) 'Monitoring and Evaluating Mozambique's Poverty Reduction Strategy PARPA 2006–2008: A Synopsis of Three Qualitative Studies on Rural and Urban Poverty', *CMI Report*, 34.

UNHCR (2000) *The State of the World's Refugees 2000: Fifty Years of Humanitarian Actions*, New York: Oxford University Press.

UN Security Council (2009) *Report on the Completion Strategy of the International Tribunal for Rwanda.* UN Doc. S/2009/247 (04.05.2009), available at: http://www.ictr.org/default.htm (accessed 21 April 2010).

UN Security Council (2012) *Report on the Completion Strategy of the International Tribunal for Rwanda.* UN Doc. S/2012/349 (22.05.2012), available at: http://www.unictr.org/Portals/0/English%5CFact Sheets%5CCompletion_St%5CS-2012-349.pdf (accessed 5 April 2013).

USIP, Truth Commission, South Africa (n.d.) available at: http://www.usip.org/resources/truth-commission-south-africa (accessed 3 March 2010).

Uvin, P. (1998) *Aiding Violence: The Development Enterprise in Rwanda*, Westport, CT: Kumarian Press.

Uvin, P. (2001) 'Reading the Rwandan Genocide', *International Studies Review*, 3(3): 75–99.

Vines, A. (1991) *RENAMO: Terrorism in Mozambique*, York: Centre for Southern African Studies, University of York.

World Health Organization (2012) 'Cholera in Sierra Leone: Update', available at: http://www. who.int/csr/don/2012_10_08/en/index.html (accessed 10 October 2012).

Wyss, K. (2006) *A Thousand Hills for 9 Million People: Land Reform in Rwanda. Restoration of Feudal Genuine Transformation?* FAST Country Risk Profile, No. 17. Bern: Swisspeace.

York, G. (2012) 'Africa Next: With Investment Outpacing Aid, Is This a New Golden Age for the Poorest Continent?' available at: http://m.theglobeandmail.com/news/world/africa-next-with-investment-outpacing-aid-is-this-a-new-golden-age-for-the-poorest-continent/article4560978/?service=mobile (accessed 10 October 2012).

Legislation

Organic Law establishing the organization, competence and functioning of Gacaca courts charged with prosecuting and trying of the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994. Republic of Rwanda (19.06.2004). No. 16/2004, Artikel 72.

Organic Law setting up 'Gacaca Jurisdictions' and organising prosecutions for offences constituting the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994. Republic of Rwanda (26.01.2001). No. 40/2000, Artikel 90.

The circle of state violence and harm

Dawn L. Rothe and Victoria E. Collins

Introduction

Criminological study has long recognized the adverse effects of states' responses to crime predominantly focusing on the institutions of control at national levels (e.g., policy responses and the criminal justice systems) (Beckett 1997; Blomberg and Lucken 2000; Pattillo *et al.* 2004; Parenti 2008; Gottschalk 2011). Criminal justice policies such as mandatory minimum sentencing practices (Currie 1998; Blomberg and Lucken 2000; Clear 2007; Lynch 2011; Mauer 2011), the three strikes law (Crutchfield 2004; Piehl 2004; Jones and Newburn 2005; 2006), and policies initiated to fight the war on drugs (Wisotsky 1990; Bennett *et al.* 1996; Blumenson and Nilsen 1998; King and Mauer 2005; Bobo and Thompson 2006), have resulted in increased prison populations in both the UK and the USA.

These processes have led to mass incarceration coupled with further undesirable effects, such as prison overcrowding (Levitt 1996; Currie 1998; Spelman 2007; Spelman 2009), "net-widening" (Blomberg and Lucken 2000), a reduction in prison and post-release programming (Travis and Petersilia 2001; Petersilia 2003; Massoglia and Warner 2011), and significant barriers for prisoners who are reentering society (Pager 2003; 2008; Roman 2004; Uggen and Manza 2007; Behan and O'Donnell 2008; Mears *et al.* 2008; Hipp *et al.* 2010; Massoglia and Warner 2011). Researchers have shown that criminal justice systems and state policies at the national level have not only resulted in unforeseen consequences, such as mass incarceration and subsequent prison overcrowding (Levitt 1996; Jones and Newburn 2006), but have also led to the disparate and unfair treatment of certain vulnerable populations (Alpert *et al.* 2007; Brunson 2007; Golub *et al.* 2007; Harris 2007; Mauer and King 2007; Skolnick 2007; Alexander 2010; Glaze 2010).

Further criminological and sociological research has focused on the highly politicized nature of the law-making process (Sutherland 1940; Chambliss and Seidman 1971; Chambliss 1989; Barak *et al.* 2010; Hagan 2010). For example, there is an extensive body of literature, so great it is impossible to adequately address here, that examines the issues of state politics and power in the construction and determination of certain behaviors as criminal (Becker 1963; Lemert 1967; Chambliss 1989; Parnaby 2006; Clement and Barbrey 2008; Reno 2009; Hughes and Lawson 2011). Attention is drawn to the means by which states and politicians define certain behaviors as dangerous, followed by discourse framing the acts as a threat to society's social order. Policies and laws are then created and enacted to prevent and punish these behaviors

(Becker 1963; Young 1971; Beckett 1994; Bobo and Thompson 2006; Findlay 2007; Hogg 2007; Parenti 2008; Bonn 2010; Alexander 2010).

Nonetheless, given the vast amount of research that recognizes the primary and secondary consequences of states' responses to crime and violence at national levels, criminologists have, in general, neglected examining these same concerns at the international level. The exception to this overall inattention to the harms caused by states' policies and institutions of social control at the global level is the research by scholars of state crime who have, over the course of the past two decades, analyzed the harm and injury perpetrated by states as well as issues related to international institutions of social control (e.g., the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for Former Yugoslavia; the International Criminal Court) (e.g., Kauzlarich *et al.* 1992; Friedrichs 1998; Parmentier 2003; Kramer and Michalowski 2005; Rothe and Mullins 2006; 2007; 2010; Michalowski 2007; Ewald 2008; Iadicola 2008; Ross and Rothe 2008; Rothe and Collins 2011). As the research on domestic systems of control has shown, more often than not, efforts to address one form of violence and/or crime have resulted in additional types of harm and violence. The same is true at the international level where responses to state harm, injury, or crime are also ridden with political concerns and consequences that result in additional state violence and harm. This is especially the case for particularly vulnerable populations. This chapter adds to the existing critiques of states' policies and systems of control that, in response to violence, contribute to and facilitate additional harm at the global level. In particular, we draw on the situation of the Somalia piracy and the militarized responses of states and the United Nations, as well as the International Criminal Court's involvement in and issuance of arrest warrants during highly contentious conflicts to illustrate the challenges to and prospects of, international responses to violence.

The quaqmire of international responses to state violence and crime

States' responses to ongoing violence and crime at the international level is perhaps more complex than a country's response to domestic crime and violence. While there are varying types of responses at the state level, typically legislative action (i.e., law-making) and criminal justice responses (i.e., police, courts, corrections), the international level includes alternative responses such as individual, bilateral, or multilateral reactions to a state's violence or crimes (through prosecutions, sanctions, or military intervention); involvement of the United Nations and other intergovernmental organizations (e.g., from sanctions to military interventions to regional criminal justice systems); and the international criminal justice system (i.e., law-making, courts, and corrections). Each of these has their own challenges and prospects. Consequentially, we provide two distinctly different cases of international efforts to address one form of harm, injury, or crime at the global level: the first addresses a case of states' reaction and policies in addressing piracy, and the other to highlight the formal criminal justice post-facto responses to illuminate the political contexts and/or latent consequences of both types of responses that have resulted in additional state violence and harm.

The case of Somalia and piracy

Internecine violence, corruption, a failing state and armed factions competing for political control have plagued Somalia for nearly two decades (Doria *et al.* 2010). While efforts have been made to politically unify the region and create a legitimate and accepted centralized government, there has been little improvement in the conditions for the Somali people. The country continues

to experience disorder, violence, displacement, high levels of poverty, hyperinflation, inequality, corruption, lack of basic infrastructure: it is in a humanitarian crisis, making them a vulnerable population. According to the United Nations Office for the Coordination for Humanitarian Affairs (2012), over two million Somalis are displaced, with over four million needing food aid as they are bordering on starvation.

With the extant conditions of the country, there has been an increased level of desperation among various factions. As noted by Rothe and Collins (2011), lack of basic infrastructure, warring factions, and political unrest create social disorganization, which is compounded by foreign entities dumping toxic waste and illegally fishing in Somali waters. This culminates and creates a criminogenic environment promoting piracy as a fiscally viable option. Consider that since 1992, coinciding with the onset of the weakened or failing state of Somalia, there have been waves of increased piracy off the coast of Somalia, escalating in 2008 and 2009. Nonetheless, in 2011, the International Maritime Bureau reported 439 piracy attacks worldwide, with 275 credited to Somali pirates (IMB 2011). Other sources (Penny 2012) reported that, according to the United Nations, the instances of piracy off the coast of Somalia totaled 237 in 2011 (Table 22.1) with an estimated 3500 Somalis active in piracy. The vast majorities of these cases are non-violent, relying on kidnappings for ransoms, opposed to other regions where seizures of ships or cargo are the primary method (Hastings 2009).

From a criminological standpoint, there are three main issues to consider if we want to examine the potential of an existing policy aimed at reducing harm and violence and/or its consequences: (1) the etiological mechanisms facilitating the crime; (2) the effectiveness of policies implemented to control or constrain the acts; and (3) the primary and secondary consequences, if any (including additional levels of violence and harm) of said policies. Given this, we provide a brief overview of factors that are believed to be directly linked to the increases in Somalia piracy followed by

Table 22.1 Cases of Somali piracy by year

Year	Number of piracy attacks
1992	1
1993	1
1994	1
1995	14
1996	4
1997	4
1998	9
1999	14
2000	13
2001	19
2002	17
2003	20
2004	11
2005	45
2006	20
2007	44
2008	111
2009	196
2010 (January thru April)	33
2011	237

a discussion of the formal responses to the crimes of piracy and subsequent consequences of those reactions/policies.

Etiological factors, policy responses, and secondary harms

Etiological factors

As has been noted by scholars of state crime, features of weak states are more conducive to opportunistic crimes which redistribute wealth (Green and Ward 2009). Opportunistic crimes are a common feature of conflict zones also where the state monopoly of violence has collapsed. Furthermore, war-torn areas are by definition disorganized (Rothe and Ross 2010). Such conditions give rise to the absence of legitimate forms of social organization as individuals and groups that engage in criminal behavior proliferate to provide social structures and opportunities absent due to broader conditions of institutional failures which have resulted in widespread social disorganization (Mullins and Rothe 2008). Chaotic conditions that typify socially disorganized environments tend to ignite criminal behaviors (Howden 2009). As Rothe (2009) notes, a country unable to adequately police or subdue insurgencies creates a gap of institutional control that simultaneously provides motivation and opportunity for the rise of criminal activity, further enhancing environments of social disorganization. Additionally, as with piracy of the past, the recent, relatively speaking, wave of instances of piracy should be viewed primarily as economically motivated criminality with some instances of political motivation (Rothe and Collins 2011).

Given that Somalia has an extremely weak and failing governmental system, lack of basic infrastructural resources and the extant economic conditions within the country, opportunistic forms of economic crime become commonplace. This is especially so as the conditions become direr and desperation to obtain basic needs sets in among the local populations. After all, the majority of Somali pirates are either ex-militia fighters or local fishermen (Parry 2008). Given the broad social disorganization due to the years of turmoil and a failing state, economic system and lack of economic opportunity, individuals look at the occupational options available, see no conventional choices, and consequentially, some will seize upon opportunistic criminal enterprises to provide what is not available through legitimate means. Beyond opportunities for employment there is widespread desperation for survival, given the economic conditions. This too has facilitated increased cases of piracy.

Consider that increased cases of piracy attacks were focused in part on targets that contained food supplies (World Food Programme 2007). Such targeting is related to the extant conditions within Somalia as up to one-half of the food aid was being diverted to contractors, various militant leaders and local UN staff. Given the infrastructural weaknesses and lack of resources and general anomic conditions, such attacks reflect not only opportunistic and economic factors but innovative or entrepreneurial motivations to provide basic needs, as is often common with the role of militias in conflict zones or in failing state conditions (Mullins and Rothe 2008).

Beyond the economic component of these opportunistic types of criminality, there is political motivation at play. This is what Green and Ward (2009: 1) refer to as "dual purpose" crime: politically and economically motivated. For example, in a recent interview with CBC News, President Ahmed Hussen of the Canadian Somali Congress stated:

> When you see the coverage of piracy, in most of the national media, you don't hear much about the $300 million annually that's lost by Somali fishermen in illegal fishing done by foreign interests. You also never hear about the cost that cannot be estimated, the negative

costs of toxic waste . . . What is hard to comprehend is why the outside world [is] turning a blind eye to foreigners fishing illegally in Somali waters and poisoning them with toxic waste . . . And as can be expected, the starving people who've been robbed have retaliated with some countering of their own. The attacks on foreign ships, Somalis say, started as a reaction to foreign pillages trying to put their fishermen out of business.

(CBC News 2009)

This is echoed by Hari (2009) who suggests that fishing locals have turned to piracy as a means not only because of economic opportunity but as a political statement. Furthermore, Somalia civilians are

responding to the dumping of toxic and hazardous wastes by international companies, increased and unlicensed foreign fishing vessels that have increasingly targeted Somalia's fish-rich waters, thus, the problem of piracy in Somalia can be understood as "a resource swap" with Somalis taking $100 million annually in ransoms while Europeans and Asians poach $300 million in fish.

(Jasparro 2009: 2)

Consider also that a Volunteer Coastguard of Somalia has been formed by local fisherman and, in their words, they use speedboats to try to dissuade the dumpers and trawlers, or at least levy a "tax" on them (Hari 2009).

There are political factors present in some of the cases, making the instances of piracy off of the Somalia coast not just economic opportunistic crimes. Additionally, as criminologists have noted in relation to organizational crimes (Clinard and Yeager 1980; Hashim 2006; Green and Ward 2009; Rothe 2009), economic crimes can simultaneously advantage both individual perpetrators and collectivities. In the case at hand, the surrounding community is benefiting from this, further facilitating the drive towards criminality. The funds from piracy ransoms are "widely distributed within local communities, with piracy becoming a major source of income within Somalia and other States" (United Nations Office on Drugs and Crime 2010: 1).

Given the underlying mechanisms motivating such acts, any policy or formal response should be proportionate to the social threat of the crime as well as address the underlying etiological factors, if it is to reduce such criminality. Given the above discussion of these factors, we now turn to the current policies and responses by states and inter-governmental organizations including the United Nations. From this, we provide an analysis of the political concerns surrounding the responses to Somalia piracy followed by a discussion of the impact of these formal responses on secondary violence and harm as well as their overall ineffectiveness.

Policy responses

Currently, according to the United Nations, there are 1116 Somalis in custody in 20 countries, all accused of acts of piracy. In 2006, the United Nations Security Council began passing resolutions related to the issue of Somali piracy. Resolution 1772, adopted in 2007, encouraged member states to take "appropriate action to protect merchant shipping" (United Nations Security Council [UNSC] 2007) and in 2008, the UNSC adopted six Resolutions (1801; 1816; 1838; 1844; 1846; 1851; United Nations Security Council 2008a–f) where piracy was said to be a threat to international peace and security. These resolutions gave UN forces unprecedented legal authority to pursue pirates. Furthermore, the UNSC granted permission to all regional organizations that are in cooperation with the Somali Transitional Federal Government (TFG)

to utilize "all means necessary" to combat piracy in Somali waters: this has included NATO forces off the Gulf of Aden with the goal of "disrupting and deterring piracy." On March 24, 2009, Operation Allied Protector led to the dispatch of five NATO ships to the Gulf of Aden with the object of deterring piracy (NATO 2010). The justification offered for the NATO presence is the importance of the Gulf of Aden as a route for trade with "22,000 ships per year transiting through there on their way to countries all over the globe" (ibid.: 1). There are warships from as many as 14 different countries floating in the Gulf of Aden and in and around the coastal waters of Somalia (Ha 2009) to protect international "peace and security" (UNSC 1801; 1816; 1838; 1844; 1846; 1851). The means of deterrence include permitting the deployment of naval vessels and military aircrafts to combat, seize, and dispose of boats, vessels, arms, and any equipment used in the commission of acts of piracy (UNSC 2008).

In Somalia, the parliament passed legislation that recognizes piracy as a crime, allowing pirates convicted abroad to be transferred to the breakaway enclave for prosecution in response to international pressure to prosecute their own. While a fleet of foreign warships patrolling the Gulf of Aden "regularly detain suspected pirates, many are quickly released because governments are reluctant to bring them to trial" (Herald 2012: 1). Under the new legislation, piracy will carry a maximum jail term of 25 years.

Assessment of responses and policy

The etiological factors that undergird the motivations to commit piracy are not only neglected in the policy responses, but have instead led to continued harms and violence against a vulnerable population. Consider that while the pirates of history were far more violent and aggressive than those operating off the Somalia Coast, the responses currently put in place have been overly militarized policies and fail to address the conditions of what has long been an ignored state of crisis facilitating the rise in piracy (Rothe 2009).

The ideology guiding these external policies and demands to stop piracy are embedded in political and economic concerns: in terms of the global economic market and disruption to foreign domestic corporate profit-making. As noted by Rothe and Collins (2011), the 'truth' that these pirates are a threat to global peace and security provides the foundation for policies that serves to aid the ongoing global economic order.

> [They] mask deeper problems of unfairness in international economic order . . . Somalia's pirates are a motley crew: some are fishermen defending their turf, while others are guns for hire . . . Of the countries that contributed naval vessels to the anti-piracy operation, half are nations engaged in fishing in the Indian Ocean with a vested interest in deterring piracy [rather than addressing the motivating factors].
>
> (Jasparro 2009: 1)

Moreover, the policies put in place have been far more costly, economically, than piracy itself. The political discourse and subsequent policy responses of the international political community have resulted in a reliance on retributive judicial processes to deter potential instances and to hold accountable those that have been caught. Consider Figure 22.1 which highlights the minimal direct costs of piracy such as ransoms in comparison to the 'fight' to control it.

Beyond the fact that such policies support the broader global economic interests and state–corporate self-interests, they ignore the underlying root causes of the criminality, which we have suggested include the socially disorganized communities and extant anomic conditions of a weakened state. Furthermore, the foundation from which these policies are drawn is
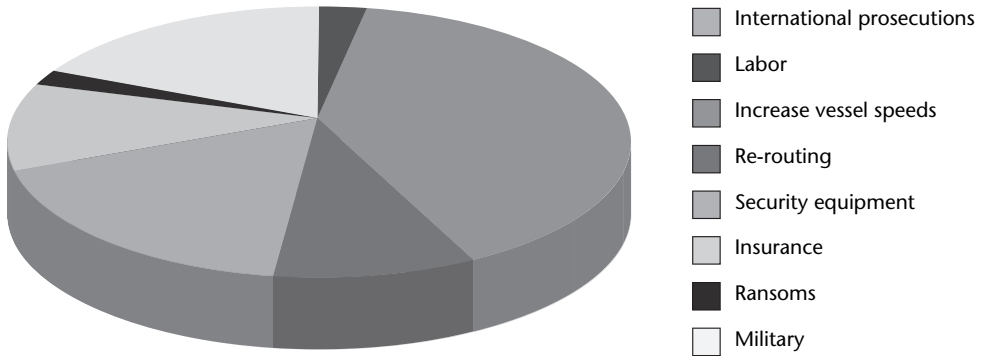
Figure 22.1 Costs associated with piracy

problematic from a criminological perspective, namely that of deterrence. After all, the efficacy of deterrence has long had mixed results for traditional street crime and organizational crime. In theory, the prosecution of alleged pirates serve as a specific deterrent to the offender and as a general deterrent to others by means of solidifying the international norms prohibiting such behaviors by way of example.

When it comes to deterrence, there is an assumption of a rational cost-benefit analysis. Yet, street crime research has shown that social location and position strongly influence deterrence. While an expansion of the more simplistic rational choice model, this body of research highlights that those different social locations can lead individuals to make cost-benefit decisions differently. Simply, the assumption is that, in general, the more individuals have at stake to lose, the greater the likelihood they would desist and/or reject criminal activity as the absolute cost is higher (Rothe and Mullins 2010). In the case at hand, there is relatively little in the way of stakes to lose when one considers the conditions within Somalia and the ongoing humanitarian crisis.

Additionally, consider that criminological qualitative studies suggest that many types of crimes are committed during the processes of irrational thought, sentiment or emotions. Wright and Decker (1994) establish that the *in situ* contexts for committing a burglary or armed robbery are framed within an offender's experiencing a "pressing need for cash." Here again, the trial transcripts of Med Yusuf Farah, Jama Mohamed Samatar, Abdirisaq Abdulahi Hirsi, Sayid Ali Garaar, and Osman Musse Farah indicate a sense of desperation for money. Garaar stated to Judge Wolterink: "If our children are hungry, who is responsible?" "I don't know who is still alive and who has died." As indicated by Andrew Mwangura, head of the East African Seafarer's Assistance Program, "desperate people take desperate measures . . . most [pirates] don't know how to swim, yet they go two hundred miles out to sea" (Eichstaedt 2010: 118).

Another central feature of deterrence is individual perceptions: the deterrent value of law is the individual's perceptions of the law itself. If not viewed as legitimate, the potential of general deterrence becomes significantly less forceful (Rothe 2009). Consider that Edwin Sutherland's Differential Association (DA) model and subsequent research have noted that individuals' definition of the law as favorable or unfavorable have a bearing on the decision-making processes to offend or not offend. Given that, in the case at hand, there are political motivations behind many of these cases and a perception that they have been wronged and taken advantage of, the "victims" and perpetrators (one and the same), are able to employ techniques of neutralization as well as override any potential of the laws prohibiting piracy as favorable. This

is emphasized in an interview with Garaad Mohammed, a pirate interviewed in Somalia about the motivations of his actions: "Illegal fishing ships, they are the real pirates . . . I was one of the first to start fighting against the illegal fishing" (Bahadur 2011: 81).

The notion of deterrence is not black and white for either general or specific deterrence, thus; the above reliance on policies embedded in this is not only premature but also naïve regarding the complexities, nuances and subtleties associated with effective deterrents. We suggest that this approach reinforces the status quo in the country: continuing a cycle of harm unto a vulnerable population.

A cycle of harm continues

The policies enacted to deter piracy have adverse consequences that further compound the vulnerability of the Somali people and perpetuate a cycle of harm that undermines their intended deterrent effect. By focusing resources on curtailing the problem of piracy in the Gulf of Aden, in a relative sense, the humanitarian crisis is relegated to a secondary, less pressing problem. For example, although the famine that plagued Somalia through much of 2011 has officially ended, the country is still reeling from the effects with approximately 1.5 million Somalis having been displaced from their homes (Internal Displacement Monitoring Centre 2012). This population is without the most basic services, and is at high risk for disease, with dehydration and diarrhea being the leading causes of death (UNICEF 2012). Furthermore, 80 percent of the Somali population is without safe drinking water (Internal Displacement Monitoring Centre 2011).

Despite the scale of this humanitarian crisis on 9 February 2011, the African Union Mission in Somalia (AMISOM), pledged US$4.5 million to address the humanitarian crisis with over US$1 million coming from international donors (Rinehard 2011), a significantly smaller amount than the economic costs expended on piracy for the same year. As already indicated in Figure 22.1, the total estimated cost to address piracy for 2011 amounted to between US$6.6 and 6.9 billion (Oceans Beyond Piracy 2011). Although these monies are being allocated to increase and maintain deterrent tactics, such as the US$1.27 billion spent on military operations in the Gulf of Aden and the US$1.16 billion on security measures, no funds have been allocated to address the humanitarian crisis itself, which we argue is the core motivation for the acts of piracy. As indicated by Geoffrey Egbide, the brother of a ship's captain taken hostage and freed by pirates:

> When a man is destitute, he will do anything to survive. It is a desperate situation in Somalia. It is a place where might makes right. In Somalia, if they can hijack a ship and get one million dollars, then it is something right for them to do.
>
> (Eichstaedt 2010: 99)

The large amounts of money being spent deterring acts of piracy do nothing to address the under-lying motivations, as indicated by Andrew Mwangura, the head of the East African Seafarer's Assistance Program: "We say the root cause of Somalia piracy is poverty" (Eichstaedt 2010: 116).

In addition to the humanitarian needs of the Somalia people, the rights and needs of those accused of piracy have also been neglected. Individuals accused of acts of piracy are vulnerable to the varying forms of "justice" administered by the different countries that have naval forces patrolling the Gulf of Aden (Eichstaedt 2010; Archibugo and Chiarugi 2011; Bahadur 2011). As noted by Archibugo and Chiarugi (2011: 232) the naval responses to pirate attacks have varied, with Western states adopting "fast-track arrest-and-release episodes," but naval forces from Russia and India have taken a more violent approach opening fire on suspected pirates, killing them as well as the kidnapped crew, before sinking the hijacked trawlers. For example,

having captured the ten pirates accused of hijacking the oil tanker *MV Moscow*, the Russian navy are reported to have released the ten men "300 miles off the coast without water, food and any navigation device" with no means to safely reach shore (Archibugo and Chiarugi 2011: 232). Although the legal systems of the Western states may be more preferable to the violent measures of the Russian and Indian Navies, they too are not without their problems.

The USA, Germany, and France have all recently brought prosecutions against Somali pirates (Frieden 2010; Schlicht 2010; BBC 2011a), however, there was huge variability in the sentencing. In the USA, the five individuals found guilty of acts of piracy were convicted and sentenced to life in prison (BBC 2011b); those in France received between four to eight years (BBC 2011a); and prosecutors in Germany are seeking eleven and a half years for the seven recently brought to trial (Reuters 2012). Kenya's participation in prosecuting Somalis accused of piracy has presented additional issues and victimization.

For example, the jail in Mombasa hosts an increasing number of individuals accused of acts of piracy. While being detained, they are often subject to human rights violations and are without due process (Archibugi and Chiarugi 2011). The accused are subject to overcrowding, not allowed to contact their families, practice their religion, provided inadequate medical care and questionable access to adequate defense attorneys. Furthermore, being accused of piracy can lead to discrimination in jail with reports detailing other inmates targeting alleged pirates for beatings (Eichstaedt 2010).

Summary of Somali piracy and subsequent responses

As the criminological research has shown, domestic formal responses and policies to a specific behavior are political in nature and have resulted in additional consequences, harms, and targeting of vulnerable populations, this too is the case at the international level in relation to Somali piracy. The overly militarized response has led to increased economic costs for the 'controllers' while continuing a cycle of harm on a vulnerable population. Additionally, the philosophy that undergirds these policies is, from a criminological standpoint, faulty. For deterrence to be effective, the law must be seen as legitimate. To reduce crime, the underlying or etiological factors must also be addressed. We have attempted to show here that neither of these conditions exists. Instead, as with the War on Terror or the War on Drugs policies, the punishments are overly militarized and harsh and fail to address the underlying causes and motivations for committing such acts. Just as the War on Drugs and the War on Terror in the United States and the United Kingdom have led to secondary levels of harm and the targeting of vulnerable populations, so too have the over-militarized international responses to Somali piracy.

The following section addresses the international criminal justice system as it relates to the challenges posed by, and to the International Criminal Court, in its effort to advance justice. Here we draw on a couple of cases, Colombia and Uganda specifically, to highlight two areas of contention and controversy surrounding the role of the court and global justice.

The International Criminal Court (ICC)

> If [the twentieth century trend of wars, war crimes, misery and hardship] is not to continue into the twenty-first century, then the international community will have to take positive steps to arrest it. One effective deterrent would be an international criminal justice system, sufficiently empowered to cause would-be war criminals to reconsider their ambitions, knowing that they might otherwise be hunted for the rest of their days and eventually be brought to justice.
>
> (Goldstone 2000: 135)

As of 1 June 2002, the Rome Statute of the International Criminal Court (ICC) came into effect, creating a court whose purpose is the prosecution of those most responsible for the commission of war crimes, genocide and crimes against humanity. As established, the Court is a complementary court designed to investigate and prosecute cases when states are unwilling or unable to do so themselves. It can only try cases dealing with crimes that have occurred since the Rome Statute's entry into force on 1 July 2002 and after a state's ratification of said statute. Further, in order for a case to fall under its jurisdiction, one of three conditions must be met in terms of location of the crimes (Article 12). The first geographic criterion is that the crimes in question must have occurred within the territory (or territory controlled by), a vessel, or aircraft of a State Party, or have been committed by nationals of a State Party (i.e., uniformed military). Second, a state may agree to accept the jurisdiction of the Court, without being a State Party. Third, the United Nations Security Council can recommend a case to the Court and authorize the Court's jurisdiction in the matter if neither of the above conditions are met (e.g., the situation in the Sudan–Darfur case) (Mullins and Rothe 2010; Rothe and Schoultz forthcoming).

Once a case or situation comes to the Prosecutorial branch's attention, an investigation is carried out to see the viability of the situation as a crime covered under the jurisdiction of the Court and subsequent successful prosecution. The Office of the Prosecutor is currently conducting investigations on crimes committed in seven states: Sudan (for the situation in Darfur), the Democratic Republic of the Congo, Uganda, the Central African Republic, Kenya, Libya and Côte d'Ivoire. The case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* is currently being heard before Pre-Trial Chamber II. In this case, five warrants of arrest have been issued (with the death of Lukwiya, the proceedings against him were terminated) and four suspects remain at large. In the Democratic Republic of Congo situation four cases have been brought before the relevant Chambers: *The Prosecutor v. Thomas Lubanga Dyilo*; *The Prosecutor v. Bosco Ntaganda*; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*; and *The Prosecutor v. Callixte Mbarushimana*. Dyilo, Katanga, and Ngudjolo Chui are in the custody of the ICC while Ntaganda remains at large. There are four cases in the situation in Darfur, Sudan: *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*; and *The Prosecutor v. Abdel Raheem Muhammad Hussein*. Banda and Jerbo appeared voluntarily on 17 June 2010, the other two suspects remain at large. In the situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, the trial started on 22 November 2010. Likewise, in the situation in Kenya, six Kenyan citizens voluntarily appeared before the Pre-Trial Chamber II on 7 and 8 April 2011. *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* remain active. In the situation of Libya, three warrants of arrest for *Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* were issued. On 22 November 2011, the case against Gaddafi was dropped due to his death and the other two suspects remain at large. In the situation of the Côte d'Ivoire, only one case is going forward *The Prosecutor v. Laurent Gbagbo*, to wit he is in custody.

While the Court may request a warrant for or subpoena an individual, the Prosecutor and the Court lack an empowered policing agency to ensure the fulfillment of either request (Articles 54–58). The Prosecutor is limited to requesting the presence of persons being investigated, victims, and witnesses. It must rely on the compliance of a state or State Party to furnish any evidence, suspects, or witnesses that are relevant to the ongoing investigations carried out by the prosecutorial branch.

Additionally, given the infancy of the Court, the structure of the international system that remains grounded in sovereign state rule, the ICC continues to promote and be attentive to

its perceived legitimacy and its mission: the "State Parties to this Statute. . . [are] *Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" (12 July 1999A UN DOC /CONF.1833/51).

There are many challenges to the Court's ability to fulfill its mission to end impunity, serve as a deterrent, address victims' needs, and to contribute to global justice and peace. There remains much skepticism about the ICC's ability to serve as a deterrent mechanism (Rothe and Mullins 2010; Rothe and Schoultz forthcoming), or in its ability to provide justice for the victims of crimes covered under the Court's jurisdiction (Rothe and Overton 2010; Rothe 2012). In addition, criticisms have been levied against the Court in relation to its involvement in conflict situations from the issuance of arrest warrants during peace negotiations to its exertion of political pressure on states in the processes of conflict resolution and restoration (Fanara 2011; Bueno and Diaz 2012). This is what Evans (2008) refers to as the justice versus peace problem. After all, there can be a clash between the demands for peace and bringing an end to a conflict and efforts to hold accountable those responsible in a court of law. The "problem arises when there is an ongoing conflict, and a peace negotiation is attempting to reach agreement between parties capable of perpetuating it" as in the case of Uganda, for example. Likewise, such a clash can occur with competing demands of justice versus those of reconciliation, as in the case of Colombia.

Uganda serves as an example, where despite the claims of the Achioli community that the intervention of the ICC would obstruct peace efforts, the prosecutor of the ICC issued arrest warrants against the Lord's Resistance Army (LRA) leadership (a militia group), leading the LRA to respond by a rejection of ending the war in the presence of the arrest warrants (Shaw *et al.* 2010). With the case of Colombia, the ICC Prosecutor Ocampo's investigation found that over 30 members of the Congressional body and President Uribe were involved either directly or through financial support of the paramilitaries in carrying out atrocities on Colombian civilians. Upon the ICC's exertion of pressure, the government responded, however, the pressure had additional and unforeseen consequences related to disarmament and peace which will be discussed in more detail below.

Uganda

Since independence in 1962, Uganda has been mired in political conflict and civil war that has produced continuous and widespread atrocities, war crimes and crimes against humanity. The nearly four decades of crimes against humanity and violence that have plagued Uganda's vulnerable populations are the result of the actions of a militia group, the Lord's Resistance Army, political party factions attempting to gain power and control of the state, and the Ugandan military force practicing sporadic banditry and violence (Mullins and Rothe 2008).

In December 2003, the President of Uganda, Yoweri Museveni referred the ongoing conflict with the LRA and their crimes against humanity to the International Criminal Court.[1] In October 2005, the Court announced arrest warrants for Joseph Kony and four of his top deputies. The charges ranged from the mutilation of civilians to the forced abduction of, and sexual abuse of children. The involvement of the Court, however, did not serve the processes of peace or conflict resolution in Uganda. Rather, the Juba peace talks ceased and the LRA stepped up the levels of violence as well as relocating across the border in Sudan. Beyond continued violence, the LRA, after ICC involvement, stepped up its campaign to engage child soldiers through increased abductions and inductions into the militia group. Kony immediately stated his refusal to continue the ongoing peace negotiations unless the ICC withdrew its arrest warrants. Consequentially, the Juba Peace Accords broke down in 2008 due to the LRA leaders' refusal to take part in the 2008 round of talks. This was based largely on the threat posed by

the ICC's indictments of the LRA commander as well as the Court's Prosecutor's refusal to drop the indictments (Roach 2012).

After the initial referral and the end of peace negotiations, Museveni had requested that the Court drop the charges against the LRA leaders. However, under the Rome Statute, there is no condition where a government can withdraw a request once it has been accepted and in process (Ginsberg 2008). Consequentially, the arrest warrants facilitated, what many in Uganda believe to be, another barrier to the conclusion of peace talks that had already seen many obstacles.

Additionally, controversy remains over the role of amnesty in national settings once the ICC has become involved. Specifically, there is a tension between allowing amnesty for peace and cessation of a conflict and what the Court, and some proponents of the ICC view as impunity (Roach 2012). As Clark (2010: 145), suggests:

> to give amnesty to individuals indicted by the ICC over the most serious crimes of concern to the international community as a whole would compromise the effectiveness of the ICC and bring questions about whether the ICC can really carry out its mandate.

This relates specifically to the case of Uganda and its 1999 amnesty law, which was designed as a tool to enhance peace negotiations and end the violence by allowing LRA fighters to confess and demobilize in exchange for amnesty (Justice and Reconciliation Project 2009: 10–12). Uganda's right to utilize the Amnesty Act of 2000 does not, however, void their referral to the ICC or the Court's jurisdiction (Fanara 2011). Clark (2010: 141) insists, "Peace must come before justice and that the ICC's arrest warrants undermine prospects for peace in Uganda."

Furthermore, as history has shown in the case of Uganda, prosecution offers no incentive to end hostilities (Shelton and Cengage 2006; Fanara 2011), rather it may well be a major factor in the continuation of and displacement of the conflict (Moy 2006; Mullins and Rothe 2008). After all, "it will be more difficult for the members of illegal armed groups to sit at the negotiations table if they know they will be strictly punished" (Riveros 2009: 8).

The ICC's intervention in Northern Uganda has raised concerns about the role of international justice in conflict and post-conflict situations. Such interference has called increasing attention not only to the political tensions between the ICC and state governments, but also to the legitimacy of the Court's goals for justice at what may be the expense of peace (Ginsberg 2008; Roach 2012). Furthermore, as noted by Bill Oketch (2012: 2):

> It's true that justice should prevail, but we should not forget that justice delayed is justice denied. And there is no doubt that it has been delayed . . . Anyone campaigning for Kony's arrest should beware of reopening old wounds inflicted by the LRA. Those wounds are deep enough. Northern Uganda has lost more than 20 years to the LRA insurgency and we cannot afford to lose one more day. We need to concentrate on peace-building, redevelopment, reconciliation, and educating our children.

Colombia

For more than five decades Colombia was involved in an armed conflict that has resulted in millions of victims of serious violations of human rights including but not limited to torture, massacres, kidnapping, forced displacement, and child recruitment into paramilitary and guerrilla groups. Roughly three million Colombians have been internally displaced (IDP), making it the world's second largest population of IDPs (Quintero and Culler 2012). Thousands of individuals have been involved in committing these atrocities, most notably government forces and

paramilitary, guerrilla groups (i.e., the United Self-Defense Forces of Colombia (AUC), the Revolutionary Armed Forces of Colombia (FARC), the Ejército Popular de Liberación (EPL), the Partido Revolucionario de los Trabajadores (PRT), the Movimiento Armado Quintín Lame (MAQL), and the Army of National Liberation (ELN)) – many of whom have demobilized either collectively or individually (Bueno and Diaz 2012).

The role of the International Criminal Court, in relation to Colombia, concerns its jurisdiction for crimes committed, given the country's efforts to address them through restorative justice mechanisms, legislation, and implementation of new laws. Specifically, the involvement of the ICC has raised considerable concerns surrounding its jurisdictional role and the national mechanisms of justice, given the Court has established limitations regarding other national approaches to justice. Additionally, and perhaps most concerning is that, not unlike Uganda, the threat of being prosecuted by the ICC has hindered local processes for reconciliation and restoration as well as the willingness of paramilitary groups to surrender and reintegrate. Prior to discussing these issues, it is important to have an understanding of the history of the Court and Colombia.

Less than four months after the Rome Statute entered into force in 2002, Colombia came under its jurisdiction for the crimes of genocide and crimes against humanity. On November 1, 2009, the moratorium that had been in effect for war crimes, requested by President Uribe, was lifted, leaving the Court with jurisdiction for all crimes listed in the Rome Statute (save for crimes of aggression which remains undefined). The Court's jurisdiction, however, is contingent upon the failure of the national justice system to 'address' those that committed the crimes and to impart justice. Simultaneously, in 2002, the Colombian government began implementing local transitional justice mechanisms to bring to an end the conflict that had lasted for more than 50 years. This included Colombia's Law 975, known as the Justice and Peace Law (JPL) which was enacted to facilitate peace negotiations between the regime and the various armed factions. This law was in part, also a response to the pressure and influences of the international retributive model of justice (Bueno and Diaz 2012).

Given the relationship between the Court and Colombia, there are multiple relations and effects. Consider that since 2005 when the Court claimed it would maintain a permanent evaluation of the situation in Colombia and then in 2006 when it opened its preliminary examination, Colombia has actively and symbolically reacted to the Court and subsequent pressures from the Prosecutor, including adjusting and creating domestic policy responses to appease the international system of control. For example, JPL replaced other laws used to enhance peace negotiations through the use of amnesty and pardons, and states that ex-combatants who committed grave crimes and agree to demobilize must be prosecuted in exchange for reduced sanctions.

The effects of the Court's involvement and self-proclaimed jurisdiction, while having had some positive impacts, have also resulted in secondary consequences. Recall that the Court's jurisdiction is regulated by the principle of complementarity where priority is given to states to provide accountability for the crimes encoded in the Rome Statute. Thus, the Court is not supposed to take an active role save a state "is unwilling or unable genuinely to carry out the investigation or prosecution." As noted, the Court remains overseeing the matter in Colombia and

> continues to exert pressure on the Government to increase the punitive models and accountability at what may well be expense of the surrender and reconciliation of militia and paramilitary members as well as the success of national measures to address the conflict and subsequent crimes committed.
>
> (Bueno and Diaz 2012)

The significance of this needs to be considered in light of Colombia's long history of using amnesties to address the demobilization of guerrilla members and some paramilitary groups in an effort to achieve peace and reconciliation, which has now been replaced with the inclusion of a more retributive response. Through pressure to disallow amnesty and increase the retributive component of justice, many individuals within the various factions have continued in hiding and/or with arms to avoid potential prosecution, prolonging the conflict and violence.

As stated by Sriram in the interviews she conducted in Colombia, "all armed groups feared prosecution before the ICC, but were split as to whether it would encourage them to keep fighting or to lay down their arms." Likewise Bueno's[2] research and extensive interviews revealed that one of the main reasons why offenders from the guerrilla groups have not demobilized is precisely the fear of being locked up in prisons and or extradited to the United States.

The following quotes are from low-level FARC offenders[3] who are not covered by the Justice and Peace Law, but by Law 1106 of 2006 (absence of prosecutions) and show the tensions between the desire to demobilize and fear of prosecution or extradition. "Imagine that you come here [demobilization site] to be free and you end up in prison; one prefers to remain free *en el monte*; always running but at least having a space where to run" (111 FARC). Another FARC member (112) stated that the threat of punishment and extradition would stop offenders from demobilizing: "There should be opportunities for everyone. If I were asked in extradition, I would never demobilize. That person (asked in extradition) should be given an opportunity. Even if the person has to work to pay for his/her faults . . ." Another FARC member (141) states that prison sentences are discouraging many combatants from FARC from demobilizing: "If they promise you freedom and therefore you demobilize and then they put you in jail, how would the others demobilize? That's why there are many people who do not come here, they see all that in the news." Another FARC member (189) discusses his own fearful experience of demobilization, "I was so scared the day I demobilized, I said to myself, 'Where would they take me? Would they lock me up, tie me up?'" Offenders are often afraid of being obliged to go to prison, "thinking that they're going to rot in jail makes them hesitate and stops them from taking the decision we took [to demobilize]" (Olimpo, ex-member of the ELN and chief commander of ERG).

Other FARC members note that punitive measures such as prison are counter-productive and lend to victimization of offenders. As stated by FARC 99:

> The government should give psychological assistance to a demobilized chief commander. Over there things are done because you are obliged to, not because you mean to, so I think it won't be fair to put an offender in jail, no matter what his rank is. We are talking about a person who regrets and wants to be free; instead of sending him to prison he should receive therapeutic education. There are chiefs who have never been educated; some of them don't even know how to sign.

FARC 202 states, "I think that 50 or 40 or 2 or 3 years is the same; they shouldn't do it because it doesn't solve anything. It would be difficult to go to jail for 40 years, but in any case one doesn't repair what has been done." This sentiment was repeated in many interviews, noting that "spending a long time in prison won't repair anything" (FARC 105).

The situation in Colombia with the ICC highlights the tenuous nature between the push for an international criminal justice system and a retributive model of accountability and the most feasible means to achieve peace and demobilization of various factions. As the quotes above highlight, there are secondary effects of international threats of prosecution where various members of militias, guerrilla groups, and paramilitary that will not demobilize or surrender their cause

in the face of such a threat. Likewise, the issue of punishment and its role in achieving reconciliation is a factor that not only can impede local justice and peace, but can lend to additional victimization.

Summary of International Criminal Justice involvement

The involvement of the international criminal justice system of control in conflicts does present some challenges to the overall goals of peace and reconciliation. Likewise, due to the involvement of the ICC, we have seen that other issues arise, leading to additional cycles of violence where crimes against civilians continue, groups move across another border and continue to victimize vulnerable populations, as well as the refusal of various factions to demobilize or surrender. As noted by Lambourne (2006):

> The efforts of international lawyers and human rights advocates to fairly and justly prosecute those responsible for perpetrating crimes against humanity, and to ensure a future respect for the rule of law and human rights principles, are juxtaposed against the efforts of international peace negotiators and conflict resolution practitioners who prioritize the establishment of peace and security and a climate of reconciliation between former enemies.

In the case of Uganda, Joseph Kony and the LRA immediately stepped up violence, moved across borders and victimized others there, especially young children, because of the ICC intervention. Moreover, moving to another country and stepping up efforts using different means, not only continued the cycle of violence on vulnerable populations, but served to negate peace negotiations with the group and the Ugandan government. In an interview with the United Nations Under-Secretary General for Humanitarian Affairs and Emergency Relief, Jan Egeland, in November 2006, Kony emphatically stated that he would never surrender as long as he faces the risk of being arrested. The long impasse between the LRA and the ICC has frustrated many Ugandans, as they are sick of conflict and have far greater concerns of illness and starvation and have stated they would prefer the ICC charges be dropped to stop the ongoing conflict that has now extended into other bordering states. Similarly, in the case of Colombia, we see various members of insurgency factions that have refused to participate in negotiations or demobilize under the threat of prosecution and the removal of any amnesty or pardons.

Beyond the general continuation of violence and crimes against humanity, there are levels of secondary victimization of both victims and perpetrators. As some of the FARC members have noted, after demobilization, many realize that they have been 'used' by chief commanders: "They are the ones who rule, in a very relaxed way, drinking whiskey, while one risks one's life . . . they are the ones who order" (FARC 41). "If we don't do it [execute the order], we risk our lives, we have to do it for A or B reason. They are responsible" (FARC 82). While obeying orders is not a legal defense, such a deep-seated belief impacts not only the belief in the fairness of punishments, but the long-term efforts towards restoration. This is especially so when high-ranking state officials and military personnel have committed their share of crimes against humanity and or war crimes and receive complete impunity while the focus remains on the insurgency groups, paramilitary, and militias.

In the case of Uganda, as the cycle of violence and the kidnapping of children continues, those children that have escaped or been rescued from the LRA continue to be victimized in many cases by not being allowed to return or accepted back into their local communities. Moreover, female child soldiers continue to be victims as they have been raped, many have been impregnated, and suffer from psychological disorders and sexually transmitted infections

as a result of the violence. Though many have been freed, they have returned to impoverished communities where they are rejected and "verbally and physically harassed by the community, called 'killers,' 'Kony's wives,' and 'prostitutes,' and often beaten and stoned" (United Africans for Women's and Children's Rights 2010). Moreover, children remain in hiding, afraid to wander in the streets or walk to school, for fear of being abducted again into the LRA.

As we have highlighted here, there is a fine line between ending a long history of impunity and achieving peace in conflicts where crimes against humanity, genocide, and war crimes are committed. There are a host of factors that present challenges to using the rule of law and a retributive system to obtain 'justice' (e.g., deterrence, the role of the victim, and case selectivity, to mention a few). The cases discussed in this chapter merely highlight the potential of the ICC to serve as a barrier to peace negotiations when the threat of prosecution at the international level is introduced. In these cases, one must carefully balance the goal of peace and cessation of conflict with prosecutions. As noted by Grono (2006), ICC prosecution or peace through amnesty and impunity should only be traded off against the other when there is no other viable alternatives and when the benefits of peace outweigh the harm that may be caused by involvement of the international criminal justice system.

Conclusion

Millions of people have been victimized by the actions and omissions of states and governments. Likewise, attempts by states and the international criminal justice system to constrain or control crimes committed by other states and/or individuals that are said to be a threat to global peace and security have presented secondary consequences, including additional levels of victimization and policies that have had no impact on restraining the criminal activity. More often than not, efforts to address one form of harm, injury, or crime at the global level are riddled with political concerns and/or latent consequences that result in additional state violence and harm. We have drawn on the issue of piracy in Somalia as a case in point for the latter. Here we discussed how the responses of states were not only misguided but founded on political concerns as well as the questionable assumptions of deterrence at the expense of addressing the root causes. Such reactions and state policies are not uncommon and have had challenges and outcomes that were less than desirable. One need only recall the US use of shock and awe in its attack on Iraq that resulted in thousands of civilian deaths, or the CIA's use of a Pakistani doctor to set up medical facilities to distribute fake polio shots to track down bin Laden and get DNA from his family, leading Pakistani citizens to distrust and refuse humanitarian efforts to vaccinate the population, leading to hundreds of new cases.

Likewise, the international criminal justice system, and the International Criminal Court in particular, have made significant progress, given its infancy, yet, the Court has its challenges and contradictions. The cases drawn on in this chapter have paid particular attention to the role of the Court in ongoing conflicts and the challenges of peace negotiations in light of the threat of arrest and prosecution. In the case of Uganda and Colombia, this tension has resulted in additional levels of victimization and continued violence. Having said this, it should be noted that the continuation of this violence and crimes is not solely due to the ICC involvement, but one should not discount the role it has played. After all, the Court's involvement in other cases has resulted in similar acts of defiance and non-cooperation, leading to additional levels of victimization as is the case with Sudan and President al Bashir.

As with domestic-level criminal justice systems, there is always a level of politics involved. So too is the case at the international level, especially so given the Court's complementary nature,

impacting its jurisdiction and empowerment. In the case of the ICC, there are issues of sovereignty and an ambiguous definition of what is a country's acceptable level of addressing the crimes committed versus allowing impunity before the Court intervenes. Article 17 (2) of the Rome Statute, states:

1 In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
   a The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
   b There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
   c The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

This is especially important in discussing the role of amnesty in peace negotiations which is the issue at the heart of the justice versus peace debate.

With regards to reconciliation, it seems doubtful to believe that prosecutions can positively contribute to a process of reconciliation in a torn-apart society or one that continues to experience conflict. In fact, "there have been virtually no studies that systematically have attempted to examine or measure the contribution of trials to reconciliation and social reconstruction." As the cases have shown in this chapter, prosecutions could even hinder the road towards reconciliation (Bueno and Diaz 2012).

The role of states in responding to state criminality and international level crimes remains one that merits future analysis and attention. Likewise, the impact of the ICC in ongoing situations of conflict should be monitored. It is only through the continuation of scrutiny and research on these topics that scholars, practitioners, and jurists will be able to alter policies and approaches that may contain less challenges, politics, and secondary levels of harm and victimization.

Discussion questions

1 Based on the examples in this chapter, provide three examples where responses to state harm, injury, or crime have resulted in additional state violence and harm.
2 Do you think, given the underlying mechanisms motivating such piracy, the policy or formal response have been proportionate to the social threat of the crime? Why or why not?
3 Based on the chapter, provide three examples where the ICC's involvement may have resulted in additional victimization.

Websites

Colombia Agency for Reintegration: http://www.reintegracion.gov.co/Es/Paginas/index.aspx.
Human Rights Watch: Joseph Kony: http://www.hrw.org/news/2012/03/21/qa-joseph-kony-and-lords-resistance-army.
International Criminal Court: Cases and Situations: http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/.

Acknowledgments

Notes

1   This caused outrage among the Ugandan population, NGOs, and militia groups, calling into question the legitimacy of the Court. Knowing that Museveni and the Uganda People's Defence Force (UPDF) were deeply involved in crimes against humanity, including child abductions, torture, rape, indeterminate detentions, and civilian displacement, the public announcement appeared as if the Court was providing additional impunity to the regime. The Court failed to effectively communicate its mandate and impartiality to the civilians of northern Uganda which undermined the Court's credibility and impartiality in the eyes of many there.
2   The following quotes were responses from various faction groups in extensive interviews conducted by Isabella Bueno and have been provided to the authors for use in this chapter.
3   Names have been removed and interviewees were assigned numbers to protect their identity, save for any that have requested their names be given

References

Alexander, M. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, New York: The New Press.

Alpert, G. P., Dunham, R. G. and Smith, M. R. (2007) "Investigating Racial Profiling by the Miami-Dade Police Department: A Multimethod Approach," *Criminology and Public Policy*, 6: 25–56.

Archibugi, D. and Chiarugi, M. (2011) "Looking for a Jurisdiction for Somali Pirates," *The Political Quarterly*, 82: 231–239.

Bahadur, J. (2011) *The Pirates of Somalia: Inside their Hidden World*, New York: Pantheon Books.

Barak, G., Leighton, P. and Flavin, J. (2010) *Class, Race, Gender, and Crime: The Social Realities of Justice in America*, Lanham, MD: Rowman and Littlefield.

BBC (2011a) "Somali Pirates Jailed in France for Kidnapping Couple," *BBC News Africa*. Available at: http://www.bbc.co.uk/news/world-africa-15976883 (accessed 12 March 2012).

BBC (2011b) "Convicted Somali Pirates Get Life Sentences in US Court," *BBC News US & Canada*, available at: http://www.bbc.co.uk/news/world-us-canada-12739803 (accessed 12 March 2012).

Becker, H. S. (1963) *Outsiders: Studies in the Sociology of Deviance*, London: The Free Press of Glencoe Collier-Macmillan Ltd.

Beckett, K. (1994) "Setting the Public Agenda: 'Street Crime' and Drug Use in American Politics," *Social Problems*, 41: 425–447.

Beckett, K. (1997) *Making Crime Pay: Law and Order in Contemporary American Politics*, Oxford: Oxford University Press.

Behan, C. and O'Donnell, I. (2008) "Prisoners, Politics and the Polls," *British Journal of Criminology*, 48: 319–336.

Bennett, W. J., Dilulio, J. J. and Walters, J. P. (1996) *Body Count: Moral Poverty – and How to Win America's War Against Crime and Drugs*, New York: Simon & Schuster.

Blomberg, T. G. and Lucken, K. (2000) *American Penology: A History of Control*, New York: Aldine de Gruyter.

Blumenson, E. and Nilsen, E. (1998) "Policing for Profit: The Drug War's Hidden Economic Agenda," *The University of Chicago Law Review*, 65: 35–114.

Bobo, L. D. and Thompson, V. (2006) "Unfair by Design: The War on Drugs Race, and the Legitimacy of the Criminal Justice System," *Social Research*, 73: 445–472.

Bonn, S. (2010) "How an Elite-Engineered Moral Panic Led to the U.S. War on Iraq," *Critical Criminology*, 19: 227–249.

Brunson, R. K. (2007) "'Police Don't Like Black People': African-American Young Men's Accumulated Police Experiences," *Criminology and Public Policy*, 6: 71–102.

Bueno, I. and Diaz, A. (2012) "Retributive and Restorative Justice in Colombia: Challenges in the Time of the ICC and the Ongoing Conflict," forthcoming in M. Bohlander, T. Ingadottir, J. Meernik, D.

L. Rothe and W. Schomburg (eds.) *The Reality of Modern International Criminal Justice*, The Hague: Martinus Nijhoff Publishers.

CBC News (2009) "President Ahmed Hussen of the Canadian Somali Congress. Pirates in Somalia," [radio broadcast], Radio Canada, Montreal.

Chambliss, W. (1989) "State-Organized Crime: The American Society of Criminology, 1988 Presidential Address," *Criminology*, 27: 183–207.

Chambliss, W. and Seidman, R. (1971) *Law, Order, and Power*, Reading, MA: Addison-Wesley.

Clark, J. N. (2010) "The ICC, Uganda and the LRA: Re-Framing the Debate," *African Studies*, 69: 141–160.

Clear, T. R. (2007) *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*, New York: Oxford University Press.

Clement, K. and Barbrey, J. (2008) "Criminal Laws on the Fringe: An Analysis of Legislated Punishments for Morality Crimes in the 50 States," *Critical Criminology*, 16: 105–121.

Clinard, M. B. and Yeager, P. C. (1980) *Corporate Crime*, New York: Macmillan.

Crutchfield, R. D. (2004) "Mass Incarceration," *Criminology and Public Policy*, 3: 265–266.

Currie, E. (1998) *Crime and Punishment in America: Why the Solutions to America's Most Stubborn Social Crisis Have Not Worked – and What Will*, New York: Holt Paperbacks.

Doria, J., Rothe, D. L. and Mullins, C. (2010) "Africa: Regional Report", in M. C. Bassiouni (ed.) *The Pursuit of International Criminal Justice: A World Study of Conflicts, Victimization and Post-Conflict Justice*, Antwerp: Intersentia.

Eichstaedt, P. (2010) *Pirate State: Inside Somalia's Terrorism at Sea*, Chicago: Lawrence Hill Books.

Evans, G. (2008) *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, Washington, DC: Brookings Institution Press.

Ewald, U. (2008) "Reason and Truth in International Criminal Justice: A Criminological Perspective on the Construction of Evidence in International Trials," in A. Smeulers and R. Haveman (eds.) *Supranatural Criminology: Towards a Criminology of International Crimes*, London: Intersentia.

Fanara, M. (2011) "Prosecution or Impunity? Is There an Alternative?" Available at: http://www.monitor. upeace.org/archive.cfm?id_article=799 (accessed 18 April 2012).

Findlay, M. (2007) "Terrorism and Relative Justice," *Crime, Law and Social Change*, 47: 57–68.

Friedrichs, D. O. (1998) *State Crime*, vols I and II, Aldershot: Ashgate/Dartmouth.

Ginsberg, T. (2008) *The Clash of Commitments at the International Criminal Court*, Chicago: The Law School, The University of Chicago. Available at: http://www.law.uchicago.edu/files/files/pl251.pdf (accessed 11 March 2012).

Glaze, L. E. (2010) *Correctional Populations in the United States, 2009*, Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.

Goldstone, R.J. (2000) *For Humanity: Reflections of a War Crimes Investigator*, New Haven CT: Yale University Press.

Golub, A., Johnson, B. D. and Dunlap, E. (2007) "The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City," *Criminology and Public Policy*, 6: 131–164.

Gottschalk, M. (2011) "The Past, Present, and Future of Mass Incarceration in the United States," *Criminology and Public Policy*, 10: 483–504.

Green, P. and Ward, T. (2004) *State Crime: Governments, Violence and Corruption*, London: Pluto Press.

Green, P. and Ward, T. (2009) "The Transformation of Violence in Iraq," *British Journal of Criminology*, 49: 609–627.

Grono, N. (2006) *The Role of the International Criminal Court in Peace Processes: Mutually Reinforcing or Mutually Exclusive?* London: Institute of Public Policy Research, available at: http://www.crisisgroup.org/ en/publication-type/commentary/the-role-of-the-international-criminal-court-in-peace-processes.aspx (accessed 29 March 2012).

Ha, M. (2009) "Cabinet Approves Dispatch of Naval Ship to Somali Coast," *Korea Times*, LexisNexis Academic database.

Hagan, J. (2010) *Who Are the Criminals?: The Politics of Crime Policy from the Age of Roosevelt to the Age of Reason*, Princeton, NJ: Princeton University Press.

Hari, J. (2009) "Johann Hari: You Are Being Lied to About Pirates," available at: http://www.independent. co.uk/opinion/commentators/johann-hari/johann-hari-you-are-being-lied-to-about-pirates-1225817. html (accessed 11 March 2012).

Harris, D. A. (2007) "The Importance of Research on Race and Policing: Making Race Salient to Individuals and Institutions Within Criminal Justice," *Criminology and Public Policy*, 6: 5–24.

Hashim, A. S. (2006) *Insurgency and Counter-Insurgency in Iraq*, London: Hurst and Co.

Hastings, J. V. (2009) "Geographies of State Failure and Sophistication in Maritime Piracy Hijackings," *Political Geography* 28: 213–223.

Hipp, J. R., Petersilia, J. and Turner, S. (2010) "Parolee Recidivism in California: The Effect of Neighborhood Context and Social Service Agency Characteristics," *Criminology*, 48: 947–979. DOI: 10.1111/j.1745-9125.2010.00209.x.

Hogg, R. (2007) "Criminology, Crime and Politics Before and After 9/11," *Australian and New Zealand Journal of Criminology*, 40: 83–105. DOI: 10.1375/acri.40.1.83.

Howden, D. (2009) "Human Tides of Misery Flee the Anarchy of Somalia," *The Independent*, available at: http://www.independent.co.uk/news/world/africa/human-tide-of-misery-flees-the-anarchy-of-somalia-1669948.html (accessed 11 March 2012).

Hughes, G. and Lawson, C. (2011) "RSPCA and the Criminology of Social Control," *Crime, Law and Social Change*, 42: 1–15.

Iadicola, P. (2008) "Globalization and Empire," *International Journal of Social Inquiry*, 1: 3–36.

Internal Displacement Monitoring Centre (2011) "New Displacement and Worsening Humanitarian Protection Crisis for IDPs," *Internal Displacement Monitoring Centre*, available at: http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/76AE3E5570C42FE8C1257961004D7CD3/$file/somalia-overview-dec2011.pdf (accessed 2 March 2012).

Internal Displacement Monitoring Centre (2012) "New Displacement and Worsening Humanitarian and Protection Crisis for IDPs," *Internal Displacement Monitoring Centre*, available at: http://www.internal-displacement.org/8025708F004CE90B/(httpCountries)/02EE5A59E76049F5802570A7004B80AB?opendocument (accessed 2 April 2012).

International Maritime Bureau (2011) "Annual Report on Piracy and Armed Robbery Against Ships," available at: www.iccwbo.org (accessed 12 March 2012).

Jasparro, C. (2009) "Piracy Offers Lessons on Global Governance," *Yale Global*, available at: http://yaleglobal.yale.edu/content/somalia%E2%80%99s-piracy-offers-lessons-globall-governance (accessed 11 March 2012).

Jones, T. and Newburn, T. (2005) "Comparative Criminal Justice Policy-Making in the United States and the United Kingdom," *British Journal of Criminology*, 45: 58–80. DOI: 10.1093/bjc/azh067.

Jones, T. and Newburn, T. (2006) "Three Strikes and You're Out," *British Journal of Criminology*, 46: 781–802. DOI: 10.1093/bjc/azl007.

Justice and Reconciliation Project (2009) *Agencia Colombiana para la Reintegración, Desmovilización*, available at: www.reintegracion.gov.co (accessed 10 January 2012).

Kauzlarich, D., Kramer, R. and Smith, B. (1992) "Toward the Study of Governmental Crime: Nuclear Weapons, Foreign Intervention, and International Law," *Humanity and Society*, 16: 543–563.

King, R. and Mauer, M. (2005) *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, New York: The Sentencing Project.

Kramer, R. C. and Michalowski, R. J. (2005) "War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq," *British Journal of Criminology*, 45: 446–469.

Lambourne, W. (2006) "Transitional Justice and Peacebuilding After Mass Violence," Seminar Presentation, Centre for Peace Research and Strategic Studies, K.U. Leuven, Leuven.

Lemert, E. (1967) *Human Deviance, Social Problems and Social Control*, Englewood Cliffs, NJ: Prentice-Hall.

Levitt, S. D. (1996) "The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation," *The Quarterly Journal of Economics*, 111: 319–351.

Lynch, M. (2011) "Mass Incarceration, Legal Change, and Locale," *Criminology and Public Policy*, 10: 673–698. DOI: 10.1111/j.1745-9133.2011.00733.x.

Massoglia, M. and Warner, C. (2011) "The Consequences of Incarceration," *Criminology and Public Policy*, 10: 851–863. DOI: 10.1111/j.1745-9133.2011.00754.x.

Mauer, M. (2011) "Addressing the Political Environment Shaping Mass Incarceration," *Criminology and Public Policy*, 10: 699–705. DOI: 10.1111/j.1745-9133.2011.00735.x.

Mauer, M. and King, R. S. (2007) *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, Washington, DC: The Sentencing Project.

Mears, D. P., Wang, X. I. A., Hay, C. and Bales, W. D. (2008) "Social Ecology and Recidivism: Implications for Prisoner Reentry," *Criminology*, 46: 301–340.

Michalowski, R. (2007) "Invasion, Empire and Human Rights," in G. Barak (ed.) *Violence, Conflict and World Order*, New York: Rowman and Littlefield.

Moy, A. H. (2006) "The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity," *Harvard Human Rights Journal*, 19: 267–273.

Mullins, C. W. and Rothe, D. L. (2008) "Gold, Diamonds and Blood: International State–Corporate Crime in the Democratic Republic of the Congo," *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, 11: 81–99.

NATO Allied Maritime Command (2010) "One Year on NATO Remains Vigilant in Gulf of Aden," *NATO News Release*. Northwood: NATO.

Oceans Beyond Piracy (2011) "The Economic Cost of Somali Piracy 2011," Oceansbeyondpiracy.org, available at: http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011_summary.pdf (accessed 12 March 2012).

Oketch, B. (2012) "Kony 2012 Campaign Too Late in North Uganda," Institute for War and Peace Report. *ICC: AFRICA UPDATE*, 316, March 29, 2012.

Pager, D. (2003) "The Mark of a Criminal Record," *American Journal of Sociology*, 108: 937–975.

Pager, D. (2008) "Race, Crime, and Finding Work in an Era of Mass Incarceration," in D. B. Grusky, M. C. Ku and S. Szelenyi (eds.) *Social Stratification: Class, Race, and Gender in Sociological Perspectives*, Philadelphia, PA: Westview Press.

Parenti, C. (2008) *Lockdown America: Police and Prisons in the Age of Crisis*, New York: Verso.

Parmentier, S. (2003) "Global Justice in the Aftermath of Mass Violence: The Role of International Criminal Court in Dealing with Political Crimes," *International Annals of Criminology*, 41(1–2): 203–224.

Parnaby, P. F. (2006) "Crime Prevention through Environmental Design: Discourses of Risk, Social Control, and a Neo-liberal Context," *Canadian Journal of Criminology and Criminal Justice*, 48: 1–29.

Parry, C. (2008) "Promising New Waters for Al-Qa'ida? The Poor Take Up Lawlessness at Sea for Large Ransoms, But Future Pirates' Motives Could Be Political," *The Independent*, available at: http://www.independent.co.uk/opinion/commentators/chris-parry-promising-new-waters-for-alqaida-1031031.html (accessed 12 March 2012).

Pattillo, M., Weiman, D. and Western, B. (2004) *Imprisoning America: The Social Effects of Mass Incarceration*, New York: Russell Sage Foundation.

Penny, T. (2012) "Cameron Hosts Talks in Bid for Somalia Security Piracy Curb," *Bloomberg Businessweek*, available at: http://www.businessweek.com/news/2012-02-24/cameron-hosts-talks-in-bid-for-somalia-security-piracy-curb.html (accessed 30 March 2012).

Petersilia, J. (2003) *When Prisoners Come Home: Parole and Prison Reentry*. New York: Oxford University Press.

Piehl, A. M. (2004) "The Challenges of Mass Incarceration," *Criminology and Public Policy*, 3: 303–308.

Quintero, A. and Culler, T. A. (2012) "IDP Health in Colombia: Needs and Challenges," *Reproductive Health Access, Information and Services in Emergencies*, available at: http://www.fmreview.org/FMRpdfs/FMR33/70-71.pdf (accessed 20 March 2012).

Reno, W. (2009) "Illicit Markets, Violence, Warlords, and Governance: West African Cases," *Crime, Law and Social Change*, 52: 313–322.

Reuters (2012) "German Prosecutor Urges Jail in Somali Piracy Trial," *Reuters Africa*, available at: http://af.reuters.com/article/somaliaNews/idAFL5E8CP3HR20120125 (accessed 12 March 2012).

Rinehard, B. (2012) *Horn of Africa: Land & Sea*, Report from the Civil-Military Fusion Centre, North Atlantic Treaty Organization.

Riveros, N. (2009) "Peace vs. Accountability in Colombia," *University for Peace*, available at: www.monitor.upeace.org/NRIVEROS.pdf (accessed 12 March 2012).

Roach, S. (2012) "Multilayered Justice in Northern Uganda: Reconciling Mato Oput with ICC Intervention," forthcoming in M. Bohlander, T. Ingadottir, J. Meernik, D. L. Rothe and W. Schomburg (eds.) *The Reality of Modern International Criminal Justice*, The Hague: Martinus Nijhoff Publishers.

Roman, C. G. (2004) "A Roof is Not Enough: Successful Prisoner Reintegration Requires Experimentation and Collaboration," *Criminology and Public Policy*, 3: 161–168.

Ross, J. I. and Rothe, D. L. (2008) "Ironies of Controlling State Crime," *International Journal of Law, Crime and Justice*, 3: 196–210.

Rothe, D. L. (2009) *State Criminality: The Crime of All Crimes*, Lanham, MD: Lexington Books.

Rothe, D. L. (2012) "International Criminal Justice System for Victims? The Situation at the International Criminal Court," in R. Peacock (ed.) *Victimology in South Africa*, in press.

Rothe, D. L. and Collins, V. E. (2011) "Got a Band-Aid? Political Discourse, Militarized Responses, and the Somalia Pirate," *Contemporary Justice Review*, 14: 329–343.

Rothe, D. L. and Mullins, C. W. (2006) "The International Criminal Court and United States Opposition," *Crime, Law and Social Change*, 45: 201–226.

Rothe, D. L. and Mullins, C. W. (2007) "Darfur and the Politicalization of International Law: Genocide or Crimes Against Humanity," *Humanity and Society*, 31: 83–107.

Rothe, D. L. and Mullins, C. W. (2010) "Beyond the Juristic Orientation of International Criminal Justice: The Relevance of Criminological Insight to International Criminal Law and its Control," *International Criminal Law Review*, 10: 97–110.

Rothe, D. L. and Overton, A. (2010) "The International Criminal Court and the External Non-Witness Expert(s), Problematic Concerns: An Exploratory Endeavour," *International Criminal Law Review*, 10: 345–364.

Rothe, D. L. and Ross, J. I. (2010) "Private Military Contractors, Crime, and the Terrain of Unaccountability," *Justice Quarterly*, 27: 593–617.

Rothe, D. L. and Schoultz, I. (forthcoming) "International Criminal Justice: A Deterrent for Crimes of the State?" *The Journal of Studi Sulla Questione Criminale. Nuova Serie dei Delitti e Delle Pene*.

Schlicht, M. (2010) "Somalis on Trial in Germany's First Modern Piracy Case," Reuters.com, available at: http://www.reuters.com/article/2010/11/22/us-germany-pirates-idUSTRE6AL2EA20101122 (accessed 2 March 2012).

Shaw, R., Waldorf, L. and Hazan, P. (2010) *Localizing Transitional Justice: Intervention and Priorities after Mass Violence*, Stanford, CA: Stanford University Press.

Shelton, E. D. L. and Cengage, G. (2005) "Genocide and Crimes Against Humanity: 'Amnesty'," cited in M. Fanara (2011) "Prosecution or Impunity? Is There an Alternative?" Available at: http://www.monitor.upeace.org/archive.cfm?id_article=799 (accessed 18 April 2012).

Skolnick, J. H. (2007) "Racial Profiling: Then and Now," *Criminology and Public Policy*, 6: 65–70.

Spelman, W. (2007) "The Limited Importance of Prison Expansion," in M. E. Vogel (ed.) *Crime, Inequality and the State*, New York: Routledge.

Spelman, W. (2009) "Crime, Cash, and Limited Options: Explaining the Prison Boom," *Criminology and Public Policy*, 8: 29–77.

Sriram, C. L. (n.d.) "The ICC Africa Experiment: The Central African Republic, Darfur, Northern Uganda, and the Democratic Republic of the Congo," available at: http://humansecuritygateway.com/documents/ISA_ICCAfricaexperiment.pdf

Sutherland, E. H. ([1939] 1947) *Principles of Criminology*, 4th edn, Chicago: J.B. Lippincott.

Sutherland, E. H. (1940) "White-Collar Criminology," *American Sociological Review* 5: 2–10.

The Herald (2012) "Somaliland's New Laws Show Intent to Fight Piracy," available at: http://www.herald.co.zw/index.php?option=com_content&view=article&id=34669:somalilands-new-laws-show-intent-to-fight-piracy&catid=45:international-news&Itemid=137 (accessed 1 April 2012).

Travis, J. and Petersilia, J. (2001) "Reentry Reconsidered: A New Look at an Old Question," *Crime and Delinquency* 47: 291–313.

Uggen, C. and Manza, J. (2007) "Democratic Reversal? Felon Disenfranchisement and American Democracy," in M. E. Vogel (ed.) *Crime, Inequality and the State*, New York: Routledge.

UNICEF (2012) "Safe Water Remains Scarce in Somalia, Contributing to Disease and Malnutrition," *United Nations Children's Fund*, available at: http://www.unicef.org/infobycountry/somalia_62048.html (accessed 12 March 2012).

United Africans for Women's and Children's Rights (2010) "United Africans for Women's and Children's Rights: What We Do," available at: http://www.africanwomenrights.org/what_we_do/scholarships.php (accessed 12 March 2012).

United Nations Office for the Coordination for Humanitarian Affairs (2012) "Drought Strikes the Horn of Africa," Voices of America, available at: http://www.voanews.com/english/news/special-reports/world-and-regional/Famine-in-Somalia-126248473.html (accessed 15 March 2012).

United Nations Office on Drugs and Crime (2010) "Eastern Africa," available at: http://www.unodc.org/easternafrica/en/piracy/background.html (accessed 2 March 2012).

United Nations Security Council (2007) "Resolution 1772: UN doc. S/RES/1772 (2007)," available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/485/62/PDF/N0748562.pdf?OpenElement (accessed 12 March 2012).

United Nations Security Council (2008a) "Resolution 1801: UN doc. S/RES/1801 (2008)," available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/246/98/PDF/N0824698.pdf?OpenElement (accessed 11 March 2012).

United Nations Security Council (2008b) "Resolution 1816: UN doc. S/RES/1816 (2008)," available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/361/77/PDF/N0836177.pdf?OpenElement (accessed 12 March 2012).

United Nations Security Council (2008c) "Resolution 1838: UN doc. S/RES/1838 (2008)," available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/538/84/PDF/N0853884.pdf?OpenElement (accessed 12 March 2012).

United Nations Security Council (2008d) "Resolution 1844: UN doc. S/RES/1844 (2008)," available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/611/31/PDF/N0861131.pdf?OpenElement (accessed 12 March 2012).

United Nations Security Council (2008e) "Resolution 1846: UN doc. S/RES/1846 (2008)," available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/630/29/PDF/N0863029.pdf?OpenElement (accessed 10 March 2012).

United Nations Security Council (2008f) "Resolution 1851: UN doc. S/RES/1851 (2008)," available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/655/01/PDF/N0865501.pdf?OpenElement (accessed 15 March 2012).

United Nations Under-Secretary General for Humanitarian Affairs and Emergency Relief, Jan Egeland (November 2006). Quoted in J. Gettleman, "U.N. Envoy Meets with Ugandan Rebel," World, Africa, *New York Times*, available at: http://www.nytimes.com/2006/11/13/world/africa/13uganda.html.

Wisotsky, S. (1990) *Beyond the War on Drugs: Overcoming a Failed Public Policy*, Buffalo, NY: Prometheus Books.

World Food Programme (2007) "Coordinated Action Urged: Piracy Threatens UN Lifeline to Somalia," available at: http://www.wfp.org/node/328 (accessed 11 March 2012).

Wright, R. and Decker, S. (1994) *Burglars on the Job: Streetlife and Residential Break-ins*, Boston: Northeastern University Press.

Young, J. (1971) *The Role of the Police as Amplifiers of Deviance, Negotiators of Drug Control as Seen in Notting Hill*, Harmondsworth: Penguin Books.

International Criminal Court cases

The International Criminal Court, Case Number ICC-01/04-01/06, *The Prosecutor v. Thomas Lubanga Dyilo*.

The International Criminal Court, Case Number ICC-01/04-01/07, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

The International Criminal Court, Case Number ICC-01/04-01/10, *The Prosecutor v. Callixte Mbarushimana*.

The International Criminal Court, Case Number ICC-01/04-02/06, *The Prosecutor v. Bosco Ntaganda*.

The International Criminal Court, Case Number ICC-01/05-01/08, *The Prosecutor v. Jean-Pierre Bemba Gombo*.

The International Criminal Court, Case Number ICC-01/09-01/11, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*.

The International Criminal Court, Case Number ICC-01/09-02/11, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai KenyattaMuammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*.

The International Criminal Court, Case Number ICC-02/04-01/05, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*.

The International Criminal Court, Case Number ICC-02/05-01/07, *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*.

The International Criminal Court, Case Number ICC-02/05-01/12, *The Prosecutor v. Abdel Raheem Muhammad Hussein*.

The International Criminal Court, Case Number ICC-02/05-01/09, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*.

The International Criminal Court, Case Number ICC-02/05-03/09, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*.

The International Criminal Court, Case Number ICC-02/11-01/11, *The Prosecutor v. Laurent Gbagbo*.

Legislation

Amnesty Act of 2000, available at: http://www.ulii.org//cgi-bin/uganda_disp.pl?file=ug/legis/consol_act/aa2000111/aa2000111.html&query=Amnesty Act (accessed 18 April 2012).

23

Fundamentalism, extremism, terrorism

Commonalities, differences and policy implications of 'blacklisting'

Hans J. Giessmann

Introduction

After 9/11 and the Global War on Terrorism (GWOT), which was declared by the Bush administration immediately after the terrorist incidents, the practice of proscribing individuals, groups, organisations and even states that were suspected of having collaborated with al-Qaida by providing funds, training sites or hide-outs became significantly expanded and improved. The international, but even more the national, practices of proscription affected not only some terrorist groups and cells, but were also applied to a larger group of resistance and liberation movements who were labelled terrorists by the governments to which they were opposed. This chapter will shed light on crucial political problems that emerge if different types of actors become involved in terrorist activities, but also if sanctions fail to sufficiently distinguish between terrorist perpetrators and other non-state 'power contenders' (Dudouet *et al.* 2012a: 4). It is based on a political analysis of the concept and practice of proscription, or blacklisting, which has become widely used by states and international organisations. It provides a preliminary assessment of the appropriateness and effectiveness of this practice. In doing so, the chapter will also discuss the lack of transparent 'criteria' that are applied in order for a group to be listed, and will provide a critical reflection of the role of ideologies that are considered by states and international organisations as providing the background and guidance for terrorism. The chapter will give attention to the impact of exclusive and reductionist counter-terrorism policies on the strategies and tactics of political opposition movements and will discuss related issues of confrontational group identities in the context of disputed legitimacy.

The first section provides a background analysis. The following section reflects on the difficulties of distinguishing terrorist perpetrators from other non-state actors who consider the use of violence a legitimate tool for resistance and liberation. The third section gives an overview of relevant discourses about the ideological sources of terrorism and of the main ideologies that in the West are commonly held responsible for the existence of terrorist threats. Subsequently the current system of 'blacklisting' as practised by the UN, the EU and the United States will be briefly presented. A reflection on the 'non-discrimination dilemma' complements this analysis. Finally, some preliminary conclusions will be drawn that hint to further needs of research.[1]

Background

Publicly allying with the United States, several other states tried to use the attacks of 9/11 to flag their own national policies against secessionist or insurgency movements in compliance with 'legitimate counter-terrorism' strategies. Certain states used the label of terrorism for any form of resistance against their rule – regardless of whether or not the resistance was violent or legitimate. Simply posing a potential threat to state-owned assets was sufficient for sanctions to be imposed on individuals and organisations who contested the existing rule. Sanctions were disconnected from concrete activities, and even the use of pre-emptive counter-violence became justified as a legitimate form of response by the challenged states or governments to the threat of 'terrorism'. This is not to say that terrorism as such is legitimate or justified. But by merging different types of actors, their ideologies and motivations, a catch-all justification for using violence against those actors has emerged. After a series of terrorist plots against civilian targets in Moscow between 2002 and 2010, all secessionist movements in Chechnya and the neighbouring autonomous regions were blamed by the Russian media and political establishment for being the masterminds behind these attacks. Similarly, Beijing has publicly condemned activities of political protesters in Tibet and in Xinjiang Province as terrorist acts of 'evil' against Chinese sovereignty and integrity.

Condemning insurgents as terrorists has led to proscription practices. Proscription combines a means of prevention with prosecution. International and national terror lists mushroomed in the early 2000s, particularly after 9/11 (Sullivan and Hayes 2010: 86; Dudouet 2011). Both individuals and organisations were targeted by such lists.

In the case of organisations, which this analysis focuses on, the common practice of adding organisations to blacklists is based on the assessment that hatred ideologies form their corporate identity and may therefore also provide the motivation according to which actors justify and commit terrorist attacks. According to this assumption, mere suspicion is considered sufficient to hold organisations accountable for acts that they may or may not be responsible for. Blacklisting fails to offer clear and revisable criteria for adding groups and organisations to the various terror lists and particularly for their de-listing. In fact, some groups and their top leaders were proscribed just because they were declared responsible for 'supporting' terrorist activities, even if they were unaware of such support. Terrorist activities were assumed just by assessing the ideologies and declared policies of designated individuals and organisations (Grabovsky and Stohl 2010).

Whereas for good reason it can be assumed that terrorism must be based on at least a certain kind of militant ideology, the opposite side of the argument – that militant ideology leads to terrorism – is less clear and evident. Militant ideologies may imply a potential threat of using terrorist violence, but often they don't actually do so. In the 'Global War on Terrorism' this important difference has been eliminated. For example, the number of people who have been put under systematic observation and traced by national intelligence just because of suspected terrorism-related activities is much greater than the tiny group of actors whose activities have been linked to real terrorist activities. A recent classified German survey, which was leaked to the public in 2012, revealed that from a full scan of some 37m emails carried out by the German intelligence service until the present, hardly more than 200 were of any use for subsequent policing and prosecution activities (European Digital Rights 2012).

The excessive practice of scanning and observing what may *become* terrorism – but which is not terrorism in reality – has contributed to what the Danish researcher Ole Wæver has coined 'securitisation' (Wæver 1995). Securitisation, i.e. the subordination of all policies under a security-dominated pretext, tends to enhance simplifying 'black-and-white' or 'them-and-us' schemes.

Counter-terrorism policies have made use of (and indeed have stirred up) deeply rooted stereotypes and have enhanced simplistic threat perceptions which eventually have entered the political space, thereby diminishing opportunities for a thoughtful differentiation between legitimate and illegitimate political resistance.

A more sophisticated and intelligent perspective on the background of terrorism and counter-terrorism policy is required. This insight is neither new nor original. But an acknowledgement that the current counter-terrorism policies may not only be insufficient for enhancing security but may also contribute to further instability by deepening stereotyped perceptions, for example, between ethnic or religious communities, is not widespread.

A counter-terrorism policy that builds upon stereotypes of hostile collective identities is extremely risky. It may open doors for an arbitrary treatment of political actors, dependent upon what they say and not what they do. A failure to discriminate suspicion from evidence may have political, legal and social implications, and not only for the affected suspects. Politically it shifts the balance between the values of security and freedom at the expense of the latter (Donohue 2005). Legally, it may weaken the rule of law, because of the potentially dubious legal justification for a chosen action. And socially, the effect of isolating, stigmatising and de-legitimising political groups because of perceived fundamental or radical ideologies may push those actors into illegality and result in an increasing militancy of their members (Muller 2008: 129; Toros 2008: 411). Empirical data from the past show that while most illegal organisations have not disappeared due to the sanctions imposed on them, their reintegration into society may be extremely difficult, and is particularly difficult for states to accept that they had con-demned the organisations. Virtually all organisations that were sanctioned because of their suspected terrorist activities – with the debatable exceptions of the Tamil Tigers (LTTE), ETA and some Iranian groups – are still active, either at their place of origin or within the diasporas of the constituencies in which they are embedded (Dudouet 2011).

Most recently, the bombing and killing spree in Norway in July 2011 has made clear that the picture of terrorism is apparently more complex than was assumed shortly after 9/11, and that a new wave of terrorist violence might not be confined to acts based on mobilising ethno-nationalist and religious difference. Intelligence in Western Europe has revealed that apart from the phenomenon of so-called home-grown terrorism, other risks emerging from random attacks by radicalised individuals may even outpace common assumptions about terrorist threats – partly because the counter-measures against the various known terrorist networks and organisations have been successful, but partly also because an effective precaution against 'lone wolfs' and mavericks hardly seems achievable. The recent Europol 2012 Terrorism Trend Report emphasised accordingly that terrorist threats for the EU Member States may 'increasingly' emanate from 'lone actors and small groups . . ., whose radicalisation takes place largely undetected' (EUROPOL 2012: 9).

Identifying 'terrorists'

Terrorism, in the most general sense, seeks to achieve political goals by spreading panic and fear through the use or the threat of violence. Terrorism causes impact by virtue of its mode of operation, which is characterised as being both random and targeted at the same time. On the one hand, the perpetrators try to target certain individuals or crucial assets that they believe are representative of a larger group of social actors. It is the larger group which they address by selecting a sample that reflects the close connection between the victims and the addressees. The latter are, for example, a government, a political party, a religious community, a single-issue group, a company, or an ethnic community. But, on the other hand, the selection of

individual victims or targets is also random, because the attacks aim to spread anxiety and fear among the whole social group that the victims either belong to or which they are assumed by the perpetrators to represent.

Terrorist organisations usually refer to extremist ideologies, often interspersed with ethno-national or religious elements (Guelke 1995). Organisations use ideologies to attract followers, but such ideologies are basically functional, i.e., they serve to justify or to camouflage the terrorists' case, particularly the use of force against determined 'hostile' actors and assets. Because terrorists conduct illegal activities, their organisation is typically clandestine, which influences how the perpetrators express their views. The use of force is combined with messages – either direct (leaflets, video clips, declarations claiming responsibility, etc.) or indirect (expressions of solidarity, free-rider statements, etc.). In this sense, as Waldmann has stated, terrorism from a functional perspective is a 'communication strategy', aiming to convey messages to foes and friends alike (1998: 13).

The means terrorists employ are often seen as weapons used by the weaker against the stronger. According to that view, the threat and use of force by the former seek to blackmail the latter to enforce concessions that they otherwise would probably not make. Walter Laqueur defined terrorism as the 'application of violence or threatened violence intended to sow panic in a society, to weaken or even overthrow the incumbents, and to bring about political change' (Laqueur 1996: 24). The targeted and random threat and use of force imply a threat of escalation, i.e. the threat of follow-up attacks of a similar kind, in case the targeted party does not agree to the demands of the perpetrators. According to such an interpretation, the use of violence and counter-violence can be seen simply as expressions of a 'pre-negotiation language'. Ideologies of terrorism may vary, as mentioned before, but what they seem to have in common is a constructed and mobilised hostility between different identity groups – a ruling regime versus oppressed parts of the population, ethnic groups versus other ethnic groups, majorities versus minorities, one faith community against the other. Ethno-nationalist and religious separation is nowadays of particular relevance (Hoffman 2006; Waldmann 1998).

It must be noted, though, that the widely used terms of 'ethno-political' (Hirschmann 2000; Stepanova 2008) and 'religious terrorism' (Benjamin and Simon 2002; Hirschmann 2000; Martin 2011; Ranstorp 1996) are misleading. Ideas that intend to justify the use of terrorist force build on the exclusion and confrontation of social groups by stirring hatred. They 'steal' only from ideologies that seem to best fit and support their case. In doing so, terrorists often take larger social communities hostage for political objectives by trying to profit from shared grievances within larger layers of a society. To be heard in the public sphere and in order to be taken seriously by their political opponents, the small groups of plotters and perpetrators try to associate themselves with the larger constituencies. In addition, they want to attract political, moral and financial support and also seek to recruit followers and helpers. The motivation to make the case look more legitimate is driven by the hope of gaining more public support, thereby increasing pressure on the contested opponent. Often the aims, values and aspirations of those larger constituencies do not coincide with those which the terrorists and the masterminds of terrorism claim to represent. Especially the terrorist *modus operandi* of killing innocent civilians and spreading fear among the public are not backed by the great majority of society. The closer the association, the more difficult it is to identify the terrorists within a society. But the dividing line does exist. Perpetrators may share grievances with larger layers of a society, but this does not imply sharing a common vision of the future for the society as a whole.

Nonetheless, grievances provide a breeding ground for social and political unease and thus may also stir up public emotions which may eventually feed into the interests of terrorists. Grievances may also provide a fertile recruiting ground for terrorist actors to create a reserve

cadre for their organisations and networks. The critical relationship between the masterminds of terrorism and the larger social constituencies they pretend to represent results in an analytical and political 'trilemma', which can be summarised as follows:

- The boundaries between individual terrorists, their organisations and networks, and larger constituencies are blurred because of existing ethnic or religious commonalities in combination with shared grievances and ethno–nationalist or religious mobilisation within those constituencies.
- The boundaries between terrorists and radicalised layers of those larger constituencies are also blurred due to similarities of affiliated and presented ideologies.
- The boundaries between political and criminal activities of terrorists are blurred since, in order to justify their criminal operations, the perpetrators refer to what they consider a just political case, which gives them 'legitimacy for any form of activity', including the use and threat of violence.

In political and legal terms, blurred boundaries between different types of actors are not only problematic because innocents may be affected or ideologies may be hijacked for functional terrorist purposes. It is also a problem because it may relativize the responsibility of the real offenders who may be in a better position to camouflage their criminal motivations by referring to widely shared ideologies and thus to 'politically motivated persecution'.

An intrinsic part of this 'trilemma' is also that blurred boundaries make it more difficult to differentiate between the illegitimate use of violence by terrorists and legitimate political resistance. Legitimate political resistance – for example, by an organisation that seeks to protect an oppressed ethnic minority against an authoritarian majority rule – must be clearly distinguished from the illegitimate violence that terrorists use to spread fear and anxiety among the public. But here the boundaries are also not clear. Resistance and Liberation Movements (RLM) – or sometimes only some of their splinter groups or individual cells – may resort occasionally to the same means and tactics that are used by terrorists, sometimes contradicting the mainstream policies within their own constituencies. Identifying the various factions within resistance and liberation movements, and in particular assessing the importance of splinter groups in relation to other organised sub-groups, is not an easy political or legal task. Yet differentiation is politically indispensable. To differentiate between actors according to their responsibility and accountability is important when offering fair legal treatment. But it is also important when allowing states and the international community to take transparent decisions about how to deal with the challenges of armed political opposition and terrorism proper. The legal difference, the social background, and the ideologies of social actors must be better understood in order to capture the different modes of violent action in developing political responses. Even if they appear similar, the strategies of RLM and terrorists usually differ significantly (cf. Dudouet *et al.* 2012a; Giessmann 2013).

The general terms in the political and legal language to classify the different types of actors are 'NSAG' for non-state armed groups or 'ANSA' for armed non-state groups (Geneva Academy of International Humanitarian Law and Human Rights 2011; Dudouet *et al.* 2012a). But such terms are not necessarily helpful. They may distinguish state actors from non-state actors but do not take into consideration the wide scope within the category. Its 'universe' (Schneckener 2009: 8) ranges from rebels, guerrilla fighters, militias, clan chiefs and 'big men', warlords, marauders and criminals to mercenaries and private military companies (PMCs). All of these groups may be also connected to means and tactics of terrorism, but it is not terrorism that these actors are primarily interested in. An over-simplified armed state/non-state focus, which

protects and privileges states simply due to their legally recognised status according to international law, fails to take into account that in cases of corrupt, autocratic and oppressive regimes, legitimacy may rather be on the side of those who resist the existing state bureaucracy and its statutory security forces (Dudouet *et al.* 2012b: 9).

Many political conflicts are rooted in the adoption of violent strategies by societal actors who dispute the legitimacy of a rule that they perceive to be unable or unwilling to provide sufficient security and welfare to all of its citizens, often based on direct experiences of discrimination and oppression (Dudouet *et al.* 2012a: 2). Their violent resistance is based on collective grievances that are recognised under international law, such as the right to self-determination or other fundamental freedoms (Muller 2008). The focus on terrorism has brought hard-power counter-insurgency approaches (from criminalisation to military intervention) to the forefront of security politics in many countries with intra-state conflicts. This tends to be at the expense of nonviolent forms of conflict settlement and intentionally transformative approaches, from preventive diplomacy and dialogue to the use of civilian 'soft power' (Dudouet *et al.* 2012b). Whereas most of the aforementioned actors operate in compliance with a consistent system of values, the 'value system' of terrorists is functional and pragmatic. It picks what fits. For terrorists, a plot was successful if the public is mobilised to support violent action, because their primary goal of action is to trigger political change by radicalising and mobilising the public in order to exert influence on the adversary. The public effect of terrorism overshadows the wide spectrum of resistance and has made it difficult for other non-state actors to separate themselves from terrorists, at least in the eyes of the public, but apparently also in the eyes of states and international organisations.

What makes the 'trilemma' more interesting in the context of a *Handbook on International Crime and Justice Studies* is that a premature branding of armed violent resistance as terrorism may infringe upon the equal legal treatment of the affected people. Several authors have pointed to the fact that states usually tend to characterise violence as 'terrorist' when perpetrated by groups which they consider hostile and a threat to themselves, while similar acts, if perpetrated by organisations closer to them (or rather hostile to their foes), might be considered acts of legitimate resistance or liberation that should be supported. Similarly, such a double standard is often also applied on a national level: some actors are branded, while others are not, even if they, according to their violent activities and legal position, are on the same page (Taylor 1988; Ruby 2002; Giessmann 2013). In terms of counter-terrorism policy, this practice may lead to simplified or 'reductionist' policies which deepen the public portrait of hostility and which thus may eventually perpetuate the threat and spread of violence instead of offering nonviolent options for conflict transformation.

Fundamentalism, radicalism, extremism: ideological roots of terrorism?

The literature on terrorism and potentially underpinning ideologies is as large as it is diverse. The lack of conceptual understanding about the distinct character of terrorism has merged reflections on terrorism with the vast amount of literature on violent political conflicts, civil wars, low intensity warfare, armed resistance, and liberation. Narrowed down to the inter-relationship between ideology and the use of force, the empirical evidence is small and thus the academic literature hardly goes beyond some general anthropological, social and political observations.

While it can be argued that the legitimacy by which terrorists seek to justify the use or threat of violence originates from radical ideologies, there is no automatic equation between terrorism,

on the one hand, and fundamentalism and radicalism, on the other. Extremism seems to influence terrorists' motivations, but, as such, extremist thoughts may originate from different ideological sources which cannot be captured under a consistent terrorism framework. If we look at the different types of terrorist plots and the diverse nature of perpetrators, a standard definition of ideological root causes for terrorism does not exist. On the contrary, most public debates about terrorism lack differentiation and precision with regard to the founding thoughts and ideologies. As already said, the lines between the different ideological referents and terrorist violence are apparently not clearly drawn, and even in many academic debates, the terms are occasionally used interchangeably.

Fundamentalism

The dilemma of distinguishing terrorists from the larger constituencies that the terrorists claim to represent starts with terminological imprecision. Originally the term *fundamentalism* had predominantly a religious connotation. The term as such was coined by Curtis Lee Laws in 1920. He was at that time the editor of a Baptist journal in the United States and in this role he publicly pointed to the resistance of American Protestant movements to theological liberalism. The term was later picked up by researchers and politicians in the early 1920s and became widely used to capture religious orthodoxy (Almond *et al.* 2003).

In the following decades the notion became popular to condemn religious orthodoxy of every kind. In the eyes of the enlightened and secular movements, the notion of fundamentalism was equal to fanaticism and was a catch-all phrase for the dangerous, religious 'other'. Only in the late twentieth century did the term of fundamentalism become increasingly linked with secular ideologies, with an understanding of a strict adherence to certain conservative doctrines and values. It has been used up to now most often across the Western political domain in a pejorative and derogatory manner with respect to non-liberal thoughts.

Marty and Appleby, in their pioneering series on 'fundamentalisms' in the early 1990s, explained the extended scope of using the term by arguing that fundamentalism as such may not just refer to core views of religiosity, but that it must be understood as an inherently political, although sometimes clandestine, phenomenon (Marty and Appleby 1992; 1993). While the two authors understood fundamentalism as (still to a large extent religiously inspired) resistance against any kind of modernity, in their empirical studies, they clearly pointed to inherent social and ethnic grievances as root causes for fundamentalist thinking.

However, the use of the term 'fundamentalism' in connection with a general 'resistance against modernity' is questionable, if not mistaken. In fact, the combination of the two terms comprises, on the one hand, a very suggestive connotation between fundamental ideological opinions and social or cultural backwardness and, on the other hand, a link, at least implicitly, between fundamentalism and social and political violence, by hinting at (active) resistance. Both connotations seem to address deep-rooted prejudices. The criteria of criticism are neither clearly defined nor measurable. In addition, a pejorative use of the term fundamentalism as resistance against modernity also insinuates that opposing modern political or social perspectives could be illegitimate as such.

Political, academic and religious elites in the Islamic world usually become outraged due to what they consider to be a Western cultural imperialism vis-à-vis value-based traditions of thought, because to them the criticism is based on bigotry and double standards in mainstream Western debates about modernity and liberalism. While there is no doubt that controversies about ideologies, cultures or religions frequently bring about battles over change and preservation, even an encounter of strict orthodoxy and liberalism does not automatically result in a violent

confrontation between proponents and opponents of change. Orthodoxy and a preference for the use of violence are neither symbiotic nor empirically proven. In fact, many, if not most, wars of the past were fought under the flag of 'liberalism' and change. Empirically there is no evidence that orthodoxy would be more prone to the use or the threat of violence than liberalism. On the contrary, radical pacifism, which is an important strand of fundamentalist thinking in different social and political contexts, explicitly denounces any use of violence.

Radicalism

The second term under scrutiny in our context is 'radicalism'. Radicalisation and counter-radicalisation have been flagged in recent years as referential terms for combating and preventing terrorism. Yet these terms are also not precisely defined. As Allen has noted: 'No universal definition of radicalisation exists in the . . . academic/social science communities.' He continues by stipulating that 'the process of adopting an extremist belief system, including the willingness to use, support, or facilitate violence as a method to effect societal change' results in the radicalisation of social groups (Allen 2007: 3). However, he does not present a single convincing argument for an intrinsic combination of radicalism and violence. According to Waldmann,

> [A 'radical'] does not make compromises but tries to resolve problems once and for all by tackling them at their roots . . ., questions the status quo of the socio-political order with a view to replace it with another [. . . and] will often act in the name of an absolute truth, be it an ideology or a religion, which does not admit concessions or restrictions.
>
> (2010: 8)

Like other authors (cf. Nielsen-Dalgaard 2008a; 2008b; Mandel 2012), Waldmann does not draw a direct causal line from radicalisation to the use of violence, let alone to terrorism. From a more theoretical perspective, radicalisation can be explained in different ways. Most prominent in our context are the social movement theory and various socio-psychological schools. According to the social movement theory, radicalisation emanates primarily from socio-economic strains, and is driven by the mobilisation of resources and social framing.

Explanations from the perspective of a strain theory assume that the external strains on a society may lead to social fragmentation due to processes of de-motivation and self-isolation, which may result in individuals joining radical movements that are considered an outlet from the strain. According to empirical studies, such incentives are particularly high for the following four groups of social actors: (1) immigrants from rural areas or small cities in urban centres; (2) social groups and ethnic minorities who have fled political, economic and often military pressure by a ruling regime; (3) members of banned faith communities; and (4) social groups under perceived colonial or post-colonial dominance by external powers (Mandel 2012). Critiques of the strain theory point to the lack of empirical evidence of strain being an immediate cause of violence, and they also criticise the tendency to neglect the purposive rationality of social and political organisation (Nielsen-Dalgaard 2008a; 2008b). Clear evidence that social and political strain leads to violence is not provided by this theory.

Another theoretical approach relates to the mobilisation of resources. It concentrates on the manner by which social movements engage in order to garner political and public support and how social institutions, such as churches, schools or charities, define and reflect on particular grievances. Radicalisation is explained by the interest of individuals and subgroups to nurture the resources of existing institutions for their mission and campaigns. The theory does not reveal the interpersonal processes between recruiters and potential recruits for radical organisations and

it also does not explain how grievances from society are interpreted and transmitted to the institutions. While there is no doubt that radical actors and preachers of hatred are keen on infiltrating resource-providing institutions, there is no manifest evidence that resource institutions as such are a causal factor for radicalisation, let alone for militancy and the use of violence.

Finally, the social framing theory looks at how social identity-seekers conceptualise themselves as collectives and it points to the congruence of the movement's vision of reality and the reality of the movement's potential constituency (Nielsen-Dalgaard 2008b). The theory's explanation for the existence of different frames lies in the incompatibility of visions. While this would apply to the pattern of alienation, and possibly also radicalisation, the theory fails to give explanations for a general link between alienation and violence. In particular, it seems to underestimate the shaping roles of individuals as social leaders of their constituencies.

In sum, the social movement theory and its various approaches assume that radicalisation takes place if social and political subgroups (as rational actors) deviate from mainstream thinking in society or become distinct within their constituency by starting to drive their own particular political agendas. Even if identified as sectarian (because of their respective agendas), the 'radicals' remain members of their constituencies, and their surrounding social context seems to remain intact.

Different from social movement theorists, the socio-psychological schools argue that within any social groupings, permanent dynamics between its members exist, and individual interests may permanently collide with collective interests with regard to respective needs and rewards. Sociological studies focus on how determined external factors (e.g. social, economic, political, and cultural conditions) impact on individual and group behaviour. Assumptions about the inclination to accept violence are based on social interactions. One strand of thought is related to the individual experience of relative deprivation (with an assumed probability of accepting violence due to lacking social benefits), another is linked to the frustration–aggression hypothesis (violence caused by suffering from oppression or humiliation) and another looks at results from social learning (violence being considered an option to gain reputation within a broader social group). However, the theory does not convincingly explain why in many cases even overwhelming deprivation and extreme oppression do not lead to social violence. Therefore it is not clear if the use of violence provides more social recognition within a social group or constituency than other forms of behaviour, including non-aggressive behaviour (Mandel 2012).

In conclusion, it can be said that alienation and sectarian thoughts as such do not provide a sufficient basis for linking radicalism to the use of violence, let alone terrorism. Let us look then at the third ideological dimension – extremism.

Extremism

While fundamentalism is the expression of a value-based and usually conservative set of ideological opinions within a society or social group, radicalism stands for values or mind-sets that do not admit any concessions whatsoever and that usually seek to link those mind-sets with operational policies. This may include tolerance for using violence, but there is no empirical evidence between radicalisation and the use of force. What may happen, though, in relation to shared grievances, is that a larger social group or constituency becomes politically radicalised independent of whether its members subscribe to a certain ideology. Extremism is often linked with fundamentalist thoughts and radicalisation, but in essence it implies a deviation from socially accepted norms. It includes the use of all means that appear to support the aim of extremists to influence and push the mainstream within society to think in their direction.

The threat and use of force are considered a normal practice that originates from a deep disrespect for the political opponent. This said, however, there are two caveats that are important for our analysis. First, perspectives matter, e.g., extremists do not see themselves like this. From their point of view, they do not operate on the periphery of a society or social constituency but they rather defend shared values of their constituency against what *they* consider a deviation from socially and politically accepted norms. Numbers do not seem to matter in this respect. Considering themselves as the true norm-keepers, they instead consider the mainstream illegitimate and therefore the use of force justified. Second, governments seek to denounce opponents and to brand them as extremists, regardless of their own responsibility for an existing social or political conflict.

Extremism is not necessarily bound to religious roots. In fact there are many examples of extremist ideological movements with a secular background; often they even seem to share an anti-religious sentiment. Extremism is also neither primarily modern nor backward, but does typically refer to pre-modern ideologies which intend to justify the case and policy of the followers. Islamists make use of pre-modern interpretations of religious texts to underpin the need for daily resistance against political opponents, while Leftists refer to modern theories in order to explain their case to the public (Meyer 1989). However different the many variants of extremism are, some commonalities are apparent. Extremist actors are reluctant to enter open democratic political discourses and to put their ideologies to a serious test. Another commonality relates to the tendency of extremists to prefer hierarchical and authoritarian political structures. This applies regardless of whether extremist ideologies motivate terrorist groups or loners as, for example, the cases of Timothy McVeigh (Oklahoma) and the recent Merah (France) and Breivik (Norway) cases have shown.

As a preliminary conclusion, it can be stated that neither fundamentalist thought nor radicalisation can provide sound and convincing references for identifying the 'ideologies' of terrorism. Terrorist activities can be considered an expression of the extreme, but this is in most cases a reflection of deeds rather than thoughts. For the purpose of proscription, a reference to fundamentalist and radical thought seems to be of only limited value. While a consistent ideological justification seemingly has only a peripheral relevance for the justification of terrorist plots, the recognition of a legitimate political case is important. What can be seen on the addressee's side of terrorist plots is a tension between the perceived responsibility and the accountability for acts committed by the challengers. As underlined before, proscription is in essence about denying legitimacy and political recognition to a social group or organisation. But, in contradiction to that assumption, the fact that a group or organisation becomes listed also reflects inevitably some kind of political acknowledgement.

Ironically, that means that being listed may be in the interest of the listed party because it can reflect a sense of formal recognition by the creator of the list – the opposed state. The proscribed actor may read the list as evidence that the list contains only actors considered to be relevant challengers of the existing – and contested – rule. Thus it may signal respect and recognition. To the listed parties, the reasons for being listed may be therefore less relevant than the formal evidence of being listed as such. On the flipside, for the creators of the blacklist (states or international organisations), a formal recognition of another state or organisation may not (and usually does not) imply a formal recognition of the legitimacy of the sanctioned party, and sometimes it does not even imply a formal recognition of a legal status. States may have an implicit interest in the clarification of status because it helps to hold individuals or organisations accountable for their activities.

The practice of listing depends on criteria that are spelled out exclusively by the creators of the lists and only a few, if any, references to the provision of international law are made (Menon

1990a: 2, 20). This is also why neither the academic literature nor political analyses provide comprehensive insights into this topic. Therefore the literature that is used for this chapter (and which is referenced in the section on Documents on pp. 537–538) is representative of state-of-the-art knowledge.

A sanction in the form of a blacklist is based on the assessment by a state or an international organisation that written rules have been broken and that the listed actors are expected to restore at least the *status quo ante* before imposed sanctions can be lifted. Yet since the underlying criteria for listing are vague at best, and since the procedure of listing lacks transparency, the sanction itself seems to create random consequences for the listed actors. From their perspective, the blacklists are a tool of power through punishment and prosecution. Neither are the criteria for proscription transparent, nor is it clear how a group becomes de-listed, even if all proper steps are taken to do so. From a theoretical point of view, the use of listing as an instrument of imposing legal power on a listed party is an attempt to maintain or change a balance of power to the advantage of the proscribing actor (cf. Foucault 1982: 789, contested by Sterling-Folker and Shinko 2005). While states and international organisations try to use the legal system to uphold their interests against non-state power contenders, the listed partners try to make use to their advantage of what they consider to be the recognition of their status as a state challenger and to contest the existing state rule outside of the legal system as well.

The 'side effects' of listing for third actors are under-researched and politically often under-estimated. On the one hand, the conflict between two opposing parties may affect the wider societal and political context. On the other hand, the relations between third actors and the one or the other party is seriously affected by the practice of listing. While the relations between third parties and the proscribing party are most likely influenced by the latter's expectations that the third parties join prosecution efforts, third parties which maintain relations with blacklisted actors may become sanctioned as well. The analysis will delve into more of that in the section on the criteria for listing and de-listing.

The blacklisting practice of international organisations: the UN and the EU

Several international organisations have implemented blacklists. The two most sophisticated ones were installed by the United Nations and the European Union. The background of their listing practice will be presented in this section.

Terrorism has been on the agenda of the United Nations for a long time, and more than a dozen international conventions deal directly or indirectly with countering threats originating from terrorism.[2] The practice of blacklisting became a part of counter-terrorism efforts in the late 1990s and was expanded after 9/11. It does not refer specifically to a certain ideology or activity of an organisation. The driver of sanctions in the UN system is the Security Council, which drafts its resolutions based on recommendations by its member states. Proscription is a sanction and, as such, an act of enforcement according to Chapter VII of the UN Charter. In compliance with UNSC Resolution 1267 (1999), the first UN sanction list contained only persons or undertakings which were associated with al-Qaida, the Taliban and Osama bin-Laden. Some 70 entities and more than 250 individuals were listed which made them subject to the freezing of their funds and to the denial of visas, but which also warned states and governments not to provide support to them whatsoever. Resolution 1267 aimed at exerting pressure on the Taliban in Afghanistan not to provide hide-outs for al-Qaida and to extradite Osama bin-Laden. In compliance with Resolution 1267, the UN set up a special Sanctions Committee that was assigned to identify individuals and entities 'associated with' the Taliban. A few other resolutions

followed shortly afterwards (UNSC Res. 1333, 1373, 1390), which extended the blacklists to individuals and entities which were believed to be associated with Osama bin-Laden and his family network.

The practice of listing became further streamlined and more assertive with UNSC Resolution 1373 (2001), which was adopted by the Council after 9/11 and which raised criticism that the UN list lacked legal essentials, such as the provision of fair trials. It can be argued that persecuting terrorists on the basis of assuming that they pose a threat to international security and peace has opened the door to add all conceivable types of state challengers to the blacklists, well beyond the interpretation of terrorists. It is the language of Chapter VII that provides the background for the current proscription practice and since the UN member states have failed several times to agree on a common definition of terrorism, it is this language which sets the scene. The implicit equation of terrorism and other threats to international security and peace according to Chapter VII has provided legitimacy to states and governments to respond to suspected acts of terrorism as if they were acts of war and to justify responses according to Article 51 of the UN Charter. Since 2006, the UN Security Council has made several changes to its listing practice, but the Pandora's box of merging war and terrorism, and thus widening the spectre of enforcement options under the flag of 'counter-terrorism' has remained open (Sullivan and Hayes 2010: 12–16). UNSC Resolution 1390 extended the target group without time limits to 'any individuals, groups, or undertakings' associated with the Taliban, Osama bin-Laden or al-Qaida (UNSC/Res/1390 [2002]). Resolution 1267 established a global sanction regime under Chapter VII of the UN Charter, thus without leaving discretion to member states with regard to its implementation. The number of listed individuals, organisations and entities grew quickly – it started with 169 entries in 2001 and the number had increased to almost 450 entries by July 2010 (UN SC/PR/9999).

According to the UN resolutions, the European Union introduced a blacklisting system of its own after 9/11. It built upon the UN list but also set up an autonomous system of lists for the EU, while individual member states have developed their own lists (Wählisch 2010: 4). The most relevant regulations for implementing the UN list (according to UN-SR/Res/1267) are the EC regulations 467/2001 and 881/2002, which focus on al-Qaida and the Taliban in Afghanistan. The legal basis for establishing additional autonomous lists was provided by UNSC Resolution 1373(2001). The most important documents are EC regulations 2580/2001 and the Common Position on the Application of Specific Measures (2001/931/CFSP) which stipulate that all funds and services of listed entities should be frozen and that funding activities 'in any way' (Art. 3/3k of 2001/931/CFSP) are prohibited. In 2011, 25 groups and 22 individuals were listed according to 2001/931/CFSP. The comparably small number of listed organisations and individuals may be misleading because they must be added to the implemented UN lists.

But the European Union is also facing appeals by groups and organisations to European Courts with respect to complaints regarding a violation of human rights (Lehnhart 2007). The original EU list contains entities subject to Articles 2–4 of the Common Position (2001/931/CFSP) which refer to funds to be frozen and financial services to be denied. In addition to that, other groups and individuals are also listed that are not subject to sanctions according to the Common Position but nevertheless are under scrutiny because of alleged connections to terrorism. That is why the list of affected organisations and individuals has become longer than the official list according to the Common Position of 2001. The extended blacklist refers to the names and aliases of 106 entities. Among those entities are 47 organised groups (2009/67/CFSP). The lists offer neither criteria for listing, nor do they provide information about how and when to become de-listed. The reason for this seems to be simple. The lack of clarity provides more flexibility to the European Union to add suspected entities to the list, and at the same time it does not

provide a reliable legal reference for listed organisations about how to appeal their cases in the courts. It must be said, however, that this strategy has not visibly contributed to more effectiveness of the European counter-terrorism efforts (Edwards 2008; Eriksson 2010).

The US blacklisting practice

The United States possesses the most sophisticated national system of blacklisting. The history of proscription already started during the Cold War, but the practice was renewed and improved in the 1990s, in light of the terrorist attacks on the World Trade Center and other assaults against US citizens and properties in the Middle East and Africa. The first blacklist of Foreign Terrorist Organisations (FTO) was presented by the Clinton Administration in 1995. It was based on an Executive Order (Executive Order 12947) and aimed at impeding various armed activities of diverse groups primarily in the Middle East, but it was soon afterwards extended to other regions. The listing practice was expanded literally in waves, meaning that major violent actions (such as the 1999 bombings at the US Embassies in Nairobi and Dar es Salaam and the attack on the *USS Cole* in Aden, Yemen, in 2000) triggered revisions. The first official terrorist list was then released in 2000 under the guidance of the US State Department. It comprised in total 29 organisations – all of them accused of being involved in terrorist activities or connected with terrorist organisations. Only one year later, right after 9/11, a new list of *Specially Designated Global Terrorists* (SDGT) was established. In an effort to streamline the various existing lists, they were merged by Executive Order 13224, entitled 'Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism', and resulted in a kind of 'masterlist' which was named *Specially Designated Nationals and Blocked Persons* (SDN). It is complemented by two other incorporated lists: the *State Sponsors of Terrorism* and a *Terrorist Exclusion List* (*TEL*).[3]

The FTO list is commonly referred to as the core list of suspected terrorist organisations. The list imposes financial sanctions and immigration restrictions on about 50 organisations and its members from all over the globe. The current frequency of re-assessment is two years and is conducted by the State Department in close collaboration with Homeland Security and the US intelligence community (Kurth Cronin 2003: 2).

The practice of blacklisting in the USA is particularly far-reaching. According to the so-called Patriot Act, entitled, 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism', not only individual terrorists and terrorist organisations are prosecuted, but also any form of material support to such persons or organisations is prohibited – even if the provider does not intentionally support any prohibited activities. In a 2010 judgment, the US Supreme Court ruled that any support that is provided to an FTO-listed actor or organisation can lead to the punishment of the supplier, if the latter knows about the listing and the terrorist nature of the recipient. The far-reaching scope of this judgment has made any external support for the intentional de-listing efforts by these actors practically impossible, regardless of whether their case has a political or criminal background. The practice of blacklisting therefore raises critical questions about the criteria being applied.

Criteria for listing and de-listing: more fog than light

The *UN 1267 sanction regime* defined 'associated with' as

> participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, or in support of; supplying, selling

or transferring arms and related material to; recruiting for; or otherwise supporting acts or activities of Al-Qaida, Usama bin Laden or Taliban, or any cell, affiliate, splinter group or derivate thereof.

<div align="right">(UNSC/Res/1617: para. 2)</div>

Any state could nominate an individual or group for inclusion and other states could object only within five working days. There is no additional procedure of assessment under UN 1267. The role of the UN is basically confined to administering the list. It does not investigate on its own but leaves it to the discretion of the member states to decide on the listing. Binding criteria on the UN side, apart from the general ones that are mentioned above, were not applied. Originally the affected persons were not even informed about the fact that they were listed, a practice that was altered after public complaints, but up to now the procedure under 1267 cannot be considered fair treatment for the persons who have been listed (Sullivan and Hayes 2010: 13).

The *UN 1373 sanction regime* set up a parallel blacklisting system which implemented sanctions against actors who are suspected of supporting actors who 'commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts' (UNSC/Res/1373). Unlike Resolution 1267, this resolution did not refer to certain types of actors but rather gives all member states the right to decide what they deem necessary in order to prevent and suppress the financing of terrorist acts. By using a very general language, the member states were provided with a kind of blank cheque to take any action according to their own interpretation of terrorism. Also unlike Resolution 1267, a direct link between the sanctions to be imposed and the target groups of the Taliban and al-Qaida was not established. It was left to the discretion of the member states, according to their individual threat assessment, to decide against whom and how to take action. On the reverse side, listed persons were forced to appeal to national courts first to have their names removed from the UN lists.

Following several court rulings, the UN system was gradually revised and adjusted between 2005 and 2009. The most important changes applied to the lists were as follows (Sullivan and Hayes 2010: 15):

- UNSC/Res/1617 (2005) introduced a requirement for UN member states to provide the 1267 Sanctions Committee with a 'statement of case' and a written notice to the affected parties of the measures imposed against them and of the applicable procedures for de-listing. The requirement, however, was not mandatory.
- UNSC/Res/1730 (2006) established a 'Focal Point' within the UN Security Council Secretariat to receive de-listing requests from anyone affected by UN sanctions. The 'Focal Point', without any mandate or authority, was hardly more than "a mailbox" (ibid.: 15) and it was eventually scrapped by UNSC Resolution 1904 in 2009.
- UNSC/Res/1735 (2006) introduced mechanisms for member states to participate in de-listing processes under the auspices of the United Nations. It also mentioned 'proposed' and 'formal' criteria for a de-listing, when determining that a listed group or organisation (1) has been listed through mistaken identity; (2) is deceased; or (3) no longer meets the criteria for listing as set out in earlier resolutions.
- UNSC/Res/1822 (2008) obliged the Sanctions Committee to publicise a 'narrative summary' of the reasons for listing on the Security Council's website. It also demanded a revision of the 1267 list after it was revealed that this list contained numerous erroneous or ill-founded listings. According to that revision, which was completed in 2010, 45 names (including 21 groups and organisations) were removed from the UN lists.

- UNSC/Res/1822 (2009) established an Ombudsperson Office who was mandated to provide legal and human rights expertise to the Sanctions Committee in order to allow the Committee to take action according to legal justification. The resolution did not oblige the member states to provide mandatory information on their cases, so that the Ombudsperson was not in a position to offer independent in-depth recommendations.

As Sullivan and Hayes have pointed out in their analysis, the gradual reforms on the UN side have fallen short of meeting 'accepted standards of due process as set out in relevant human rights instruments' and they have done little 'to address the fundamental problems of legitimacy that are at the core of the UN blacklisting system' (Sullivan and Hayes 2010: 16).

The EU blacklisting system has also undergone a process of procedural reforms, in most cases following the ruling of European courts with respect to individual cases. The UN reforms have also influenced the EU sanction system, but the European Union has also gone further in its own procedural adjustments (ibid.: 18). In June 2007, a Working Party was created that was mandated to examine and evaluate information used to list and de-list individuals and entities; to assess whether that information sufficiently met relevant criteria; to prepare regular reviews of the blacklists; and to make recommendations for listings and de-listings (ibid.). The Working Party was mandated to accept proposals for listing from member and non-member states (including the USA) and to collaborate closely with EUROPOL and national intelligence. All information that was gathered was kept secret. The EU Council agreed to notify each person or group designated on the autonomous EU list after the listing decision was taken, if 'practicably possible' (Council Document 10826/1/07: paras 20–21). According to the procedural rules, the Council is obliged to provide updates to and revisions of the EU autonomous list every six months. For the purpose of dealing with appeals, a 'Focal Point' was established which has to forward requests by listed individuals or entities to the Working Party. Based on the positions of the member states' delegates to the Working Party, the latter submits recommendations to COREPER, the permanent representatives of the member states who finally decide on the de-listing request.

In 2009, further revisions were made with reference to the formal listing procedures, following legal challenges presented by the European Court of Justice 2008 decision in the case of Kadi.[4] According to this judgment, the European Union was not able to continue with flatly implementing UN blacklists, at least not without taking into account the fundamental rights of the sanctioned party. The European Commission is required to take into account the opinions of blacklisted persons or groups, if they wish to have their opinions heard and it must listen to the opinion of an advisory committee of experts, established by the member states, before taking a final decision on listing. In compliance with the Lisbon Treaty, the ECJ has jurisdiction not only concerning legal challenges but it can also review the legality of decisions regarding listing and de-listing measures that are adopted on the basis of the CFSP. This goes beyond comparable regulations within the UN and the USA, where appeals by listed persons or organisations can be made only in cases of a legal challenge. Reliable criteria for listing and de-listing, however, are also missing in the European sanction regime.

Who is listed? And why?

The motivations for listing are manifold. Counter-terrorism is just one motivation among many others. This is not to say that the designation of terrorists is completely indiscriminate or that the form of violent activities that are carried out by listed actors can be tolerated. Most of the listed individuals or organisations have been directly involved in violent activities or have supported the use of violence. Some organisations undeniably meet the basic criteria of

'terrorism' as spelled out in this chapter. But it should also be mentioned that the definition of 'terrorism' is most often biased by the interests of those who use the term, and that the political interests of maintaining power and expanding influence feed into the motivations to impose sanctions on others, especially on power contenders and state challengers. With this in mind, the system of blacklisting is at its core a political vehicle, not a legal instrument. Legal means are used here to support political aims. As Mark Muller has stated:

> Resolution 1373 of the Security Council has effectively outsourced the definition of terrorism . . . The implications of this outsourcing have been profound. Most significantly, it has allowed states *inter alia* to designate (and therefore criminalise) resistance movements on the basis of geopolitical, foreign policy or state diplomatic interests.
>
> (cited in Sullivan and Hayes 2010: 86)

In other words, it has opened the 'unilateral interpretation by states in light of their own national interests' (ibid.). The lack of transparency in the practice of listing, including the use of classified information for procedural purposes, has contributed to suspicions that decisions on listing are motivated by ulterior motives. A general aim of proscription is to identify and mark, not least for persecution, the legal boundaries of hostile political entities, both individuals and groups. While listed entities often interpret proscription as a form of at least implicit political recognition by the creators of blacklists, governments understand their practice of listing rather as a technical means of actor definition according to the law. The means of listing helps define organised actors by their institutional settings and memberships, sometimes by assessing their past or current activities and by their relations to third actors, especially if those are branded terrorist organisations such as al-Qaida. The problem with this approach is that it separates actors from policies. Actors are listed because they are branded terrorists or are members of an organisation which is branded as a terrorist entity. Blacklisting aims at paralysing the targeted entity by means of criminalising, branding, stigmatising and containing all legal activities whatsoever. Therefore, the hope, if any, on the side of listed organisations that they could possibly be accepted as a political partner due to a preceding recognition is unfounded. Blacklisting is rather used to exclude the affected actors from negotiations, to keep them away from negotiation tables and to denounce their legitimacy as a political opposition (Toros 2008: 414). Listed actors are branded as criminals and thus declared outlaws.

But the sanction of listing may not only affect a targeted individual or non-state organisation. It can also affect other states and organisations because they are suspected of supporting the listed entity. Therefore, the means of listing can also be applied to weaken the influence of a state or organisation that is considered hostile because it is deemed responsible for such support. In that respect the practice of listing seems to be quite effective in the hands of those who have the power to enforce the sanction. However, at the end of the day the effectiveness of the sanction depends on several other circumstances as well, including the support of other nations and organisations. Another 'side-effect' of listing, as spelled out above, relates to the possible impediments for organisations offering to mediate and facilitate between governments and political opposition groups who are listed for the purpose of conflict transformation.

The political motivation behind listing and de-listing practices can be discovered with a closer look at who has become listed and who has not. Approximately two-thirds of all listed groups in the USA have a religious background. Within the 'secular' entities, there is almost an equal share of groups that claim some sort of territorial independence, whereas the other half is justified by or based on extremist ideologies. Most of the latter groups are 'leftist'; the only group on the 'right' spectrum is the United Self-Defence Force of Colombia (AUC), a paramilitary

organisation, which was originally established in 1997 to defend regions under its control against leftist guerrillas, especially the FARC and ELN, but which later turned into an organised criminal organisation. It took a while before AUC was listed at all, allegedly – according to critics – because the organisation served crucial US companies' interests in Colombia by combatting the power and influence of leftist social movements (Leech 2001; Brodzinsky 2007).

The apparent practice of differentiating between violent actors who are tolerated and those actors who are sanctioned contributed to the disorientation with regard to reliable criteria for listing. Political motivations are apparently also behind US decisions to add Chechen groups, a separatist group from Xinjiang Province in China, and separatist movements from the Basque region – all of which were added to the US lists in 2003. The decision was criticised as being politically motivated by the interests of the Bush administration to counteract negative opinions about the US intervention in Iraq and to get support from hesitant NATO allies (Mariner 2003: 2). According to Mariner, the Speaker of the White House, Ari Fleischer, explicitly stated:

> I think the State Department may have something to say today in regard to the designation of terrorist organisations in Spain. The United States and Spain have a very strong relationship and the President is very grateful to Spain for the leadership they took in helping to free the world from the threat of the Iraqi regime.
>
> (ibid.: 2)

Transparent and legally accountable criteria are missing. Therefore, the EU is also suspected of acting on political motives. Examples for this are provided with respect to the People's Mujahedeen of Iran (PMOI) and the Kurdistan Workers' Party (PKK) (Casier 2010; CFI 2006), and also by the fact that some organisations suspected of posing risks to the West were listed, while others were not, for example, armed opposition groups in Libya, Egypt and Syria in the post-Arab Spring period (Gardner 2011; Kholaif 2012). As Sullivan and Hayes have concluded, the blacklists have functioned so far as legal vehicles for denouncing any form of armed conflict: 'In this way, the lists function not simply as legal tools for combating terrorism, but also as ideological and political tools for undermining the right to popular resistance and self-determination' (2010: 87). Or, as the EU Coordinator on Counter-terrorism, Gilles de Kerchove, has put it bluntly: 'The reason is political. You say that is a criminal organisation, not a political organisation. That is the message' (cited in Casier 2010: 400).

Blacklisting: the dilemma of non-discrimination

Uniform branding of various forms of armed resistance and insurgencies as 'terrorism' through blacklisting and proscription fails to distinguish between different non-state armed groups and their motivations for using force.[5] The old adage of one man's terrorist being another man's freedom fighter perfectly illustrates the dilemma for states and international organisations of stigmatising non-state actors regardless of the type of actions they carry out, the ideologies that guide their actions, and the degree of their social or political legitimacy. If pragmatism prevails, decisions may be different according to shifting motives. A telling illustration is provided by the case of the guerrilla organisation Farabundi Marti National Liberation Front (FMLN) in El Salvador. While it was recognised in 1981 by the French and Mexican governments as a legitimate representative political force that should be invited to the negotiation table, the FMLN was later on retroactively added to databases of terrorist organisations, such as the global terrorism database set up by the US Department for Homeland Security at the University of Maryland

or the DoD-funded RAND Corporation's statistical study *How Terrorist Groups End* (RAND 2008). In Nepal, in the wake of failed bilateral peace negotiations with the King's government, the Communist Party of Nepal (CPN-M) was placed on the US Terrorism Exclusion List (TEL) and the Specially Designated National List (SDN) in 2003. Although the movement later officially renounced violence, signed a peace accord in 2006 and entered the realm of conventional politics in 2008, its terrorist designation has not been revoked by the US government. This designation has created numerous impediments for initiatives – by the USA and others – to engage constructively with the rebel movement and later the Maoist Party and government in order to support the peace process and the implementation of necessary reforms (Gross 2011).

Non-discrimination is not only a problem for the affected individuals and organisations. It is also detrimental to the state's flexibility with respect to taking action. Publicly flagging 'counter-terrorism' as a core issue of national or international security policy puts pressure on the governments to deliver to their society what has been promised, namely the elimination of the 'terrorist threat'. If governments change policies and try to enter into constructive dialogue with insurgents, they run the risk of losing credibility and public support because of collaboration with actors it had previously branded as 'terrorists'. This explains why it is so difficult to get proscribed actors de-listed even when they demonstrate readiness to dissociate themselves from the use of force (Dudouet 2011).

On the flipside of the non-discrimination dilemma, terrorist organisations seek to hide their practice behind political aspirations that seem to be commonly shared by others in order to gain their backing and support. Cases are also known where terrorist activities are 'outsourced' from political organisations that claim political and legal recognition while relying on – or supporting – the activities of militant wings. While the latter carry out armed attacks, the former offer support to local people, for example, by providing charity through social services, health care and education. Such a division of labour seems to function well in societies where the state is not able (or willing) to cover the citizens' needs and to provide essential services for the affected part of the population. Political parties and organisations in Kurdish settlements, in the Palestinian Territories, and formerly also in Northern Ireland and the Basque region, have applied this method. At least the two latter cases reveal, however, that at the end of the day it is not blacklisting but an overall fatigue and a 'mutually hurting stalemate' (Zartman 1985) that has led to the 'ripe moment' (Zartman 2000) and subsequently to a cautious constructive engagement of the conflicting parties.

Conclusion

This chapter has elaborated on crucial issues of counter-terrorism policy, taking into account the typology of suspected actors, the ideologies that allegedly drive terrorist activities, and the effectiveness of actor-focused sanctions, particularly the practice of proscription or blacklisting. It has revealed that:

- The criteria used for the various lists are not transparent, nor are the criteria for branding actors that are opposed to a state or authority as terrorists. The blurred boundaries between illegitimate terrorism and legitimate resistance against autocratic rule pose a particular political challenge for applying just and fair legal tools to contain terrorist threats.
- Sanctions, which fail to set clear and transparent criteria for a de-listing, cannot bring about incentives for the listed actor to change its policy, let alone to enter into negotiations, because even a significant and constructive move by the listed party may not enhance the chances of being removed from the list.

- The non-discriminate character of sanctions affects a wide range of actors who are either suspected of committing terrorist activities or may support those actors, even in their efforts to resolve underlying root causes of the conflict with nonviolent means.
- Ideologies do not provide an appropriate reference for counter-terrorism policies since the reference made to ideologies by terrorists is functional and pragmatic. The lowest common denominator is apparently a close link between extremist thought and the readiness to sacrifice the life of innocent people in order to increase public pressure on a designated enemy.
- Non-discrimination is not only a problem for the suspected and affected individuals and organisations. It is also detrimental to the state's flexibility with respect to initiate constructive action to mitigate risks of terrorism through cooperation with political opponents. In most cases of insurgency groups that have been considered by the opposed states as 'terrorist actors', from the IRA to the ANC, from GAM to FMLN, from SPLM to the Maoists in Nepal, the violent conflicts did not cease to exist because of the effectiveness of listings or other sanctions, but because of a constructive engagement of conflict parties and stakeholders.
- Proscription and blacklisting may be an option if they are targeted, geographically limited, and bound to transparent criteria and if they offer a roadmap for de-listing.

Discussion questions

1   How can we prevent radicalisation from turning into extremism and violence? How can we make counter-recruitment that addresses constituencies of violence more effective and sustained?
2   Can legal experts and policy-makers do better in distinguishing illegitimate terrorism from legitimate violent resistance?
3   How should criteria for listing/de-listing be defined in order to attract states and non-state actors to comply with the norms of international humanitarian law and international human rights law? What are the appropriate legal procedures and political responsibilities that the compilers of proscription lists should apply?

Websites

Electronic legal database on international terrorism: https://www.unodc.org/tldb/.
EU counter-terrorism: http://www.eurunion.org/eu/Hot-Topics/Counterterrorism-Current-Actions. html.
European Centre for Constitutional and Human Rights: http://www.ecchr.de/index.php/terror_lists.html.
UNODOC and terrorism prevention: http://www.unodc.org/unodc/en/terrorism/index.html?ref= menuside.
US Homeland Security: http://www.dhs.gov/.

Notes

1   The author is grateful to Armin Sick, Janel B. Galvanek and Astrid Fischer for their helpful support and comments.
2   See, for more details, http://www.un.org/terrorism/instruments.shtml.
3   For details about the lists, see Kurth Cronin (2003).
4   On 3 September 2008, the European Court of Justice (ECJ) annulled Council Regulation 881/2002 on freezing the assets of Yassin Abdullah Kadi and the Al Barakaat International Foundation of Sweden. After they were listed in the USA, and shortly after by the European Union, both Kadi and Barakaat

had filed complaints to the European Court of First Instance because to them their fundamental rights to be heard, the right to respect for property and the right to effective judicial review were infringed. The complaint was rejected but Kadi and Barakaat filed an appeal with the ECJ and in its final judgment the Court annulled the Council Regulation. The ground-breaking judgment held that European institutions are bound by fundamental rights when implementing targeted sanctions (see for details, Court of Justice 2008; Sullivan and Hayes 2010: 57).

5   The following examples are taken from an action research project, which was carried out by the Berghof Foundation. See, for details, Dudouet *et al.* (2012a; 2012b).

References

Allen, C. E. (2007) *The Threat of Islamic Radicalisation to the Homeland*, Senate Committee on Homeland Security and Governmental Affairs, 14 March 2007. Available at: http:www.hsgac.senate.gov/download/031407allen (accessed 17 September 2012).

Almond, G. A., Scott Appleby, R. and Sivan, E. (eds) (2003) *Strong Religion: The Rise of Fundamentalisms around the World*, Chicago: University of Chicago Press.

Benjamin D. and Simon, S. (2002) *The Age of Sacred Terror*, New York: Random House.

Brodzinsky, S. (2007) 'Terrorism and Bananas in Colombia', *Time Online*, 2 May 2007. Available at: http://www.time.com/time/printout/0,8816,1616991,00.html (accessed 15 September 2012).

Casier, M. (2010) 'Designated Terrorists: The Kurdistan Workers Party and its Struggle to (Re)Gain Political Legitimacy', *Mediterranean Politics*, 15(3): 393–413.

Donohue, L. K. (2005) 'Security and Freedom on the Fulcrum', *Terrorism and Political Violence*, 1–2: 67–87.

Dudouet, V. (2011) 'Anti-Terrorism Legislations: "Impediments for Conflict Transformation"', *Berghof Policy Brief*, 2, Berlin: Berghof Foundation.

Dudouet, V., Giessmann, H. J. and Planta, K. (2012a) *Post-War Security Transitions: Participatory Peacebuilding after Asymmetric Conflicts*, London: Routledge.

Dudouet, V., Giessmann, H. J. and Planta, K. (2012b) *From Combatants to Peacebuilders: A Case for Inclusive, Participators and Holistic Security Transitions*, Policy Report, Berlin: Berghof Foundation.

Edwards, S. S. M. (2008) 'Human Sacrifices at the Altar of Terrorist Control', *Denning Law Journal*, 20: 221–238.

Eriksson, M. (2010) *Search of Due Process: Listing and De-Listing Practices of the European Union*, Uppsala University. Available HTTP: http://www.smartsanctions.se/Mikael_Eriksson/in_search_091119.pdf (accessed 4 June 2012).

European Digital Rights (2012) Report. Available HTTP: http://www.edri.org/edrigram/number10.4/internet-communications–germany–iterception (accessed 19 February 2012).

EUROPOL (2012) *TE-SAT 2012. EU Terrorism Situation and Trend Report*, Brussels: European Policy Office.

Foucault, M. (1982) 'The Subject and the Power', *Critical Inquiry*, 8(4): 777–795.

Gabovsky, P. and Stohl, M. (2010) *Crime and Terrorism*, London: Sage.

Gardner, F. (2011) 'Is the Arab Spring Good or Bad for Terrorism?' *BBC Online*, 22 June 2011. Available at: http://www.bbc.co.uk/news/world-middle-east-13878774 (accessed 4 May 2012).

Geneva Academy of International Humanitarian Law and Human Rights (2011) *Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors*, Geneva: author.

Giessmann, H. J. (2013) 'Asymmetric Non–International Violent Conflicts: Challenges to The Protection of Human Rights', in M. Gibney and A. Mihr (eds) *The SAGE Handbook of Human Rights*, London: Sage (forthcoming).

Gross, J. (2011) 'Proscription Problems: The Practical Implications of Terrorist Lists on Diplomacy and Peacebuilding in Nepal', *Praxis*, 26: 38–59.

Guelke, A. (1995) *The Age of Terrorism and the International Political System*, London: I.B. Tauris Publishers.

Hirschmann, K. (2000) 'The Changing Face of Terrorism', *International Politics and Society*, Berlin: Friedrich-Ebert Foundation, pp. 299–310.

Hoffman, B. (2006) *Inside Terrorism*, New York: Columbia University Press.

Kholaif, D. (2012) 'West Slow to Endorse Arab Spring, Fearing Terrorism, Group Says', *Business Week online*, 22 January 2012. Available at: http://www.businessweek.com/news/2012-01-22/west-slow-to-endorse-arab-spring-feaing-terrorism-group-says.html (accessed 5 June 2012).

Kurth Cronin, A. (2003) 'The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organisations', in Library of Congress (ed.) *CRS Report for Congress*, Washington, DC: US Government Printer, October 21.

Laqueur, W. (1996) 'Postmodern Terrorism', *Foreign Affairs*, Sept. /Oct:, 24–36.

Leech, G. (2001) 'Good Terrorists, Bad Terrorists: How Washington Decides Who's Who', *Colombia Journal*, 7 May 2001. Available at: http://colombiajournal.org/colombia62.htm (accessed 15 September 2012).

Lehnhart, C. (2007) 'European Court Rules on UN and EU Terrorist Suspect Blacklists', *American Society of International Law*, 11, 1. Available at: http://www.asil.org/insights07131.cfm (accessed: 10 June 2012).

Mandel, D. R. (2012) 'Radicalisation: What Does It Mean?', in T. M. Pick and A. Speckhard (eds) *Indigenous Terrorism: Understanding and Addressing the Root Causes of Radicalisation among Groups with an Immigrant Heritage in Europe*, Amsterdam: ISO Press.

Mariner, J. (2003) *Trivialising Terrorism*. Available at: http://writ.news.findlaw.com/mariner/20030513.html (accessed 16 September 2012).

Martin, C. G. (2011) *Essentials of Terrorism: Concepts and Controversies*, 2nd edn, London: Sage.

Marty, M. E. and Scott Appleby, R. (1992) *The Glory and the Power: The Fundamentalist Challenge to the Modern World*, Boston: Beacon Press.

Marty, M. E. and Scott Appleby, R. (1993) *Fundamentalisms and the State: Remaking Polities, Economies and the Militancy*, Chicago: University of Chicago Press.

Menon, P. K. (1990a) 'Some Aspects of the Law of Recognition. Part II: Recognition of States', *Revue de droit international de sciences diplomatiques et politiques*, 68: 1–29.

Menon, P. K. (1990b) 'Some Aspects of the Law of Recognition. Part III: Recognition of Governments', *Revue de droit international de sciences diplomatiques et politiques*, 68: 161–182.

Meyer, T. (1989) *Fundamentalismus. Aufstand gegen die Moderne*, Reinbek: Rowohlt.

Muller, M. (2008) 'Terrorism, Proscription and the Right to Resist in the Age of Conflict', *Denning Journal*, 20, 111–113, Available at: http://www.coe.int/t/dghl/standardsetting/media/confantiterrorism/DenningLawJournal2008_en.pdf.

Nielsen-Dalgaard, A. (2008a) 'Studying Violent Radicalisation in Europe I: The Potential Contribution of Social Movement Theory', *DIIS Working Paper* 2.

Nielsen-Dalgaard, A. (2008b) 'Studying Violent Radicalisation in Europe II: The Potential Contribution of Socio-Psychological and Psychological Approaches', *DIIS Working Paper 3*.

RAND (2008) *How Terrorist Groups End: Lessons for Countering al Qa'ida*, Washington, DC: RAND Corporation.

Ranstorp, M. (1996) 'Terrorism in the Name of Religion', *Journal of International Affairs*, 50(1): 41–62.

Ruby, C. (2002) 'The Definition of Terrorism', *Analyses of Social Issues and Public Policy* (The Society for the Psychological Study of Social Issues), 2(1): 9–14.

Schneckener, U. (2009) 'Spoilers or Governance Actors? Engaging Armed Non-State Groups in Areas of Limited Statehood', in: SFB-Governance Working Paper Series, no. 21, October: Free University Berlin: SFB 700.

Stepanova, E. (2008) *Terrorism in Asymmetrical Conflict: Ideological and Structural Aspects*, *SIPRI Research Report 23*, London: Taylor & Francis.

Sterling-Folker, J. and Shinko, R. E. (2005) 'Discourses of Power: Traversing the Realist-Postmodern Divide', *Millenniu: Journal of International Studies*, 33: 637–664.

Sullivan, G. and Hayes, B. (2010) *Blacklisted: Targeted Sanctions, Pre-emptive Security and Fundamental Rights*. Berlin: European Centre for Constitutional and Human Rights (ECCHR).

Taylor, M. (1988) *The Terrorist*, London: Brassey's Defence.

Toros, H. (2008) 'We Don't Negotiate with Terrorists!: Legitimacy and Complexity in Terrorist Conflicts', *Security Dialogue*, 39(4): 407–426.

Wæver, O. (1995) 'Securitization and Desecuritization', in R. D. Lipschutz (ed.) *On Security*, New York: Columbia University Press.

Wählisch, M. (2010) 'EU Terrorist Listing: An Overview About Listing and Delisting Procedures', Briefing Paper, Berlin: Berghof Peace Support.

Waldmann, P. K. (1998) *Provokation der Macht*, München: Gerling.

Waldmann, P. K. (2010) 'Radicalisation in the Diaspora: Why Muslims in the West Attack Their Host Countries', *Working Paper* 9. Available at: http://www.realinstitutoelcano.org/wps/portal/rielcano_eng/Content?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/dt9-2010 (accessed15 October 2012).

Zartman, I. W. (1985) *Ripe for Resolution: Conflict and Intervention in Africa*, New York: Oxford University Press (2nd edition in 1989).

Zartman, I .W. (2000) 'Ripeness: The Hurting Stalemate and Beyond', in P. Stern and D. Druckman (eds) *International Conflict Resolution after the Cold War*, Washington, DC: National Academy Press.

Documents

Antiterrorism and Effective Death Penalty Act – 24 April 1996. Available at: http://www.gpo.gov/fdsys/pkg/PLAW-104publ132/pdf/PLAW-104publ132.pdf (accessed 23 May 2012).

Council Common Position 2001/931/CFSP – Council of the European Union, 27 December 2001. Available at: http://eur-lex.europa.eu/LexUriServ/Lex/UriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF (accessed 15 May 2012).

Council Common Position 2009/67/CFSP – Council of the European Union, 26 January 2009. Available at: http://eur–lex.europa.eu/LexUri/Lex/UriServ.do?uri=:L2009:023:0037:0042:EN:PDF (accessed 15 May 2012).

Council Decision 2011/439/CFSP – Council of the European Union, 18 July 2011. Available at: http://eur-lex.europa.eu/LexUri/Lex/UriServ.do?uri=:L:2011:188:0047:0049:EN:PDF (accessed 15 May 2012).

Council Document 10826/1/07. Rev 1, 21 June 2007. Fight against the financing of terrorism. Available at: http://www.consilium.europa.eu/uedocs/cmsUpload/st10826-re01en07.pdf.

Council Regulation [EC] (2001) No. 467/2001 – Council of the European Union, 6 March 2001. Available at: http://www.hm-treasury.gov.uk/d/council_regulation_e_ec_467_060301.pdf (accessed 16 May 2012).

Council Regulation [EC] (2001) No. 2580/2001 – Council of the European Union, 27 December 2001. Available at: http://eur-lex.europa.eu/LexUri/Lex/UriServ.do?uri=:L:2001:344:0070:0075:EN:PDF (accessed 16 May 2012).

Council Regulation [EC] (2002) No. 881/2002 – Council of the European Union, 27 May 2002. Available at: http://eur-lex.europa.eu/LexUri/Lex/UriServ.do?uri=:L:2002:139:0009:0022:EN:PDF (accessed 15 May 2012).

Court of First Instance of the European Union – CFI (2006) People's Mujahedeen of Iran v Council of the European Union. Judgement of the Court of First Instance, 12 December 2006. Available at: http://eur–lex.europa.eu/LexUri/Lex/UriServ.do?uri=CELEX:62008A0284:EN:HTML (accessed 14 June 2012).

Court of Justice (2008) Press Release No. CJE/08/2, Advocate General's Opinion in Case C–402/05, 16 January 2008. Available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dbfe883b480acc473095eedb13a635a890.e34KaxiLc3qMb40Rch0SaxuKbx10?text=&docid=67611&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3701852 (accessed 4 October 2012).

Executive Order 12947 (1995) Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Process. US Department of the Treasury, 25 January 1995. Available at: http://treasury.gov/resource-center/sanctions/Documents/12947.pdf (accessed 20 May 2012).

Executive Order 13224 (2001) Office of the Coordinator for Counterterrorism, 23 September 2001. Available at: http://www.state.gov/j/ct/rls/other/des/122570.htm (accessed 20 May 2012).

Sanction List by the United Nations Security Council Committee – Last updated: 13 April 2012. Available at: http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml (accessed 1 May 2012).

Specially Designated Nationals and Blocked Persons [SDN] Last updated: 12 April 2012. Available at: http://www.treasury.gov/ofac/downloads/t11sdn.pdf (accessed 1 May 2012).

Sponsors of Terrorism List – US Department of State. Available at: http://www.state.gov/j/ct/c14151.htm (accessed 20 May 2012).

UNSC/Res/1267 (1999) United Nations Security Council, 15 October 1999. Available at: http://www.un.org/sc/committees/1267/&Lang=E (accessed 15 May 2012).

UNSC/Res/1333 (2000) United Nations Security Council, 20 December 2000. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf?OpenElement (accessed 15 October 2012)

UNSC/Res/1373 (2001) United Nations Security Council, 28 September 2001. Available at: http://daccess-dds-ny-un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement (accessed 16 May 2012).

UNSC/Res/1390 (2002) UN Security Council, 27 January 2002. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1390(2002) (accessed 13 September 2012).

UN SC/Res/1617 (2005) UN Security Council, 29 July 2005. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1617(2005) (accessed 1 October 2012).

UN SC/PR/9999 (2010) Press release. 'Security Council Al-Qaida and Taliban Sanctions Committee Concludes Review of its consolidated List, Pursuant to Resolution 1822 (2008)', 2 August 2010. Available at: http://www.un.org/News/Press/docs/2010/sc9999.doc.htm (accessed 1 October 2012).

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HIV/AIDS at the intersection of public health and criminal justice

Toward an evidence-informed, health- and human rights-based approach

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The spheres of public health and criminal justice share an overlapping mandate to protect public welfare and safety. Both systems are designed, in essence, to neutralize harmful elements in society – be they havoc-wreaking humans or disease-causing biological agents. Yet their immediate aims and methods are not always in optimal alignment. Criminalization, for one, is not something measured primarily by true benefits to health or life. Accordingly, laws in their application may at times prove detrimental to the health and human rights perspective (Mann *et al.* 1999). The question lies in whether and how such chasms might be bridged for the greater public good. To this end, the key lies in balancing the abstract community-level mandates of criminal law with an evidence-based focus on the rights and health of the individual.

Clearly, public health is not something that occurs in a vacuum. This is particularly true when it comes to human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS) – a historically unique epidemic with roots and interests deeply embedded in public health, law, culture, and politics alike. Cultural practices, social frameworks, and criminal law all play a critical role in the global public health community's ability to address HIV/AIDS as a compelling threat to human health. Moreover, HIV/AIDS was one of the first health issues to be "owned" widely outside of the health sector and the first disease-specific issue to be tabled at the United Nations (UN) Security Council. As such, the response to HIV/AIDS has been a pathfinder in multi-stakeholder, trans-disciplinary approaches and vulnerability science. While sectors outside of public health have long recognized the importance of addressing HIV/AIDS, the challenge has been in negotiating and understanding so many partners' roles in the response.

Fundamentally, legal frameworks have the potential to positively impact the lives of people living with (or at risk of) HIV/AIDS (PLWHA) in many ways. They can: (1) help to ensure that public health authorities are empowered to provide effective prevention and treatment programs; (2) effectuate the human rights to life, health, work, education, and property ownership; and (3) offer protection from social risks, stigma, and other harms by respecting privacy and prohibiting unwarranted discrimination (Gable *et al.* 2009). However, laws can also create barriers in many countries in their potential to impede effective HIV/AIDS interventions

by penalizing those living with (or at risk of) HIV/AIDS through criminal sanctions or other policies. Importantly, law affects behavior not only through its enforcement but also through an expressive role: It can affect societal norms profoundly, for better or for worse – creating an atmosphere of acceptance or reinforcing and perpetuating stigma and discrimination.

In this chapter, we explore the dynamic role of law as both a means and a potential barrier to implementing successful public health interventions through the lens of the evolving response to HIV/AIDS across jurisdictions worldwide. Setting forth from a broad overview of the HIV/AIDS epidemic, we first present the history and current landscape regarding criminalization of HIV transmission and exposure. We examine the traditional rationales for invoking criminal law, and whether these afford any justification for HIV-specific statutes. We then discuss the potentially detrimental impacts of HIV-specific criminal statutes on health and human rights fronts and suggest a way forward. The chapter next explores the impacts of statutes criminalizing the behaviors of several categories of marginalized people bearing high burdens of HIV risk – people who use illicit drugs, commercial sex workers, and men who have sex with men (MSM). Finally, we propose some directions for future law, policy, and practice reform toward an evidence-informed, health and human rights-based approach. In this we aim to unify criminal justice and public health systems and resources against HIV as a decidedly harmful element in society. In the end, the way forward will be evident – not to unfairly sanction or disenfranchise key affected populations but to empower them.

The HIV/AIDS epidemic: present status, future prospects

In 2001, UN member states agreed to goals that would provide HIV care, treatment, and prevention services to all who need them (UNGA 2001). A series of political commitments then operationalized these actions, while a host of funding mechanisms facilitated them (WHO 2003; UNGA 2006). Since then, more than five million people have gained access to antiretroviral therapy (ART), AIDS deaths and hospitalizations have decreased, and rates of new infections have been reduced in many countries (UNAIDS 2010). However, much remains to be done to fully address the global HIV pandemic and to meet 2011 UN General Assembly (UNGA) and Millennium Development Goal (MDG) targets by 2015 and beyond.

The spread of the HIV epidemic is now declining or stabilizing in many countries, but its devastating effects have not abated. According to UNAIDS estimates, there were roughly 33 million people living with HIV worldwide at the end of 2009 (UNAIDS 2010). Moreover, under the revised World Health Organization (WHO) ART guidelines, nine million people in need of immediate treatment are not receiving it (Chan 2011). What is worse, the rates of new infections continue to outpace rates of treatment delivery by almost two to one (WHO 2011).

Beyond insufficient resources for prevention and treatment programs, important structural impediments bar the way to achieving universal access targets. Stigma, discrimination, and a wide range of human rights abuses threaten to undermine HIV testing programs and reduce their uptake, particularly among key vulnerable populations. This, in turn, impacts the ability of individuals to access and use ART where it is available. Herein lies the crucial intersection between public health and criminal law in the field of HIV/AIDS.

Criminalization of HIV transmission and exposure

In 1998, the UN offered the following guidance on criminal law and HIV transmission:

> Criminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal

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In 2007, a 26-year-old woman living with HIV in Zimbabwe was arrested for having a consensual intimate relationship with her long-term partner. Charged with "deliberately infecting another person," she was eventually sentenced to a suspended term of five years imprisonment (Cameron 2008). In 2008, an HIV-positive homeless man in the United States was sent to jail for 35 years on charges of attacking a police officer with a "deadly weapon" (*his saliva*) (Kovach 2008). Elsewhere in the USA that same year, a man was sentenced to 25 years in prison and required to register and undergo treatment as a sex offender. His crime? Failing to disclose his HIV status prior to a one-time consensual sexual liaison with a man he met online (Bernard 2009). In none of these three cases was HIV actually transmitted.

offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.

(OHCHR and UNAIDS 2006)

Since that time, however, numerous laws criminalizing HIV transmission and/or exposure have been adopted around the world. And the trend continues apace worldwide. A 2010 global scan indicated that HIV-related prosecutions were accelerating in frequency, especially in North America, Scandinavia, and Africa (GNP+ 2010). This phenomenon raises a number of complex and important issues at the intersection of criminal law, human rights, and public health paradigms.

The state of the law on HIV/AIDs: a survey of current global trends

A 2010 survey indicated that an estimated 53 countries had laws that specifically criminalized HIV transmission or exposure as a separate crime (GNP+ 2010). Since 2005 alone, 14 African countries have passed HIV-specific laws that potentially criminalize all sexual behavior among people living with HIV/AIDS (PLWHA), many of which even criminalize mother-to-child HIV transmission (International Planned Parenthood Federation, GNP+, and International Community of Women Living with HIV/AIDS 2008). In the United States, as of 2010, 36 out of 50 states and five territories had HIV-specific criminal laws on transmission and exposure, most of which refer to sexual contact or intercourse (Bennett-Carlson *et al.* 2010). Many other jurisdictions, meanwhile, prosecute HIV transmission and/or exposure based on other existing offenses such as reckless endangerment, sexual assault, attempted homicide, or assault with intent to kill (GNP+ 2010).

The specific forms taken by laws on HIV transmission and exposure vary from jurisdiction to jurisdiction. Most focus on sexual transmission, although some jurisdictions criminalize HIV transmission or exposure through spitting, biting, and scratching, in spite of strong evidence that transmission by these actions is extremely unlikely (GNP+ 2010). In some countries (e.g., the United Kingdom), actual transmission of HIV is required for a criminal offense to be established. In other countries (e.g., Canada), however, the criminal offense requires only exposure to the virus (Csete *et al.* 2009).

The most common HIV-specific criminalization statute, adopted in almost half of the United States, is a "knowing exposure" statute that makes it a crime for a person aware of being

HIV-positive to engage in a list of exposure-prone behaviors, including specified sexual activities, blood or organ donation, or needle exchange (Webber 2012). A number of West and Central African countries have similar statutes based on a "model" HIV law (the Action for West Africa Region [AWARE] Model Law) promoted by a US Agency for International Development-funded project (USAID) (USAID 2009). Specifically, the AWARE Model Law allows for criminal penalties for HIV transmission "through any means by a person with full knowledge of his/her HIV/AIDS status to another person," regardless of intent (Pearshouse 2007).

Although many convictions are unreported, prosecutions appear to be taking place in a broader range of circumstances and with increasing frequency worldwide (Klein 2009). At least 60 countries have prosecuted individuals for transmitting HIV, and 24 of these countries have registered HIV-related convictions (GNP+ 2010). Some 350 arrests and prosecutions through 2010 were documented in US states and territories (Bennett-Carlson *et al.* 2010). By another accounting, a high percentage of over 300 such prosecutions over the period 1986–2001 in the USA resulted in the imposition of prison sentences (Lazzarini *et al.* 2002). In Canada, meanwhile, since a landmark decision of the country's Supreme Court in 1998, there have been more than 120 HIV-related prosecutions known to legal experts in the field. These include at least one case in which the accused faced charges of both aggravated assault and first-degree murder related to HIV transmission (Csete and Elliott 2011). In Finland, Sweden, and Slovakia, a 2004 survey indicated that about 0.5 per cent to 1 per cent of all PLWHA had been prosecuted for alleged intentional or "negligent" transmission of HIV (Nyambe 2005). Though traditionally less common in developing countries, prosecutions have been occurring in Africa as well. According to the 2010 worldwide scan, however, no country with an HIV prevalence of over 16 per cent had yet registered a conviction for an HIV-related offense (GNP+ 2010).

HIV criminalization and the fundamental goals of criminal justice

Criminal law theory generally offers four primary justifications for punishment: (1) *deterrence* (both general and specific); (2) *retribution/denunciation*; (3) *incapacitation*; and (4) *rehabilitation*. Such are the grounds upon which HIV criminal transmission and exposure laws are commonly defended, with particular emphasis on the deterrent and retributive aspects.

Yet careful examination of each of the usual criminal justice rationales suggests that criminalizing HIV transmission and exposure does not generally serve these goals in a manner coherent with criminal law as a whole.

Deterrence

Of all of the criminal justice principles, deterrence claims tend to figure most prominently in judicial decisions regarding HIV transmission and exposure – though generally as assertions and without empirical support. Quoting from the ruling in the Canadian Supreme Court case of *R v. Cuerrier*, "Through deterrence it will protect and serve to encourage honesty, frankness and safer sexual practices" (*R v. Cuerrier* 1998) .

Yet, ultimately, criminal law is a blunt tool poorly suited to changing complex sexual behaviors and attitudes about public health. HIV, after all, is not spread by criminals but by consensual participants in a sexual act, neither partner necessarily knowing their HIV status (Burris and Cameron 2008). The Joint United Nations Programme on HIV/AIDS (UNAIDS) concluded in 1999 that criminalization of HIV transmission "has little impact on the spread of the virus, given that the vast majority of cases of transmission occur at a time when the infected person

is unaware of his or her own infection" (UNAIDS and Inter-Parliamentary Union 1999). Similarly, Lazzarini and colleagues (2002) have argued that, while sensational media coverage of high-profile cases may provide some level of deterrence from unsafe behaviors, the overall deterrent effect of these laws is likely to be small, given the reality of how the virus is spread:

> The behavior most widely accepted as wrong – deliberately using HIV as a tool to harm or terrorize another – is too rare to influence the epidemic, whereas the behavior most responsible for spreading the virus – voluntary sex and needle-sharing – is difficult and controversial to prohibit.
>
> (Lazzarini *et al.* 2002)

Indeed, little direct empirical evidence is available to support any impact of the criminal law on HIV risk behavior. A 2007 study, for example, failed to find that the existence of HIV-specific laws and people's knowledge of criminalization had any significant effect on their sexual practices in the USA (Burris *et al.* 2007). Most respondents who knew their HIV status believed that they had a moral responsibility to use condoms and disclose their HIV status to partners. However, the study also found that, for the most part, they did not know whether their state had passed legislation criminalizing HIV transmission, much less adjusted their sexual behaviors to comply with the law (ibid.).

Retribution/denunciation

Proponents of criminalization argue that criminal law not only deters PLWHA from risk-taking behavior, but also punishes them for placing others at risk of infection (Merminod 2009). That wrongdoers do not get away unpunished and that the state has a means of communicating the moral censure of the wider community is a central plank of the "retributivist" theory. The reality, however, is that the issue of assigning blame is not so clear-cut in the case of HIV transmission.

Arguably, if an individual, knowing that he or she is HIV positive, acts with the intent to transmit the virus, and does so, that individual's state of mind, behavior, and the resulting harm do justify some punishment. Reflecting this general consensus, UNAIDS stipulates that criminalizing HIV transmission or exposure is appropriate only when there is an intent to transmit or expose (UNAIDS and UNDP 2008). Too often, however, prosecutions under existing laws, or the crafting of HIV-specific statutes, have not reflected the cautions outlined in the UNAIDS guidance. People have been charged, tried, and convicted in cases where transmission was neither likely nor demonstrated, and where intent to transmit was not properly established (Burris and Cameron 2008). In such cases, many argue, PLWHA should not rightfully be subject to censure.

An important legal issue in this regard arises in the matter of how to establish the requisite mental culpability (*mens rea*). To show that someone is criminally liable under the law generally requires demonstrating malicious intent, recklessness, or gross negligence (Elliott 2002). Which of these is the applicable threshold of mental culpability will depend on how the charge laid is defined in the law. Most HIV criminalization laws in Europe require the government to prove the defendants' intent to transmit (Nyambe 2005). Other courts have required a *mens rea* standard in the law through jurisprudence (*People v. Olaybar* 2003). The USA lacks a *de jure* distinction but generally only prosecutes suspects who have transmitted HIV through sex crimes, assault, or prostitution rather than through negligent consensual intercourse (Lazzarini *et al.* 2002). Problems in this area arise, however, where existing laws do not distinguish between reckless and negligent transmission of HIV, as in Kenya, for example (Langley and Nardi 2010).

Even aside from the issue of intent, it is difficult to demonstrate beyond a reasonable doubt that a given instance of sexual transmission occurred as the result of a given encounter and even that the complainant's infection originated with the accused person. Scientific advances in identifying HIV subtypes notwithstanding, it is most often not possible to determine definitively the timing, source, or means of a given instance of HIV transmission (Bernard *et al.* 2007). Even in cases of rape, the practical challenge associated with post-rape testing is that it may be very difficult to establish temporal causality between rape and HIV transmission (Kebonang 2012). The situation becomes yet more difficult when injecting drug users (IDUs) are involved.

Incapacitation

Criminal law theoretically serves to incapacitate those who continue to endanger others. Yet imprisonment does not effectively serve this purpose in the context of HIV transmission. At the individual level, it is clear that imprisoning someone does not neutralize that person's capacity to transmit HIV – be it through conjugal visits or through high-risk behaviors (e.g. unprotected sex, needle sharing) with other prisoners (Lazzarini *et al.* 2002). Indeed, there is considerable and mounting evidence that high-risk behaviors are particularly common in prisons (Jürgens 1996). Further, HIV transmission in prison is too often facilitated by lack of access to condoms and HIV information, lack of ART, uncontrolled sexual coercion and violence, and lack of access to sterile injecting and tattooing equipment in spite of the well-documented prevalence of both drug injection and tattooing in prison. Short of solitary confinement, the incapacitation goal of criminal law is thus not met through incarceration with respect to HIV transmission and exposure (Jürgens *et al.* 2009).

Rehabilitation

Ideally, one could imagine that imprisonment might serve rehabilitative functions. However, most PLWHA who engage in high-risk behaviors, sexual and otherwise, do so for a complex set of psychosocial reasons (De Rosa and Marks 1998). There is no empirical evidence supporting the proposition that criminal sanctions lead individuals to learn to disclose and/or practice safer sex in the future. Moreover, in cases where concern for the welfare of others, and hence the taking of precautions to prevent transmission, may be overwhelmed by desire, addiction, or – in the rare case – malicious intent, it is, quite frankly, a stretch to expect that the law will restore reasoned judgment (Elliott 2002).

Health and human rights concerns about HIV criminalization

> It is trite to say that law cannot be a panacea for all social ills. Before invoking the rough instrument of the criminal law, we must be sure that it will have some impact on the problem at hand. We must also be satisfied that, on balance, the use of criminal law will not be counter-productive, and that it will not do more harm than good.
>
> (Holland 1994)

Several key arguments have been raised about criminalization of HIV transmission and exposure in the context of a health and human rights framework (Mann *et al.* 1999). At the heart of this framework is the basic notion that improved health cannot be achieved without basic human rights, and that these rights are meaningless in the absence of adequate health. From the early

stages of the HIV epidemic, human rights and public health advocates such as Jonathan Mann (who popularized the health and human rights movement as founder and director of the WHO Global Programme on AIDS) powerfully articulated that public health interventions can only be effective if affected people are empowered and informed to participate in decisions that concern their health (ibid.).

From this perspective, the most frequently proffered arguments against application of the criminal law for HIV transmission and exposure can be summarized as follows:

1   setting inappropriate incentives and undermining prevention and treatment efforts;
2   undermining individual rights to dignity, privacy, and health;
3   vagueness and criminalization of lower-risk and risk-free activities; and
4   potential for discriminatory application.

Setting inappropriate incentives and undermining HIV prevention and treatment efforts

Where the law does not advance justice, it may risk stalling progress. This is particularly true in the public health realm. Indeed, no available evidence supports that using the criminal law to respond to HIV is effective in protecting public health, whereas some evidence suggests that it may actually cause harm (Burris *et al.* 2007). In addition to pragmatic concerns of proof and efficacy, criminal statutes on HIV transmission and exposure undermine public health responses to HIV from several perspectives (Elliott 2002; Burris and Cameron 2008; UNAIDS and UNDP 2008).

Perhaps most significantly, criminalization risks perpetuating the stigma associated with HIV/AIDS, which in turn hinders public health efforts that depend on stigma reduction. Perception of stigma discourages people from undergoing voluntary HIV testing and counseling. In a similar vein, because knowledge of status is a requirement for prosecution under the terms of reckless transmission, criminal laws may act as a disincentive to testing, especially among high-risk communities (UNAIDS and UNDP 2007; Jürgens *et al.* 2008). This is particularly problematic from the public health perspective, because there are real benefits to early diagnosis – including reduced infectivity of blood and other fluids where ART has been started (Attia *et al.* 2009). Furthermore, increasing the proportion of people who know they are infected also seems to help reduce risky behavior significantly (Radcliffe 2011).

Inappropriate, overly-broad application of the criminal law also risks spreading misinformation and perpetuating misconceptions about how HIV is transmitted. In numerous jurisdictions, for example, serious criminal charges have been laid against PLWHA for biting, spitting, or scratching, despite evidence that the risk of HIV transmission by such routes is practically non-existent (Elliott 2002; Kovach 2008). Conversely, defense attorneys may react by peddling junk science or even denying the link between HIV and AIDS, as happened in one Canadian case (Wainberg 2008). Rather than educating people about the disease and deterring unsafe practices, courtroom battles thus risk sending a dangerously inaccurate message to the public at large about how HIV is (and is not) transmitted.

Further, criminalizing HIV transmission could create perverse incentives for those engaged in high-risk behaviors by creating a category of "other" people who are the sole focus of criminal sanctions. By placing the onus of responsibility for safe sex on the HIV-positive partner, people may be encouraged to ignore their responsibility to inquire into a partner's sexual background or HIV status, falsely assuming that criminal legislation protects them (Elliott 2002; *R v. Konzani* 2005; Dodds and Keogh 2006). To the extent that public health policy states that everyone

should assume their partners are infected and take precautions accordingly, that policy is undermined by the false belief that criminal statutes have helped reduce the risk (Closen *et al.* 1994).

Undermining individual rights to dignity, privacy, and health

In concept as well as in practice, HIV-specific statutes are at odds with the basic tenets of a health and human rights framework. The enjoyment of the right to health is guaranteed in various human rights instruments (e.g., the International Covenant on Economic, Social and Cultural Rights [1966]; the UN Convention on the Rights of the Child [1989]; the African Charter on Human and People's Rights [1981]). However, as affirmed by the Committee on Economic, Social and Cultural Rights, such a right is inextricably linked to other fundamental human rights including those to life, privacy, dignity, and non-discrimination (CESCR 2000). Criminal HIV transmission and exposure laws compromise such rights based solely on disease status.

Perhaps most obviously, criminalizing HIV transmission risks violating international rights to privacy as outlined in the International Covenant on Civil and Political Rights (1966) and by the UN Human Rights Committee (1988). Specifically, singling PLWHA out for prosecution risks prying into matters of sexual intimacy between adults and compromising privacy in health records and HIV status. Grounded in legal, ethical, and human rights principles of autonomy and justice, privacy requires that PLWHA: (1) have the right not to have their health status disclosed without their consent; (2) are entitled to make health and other personal decisions without interference; and (3) have a right to control others' access, use and disclosure of their HIV/AIDS health data (Gable *et al.* 2009). It is well documented that violating such rights to privacy engenders unwarranted discrimination against PLWHA (PAHO 2003; Reidpath and Chan 2005; NAT 2006; Asante 2007).

In determining whether any law is justifiable, the actual public good realized through enforcing that law must be carefully balanced against the individual human rights at stake – to privacy, to dignity, to non-discrimination, to health, and to life. In the case of criminal HIV transmission and exposure laws, that balance would appear to be off.

Vagueness and criminalization of lower-risk and risk-free activities

In many cases, the vagueness and breadth of HIV criminal transmission and exposure laws raise the very real potential that enforcement of the law could lead to perverse and unjust outcomes. The health and human rights impact of laws on HIV transmission and exposure is of greatest concern where laws are broadly written, without regard to the cautions represented in the

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Case study 24.2

In 2007, a trial judge in Barrie, Ontario, upon learning that a witness was HIV-positive and hepatitis C-positive, ordered that he be masked or required to testify from another room (Tyler 2008). In 2009, a member of the Swaziland parliament called for people with HIV to be branded on the buttocks after mandatory testing, so that "[b]efore having sex with anyone, people will have to check their partners' buttocks before proceeding" ([Johannesburg] *Sunday Independent*, 24 May 2009, p. 1).

UNAIDS guidelines. In particular, though most of the HIV-specific national criminal laws that have been adopted or proposed may not have had the explicit intention of criminalizing vertical transmission of HIV, the broad net that they cast may inadvertently encompass such cases (Csete *et al.* 2009).

For example, the AWARE Model Law and many newer African statutes based on it make "willful transmission" of HIV an offense. In this case, "willful transmission" is defined as "through any means by a person with full knowledge of his/her HIV/AIDS status to another person" (Lazzarini *et al.* 2002). In addition to being a legally deficient definition of "willful" (which should require evidence of an intention to transmit), the phrase "by any means" could include a woman who transmits HIV during pregnancy, labor or delivery, or through breastfeeding, regardless of whether prevention services were available or used (Csete *et al.* 2009).

Vague formulations of criminal HIV transmission and exposure laws thus open the door for prosecution of vertical transmission of HIV from mother to child in pregnancy or childbirth, even though it is difficult to imagine malicious intent behind vertical transmission (ibid.). It is hard to know the precise effect that prosecution for vertical transmission would have on utilization of services to prevent vertical transmission. Yet such applications of the law are certainly unlikely to be helpful, and could give vulnerable women one more reason to be wary of HIV testing and prevention of mother-to-child transmission services.

Potential for discriminatory application

The very concept of singling HIV out for special attention under the law springs from an unfair notion of exceptionalism. By criminalizing HIV transmission, societies place a value judgment on the activity that transmits the disease and on people who are HIV-positive – that they deserve to be punished more severely than people who transmit other potentially fatal diseases. Moreover, human rights critics point out that punishment in the area of HIV transmission and exposure is often marked by unfairness: stigmatization of PLWHA, selective enforcement, or enforcement targeted against women or certain racial groups. Indeed, the fact that certain groups including women, migrants, IDUs, and sex workers are more likely to be prosecuted presents a very real potential for existing inequalities to be exacerbated through criminalization of HIV/AIDS-related risky behaviors. In this way, certain laws may actually directly undermine the goals of evidence-based public health programs and leave already vulnerable and marginalized groups especially open to prosecution.

In particular, laws criminalizing HIV transmission tend to disparately criminalize women, who, as a result of pregnancy-related medical care, form the majority of those who know their HIV status, and may be unable to negotiate with sexual partners for safe sex because of fear of violence. Because women generally have more contact with health services than men do, they are more likely to be the first in a sexual relationship to be tested for HIV and thus more vulnerable to prosecution for both sexual and vertical transmission (UNAIDS and UNDP 2008).

Toward a rights-based approach to HIV in criminal law

Whereas the core goals of criminal law focus on principles of incapacitation, retribution, rehabilitation, and deterrence, the goals of the health and human rights framework are somewhat different and potentially conflicting. In the context of HIV/AIDS, these goals include: (1) improving the quality of life of PLWHA through access to treatment, services, and support; (2) stopping the spread of HIV/AIDS through access to prevention education; (3) providing access to knowledge of one's HIV status through voluntary counseling and testing; (4) providing

access to treatment; and (5) providing access to a full range of sexual and reproductive health services. When public health is the driving force behind the creation and maintenance of laws that are meant to have an impact on the health of communities, a health and human rights approach becomes crucial to ensuring that human rights are not violated and the trust and well-being of individuals and communities are maintained. Namely, "a human rights approach requires a fair balance to be achieved between the interests of people who are, may be, or are not infected with diseases such as HIV/AIDS" (Watchirs 2005).

Overall, international law requires that governments employ "the least restrictive alternative" approach in pursuing public health goals and generally advises against coercive measures such as imprisoning people in order to combat the HIV epidemic (CESCR 2000). Criminalizing HIV transmission is clearly not the least restrictive alternative available; other measures provide greater public health benefits while imposing fewer limitations on fundamental rights. Rather than criminalizing HIV endangerment, it is better to review and reform the criminal laws to ensure that they are in conformity with international and regional human rights standards, and are not misused in the context of HIV/AIDS or targeted at vulnerable groups. HIV should not be used as a "scarlet letter."

Over the past decade, advocacy efforts seem to have made headway in enacting changes in the legal environment for PLWHA. In July 2010, the White House announced a major change in US HIV/AIDS policy – a change informed by public health law research carried out by Scott Burris, Professor of Law at Temple University and the Director of the Public Health Law Research program. The official National HIV/AIDS Strategy for the US concluded that "the continued existence and enforcement of these types of laws [criminalizing HIV infection] run counter to scientific evidence about routes of HIV transmission and may undermine the public health goals of promoting HIV screening and treatment." Consistent with this new policy, there has been a growing movement to fight HIV criminalization and HIV-specific criminal laws. Outside of the USA, too, Sierra Leone has recently repealed its HIV criminalization statute and several other repeal efforts are reportedly underway (GNP+ 2010).

Yet a focused effort to eliminate the most harmful aspects of these laws requires much more leadership and resources than the UN system, donors, and national governments have so far garnered. The harmful provisions of laws passed in West and Central Africa based on the US-funded AWARE Model Law were highlighted, for example, in several regional meetings that included policy-makers from a number of countries (UNGA 2010). However, follow-up work toward legal reform at the country level has not had strong support from parliamentarians or civil society.

Stigma and discrimination, which are fueled by these criminal laws, are also concerns that are frequently mentioned in national HIV strategies. However, effective and well-funded programs to combat these problems are difficult to find. Approximately one-third of UN member states do not have laws that protect PLWHA from discrimination (UNAIDS 2011), a minimum basic requirement for effective HIV responses. Moreover, when laws designed to prevent discrimination based on HIV status are passed within the same legislation that wildly expands the criminalization of HIV transmission and exposure, as has occurred in a number of African countries, the protective impact of anti-discrimination measures is effectively neutralized (Csete and Elliott 2011).

As Klein (2009) has argued, human rights and policy concerns have been raised about the criminalization of HIV transmission and exposure since the early days of the epidemic, but they cannot be neatly addressed within the traditional criminal law framework. In this sense, the more flexible structures of public health may be better placed to incorporate lessons from the health and human rights movement. Moreover, public health authorities may be motivated and able

to engage more deeply with some aspects of the relationship between HIV/AIDS and human rights than the criminal justice system. Through better alignment with the public health framework, the criminal justice system might be imbued with a richer and more nuanced understanding of the appropriate conditions of criminal liability in the context of HIV transmission (Klein 2009).

Criminalization of vulnerable and marginalized populations

More than three decades into the global fight against HIV/AIDS, stemming the tide of the epidemic remains stymied in many areas. In particular, people who use illicit drugs, commercial sex workers, and MSM share a heightened vulnerability to HIV/AIDS for a variety of reasons. Among an estimated 16 million IDUs worldwide, some 3 million are believed to be HIV-positive, and sharing of injecting equipment is estimated to account for about one-third of new HIV infections outside of Sub-Saharan Africa (UNODC 2012). Meanwhile, HIV prevalence among sex workers has reached as high as 60 per cent in some countries (Pettifor and Rosenberg 2011; Price and Cates 2011; UNAIDS 2011), and a meta-analysis of data from 38 countries found that MSM had a 19.3 times higher risk of HIV infection compared with overall prevalence (Baral *et al.* 2007).

Socially marginalized groups tend to suffer the most severe forms of HIV-related stigma and discrimination (Visser *et al.* 2006) – rooted in, perpetuated, and intensified by a heavy burden of criminalization in many countries. The intersection of criminal law on HIV transmission and exposure with laws that criminalize and marginalize high-risk groups is more than conceptual. For example, in some parts of the USA, prostitution not in the presence of HIV is a misdemeanor, while prostitution engaged in by someone who knows he or she is HIV-positive is a felony punishable by five years in prison (Lazzarini *et al.* 2002). Individuals may also belong to more than one of these high-risk groups, compounding the effects of criminalization and increasing HIV vulnerability. Sex work and drug use are linked phenomena in many settings (Aral *et al.* 2005; Mayhew *et al.* 2009).

Any consideration of public health law and human rights in the context of HIV/AIDS must also include policy, legislation, and social vulnerabilities that impact on access to health services and the adoption of health behaviors within vulnerable and marginalized groups. In the following section, we thus examine the experiences of three key risk groups.

Health and human rights impacts of criminalizing key HIV risk groups

People who use drugs, sex workers and MSM represent three sub-populations that bear the brunt of the HIV burden. Yet UNAIDS has estimated that around 63 per cent of the governments submitting self-reporting data have laws or policies that impact negatively on public health efforts targeting these groups. This is problematic on several fronts. In addition to the role these groups may play in spreading HIV into the wider community, individual members themselves have equal right to achieve the highest possible standard of health and to live free from discrimination in accordance with international human rights law.

The mechanisms through which criminalization may negatively interact with public health interventions for HIV control can be summarized as follows:

1   stigmatization and discrimination;
2   fear of judicial consequences;
3   fear of extra-judicial consequences and overt human rights abuses;

4   consequences of increased rates of incarceration; and
5   ineffective and poorly funded resources.

Stigmatization and discrimination

> When I went to the hospital with appendicitis, the nurse learned that I work at the sauna. She became rude with me, saying that girls like me should be killed or put in jail. All the nurses learned where I work. Because of this, I had to be discharged from the hospital ahead of schedule, before my stitches were removed.
>
> (A 19-year-old sex worker from Osh, cited in Sergo *et al.* 2008)

Criminalization reinforces the stigmatization, exclusion, and discrimination faced by key risk groups that may already be marginalized due to widespread social or moral disapproval of their status (Doezema 2002). Particularly in the case of drug users and sex workers, it may also lead to further aggravation of exclusion processes such as experiences of abuse, trauma or socio-economic deprivation (Melis and Nougier 2010). The resulting disempowerment and discrimination can have various detrimental impacts including alienation from the protective services of police, misinformation about legal rights, and refusal or discouragement from receiving or seeking out medical treatment (Global Commission on Drug Policy 2012).

In many countries, health services are simply not welcoming to certain categories of people and not designed to address their health needs (Onyango-Ouma *et al.* 2006). In the heavily AIDS-affected countries of Sub-Saharan Africa, for example, sex workers face exclusion from ART, care for other sexually transmitted diseases, and other basic health care (Arnott and Crago 2009). Worldwide, only a small percentage of HIV-positive sex workers currently have access to ART, and only 10 per cent of IDUs globally may be reached by public health interventions (Sarin *et al.* 2011). Further, criminalization and stigmatization of certain sexual behaviors may lead to a similar status being attached to associated paraphernalia that may serve an important safety function (e.g., water-based lubricants, for preventing condom breakage) (Beyrer 2010).

Beyond the impacts of generalized stigma, criminalized risk groups may also be prevented from accessing more general health care through discrimination and loss of federal benefits stemming from related convictions. In countries such as Russia and the Ukraine, for example, pregnant women risk rejection from health care providers and may be subject to state-coerced abortions if they have been convicted of drug offenses (Melis and Nougier 2010). In the USA, conviction for drugs offenses can lead to loss of federal benefits such as access to food stamps and cash assistance (Iguchi *et al.* 2002). In the case of sex workers who migrate for work, their undocumented status can impede access to mandatory health insurance schemes (Sergo *et al.* 2008).

Fear of judicial consequences

A strong punitive stance toward criminalized HIV risk groups tends to drive such groups further underground and away from health initiatives. Furthermore, in some countries and states, the health interventions themselves may be illegal.

Syringe exchanges, for example, have proven effective in reducing blood-borne disease through preventing syringe-sharing among drug users. However, drug users have faced arrest and even beating for possession of both clean and used syringes around needle exchange centers in countries including the Ukraine and Thailand (Melis and Nougier 2010). In US states where possession of drug paraphernalia is a crime (e.g., North Carolina), fear of arrest acts as a major deterrent for drug users attempting to legally buy clean syringes from pharmacies (Costenbader *et al.* 2010). Condom use is another major component of HIV prevention that may be undermined by police

practices. In some jurisdictions, for example, possession of condoms is used as a marker for prostitution and thus as grounds for arrest (Cohen and Coyle 1990).

And there is punitive risk not just for the criminalized risk groups themselves but also for outreach workers and advocates attempting to help these groups. In places where possession or distribution of syringes is a crime, health and outreach workers may also run the risk of arrest (Human Rights Watch 2011). In Senegal, health workers at one of the first clinics to reach out to MSM were arrested on sodomy charges and sentenced to nine years imprisonment (Beyrer 2010). Similarly in Uganda, three activists were arrested and charged for peacefully campaigning for MSM access to HIV services (Saavedra *et al.* 2008).

Fear of extra-judicial consequences and overt human rights abuses

Vulnerable and marginalized populations may also have their human rights violated more directly as a result of prohibitionist regimes opening up the potential for police abuse and vigilante justice. In Kazakhstan, for example, police may conduct cavity searches of drug users that can lead to demands for sex in exchange for the return of confiscated drugs (Melis and Nougier 2010), while in Ukraine large-scale extortion of bribes, planting of drugs and even rape or torture of detainees have been documented (Spicer *et al.* 2011). Sex workers are also easy targets for police extortion, and police may demand "pay-offs" in the form of money or unsafe or forcible sex. Furthermore, police raids of brothels, sometimes conducted in collaboration with faith-based entities in the name of "rescuing" sex workers, have resulted in human rights violations against sex workers, including physical violence, mandatory HIV testing, threats of criminal charges for HIV transmission, breaches of confidentiality, and unlawful detention (Soderlund 2005; Weitzer 2007). Among MSM, too, cases of physical abuse at the hands of police were documented in India and Nepal, for example, prior to the repeal of sodomy laws (Beyrer 2010). Unsurprisingly, research has demonstrated that policies that permit police harassment of MSM impede HIV programs (Gruskin and Ferguson 2009).

Extra-judicial law enforcement by communities and even authorities can also be a major issue resulting from criminalization. In 2011, for example, a group of women in Nigeria threatened to create a "squad to apprehend and prosecute call girls" who had moved to their vicinity after a crackdown (Oche 2010). In Thailand, meanwhile, the waging of a "war on drugs" in 2003 resulted in around 2300 extra-judicial killings, in which half of victims were unconnected to drug activities (Melis and Nougier 2010). Individuals engaging in homosexual behavior may also be targeted for vigilante attacks. In Iraq, for example, government decree of the validity of Sharia law has led to murder and honor killings of anyone suspected of gay practices (Mohammed 2012).

Consequences of increased rates of incarceration

Criminalization of vulnerable and marginalized populations increases their rates of incarceration. Even when not associated with extreme human rights abuses, detention can still have a major negative effect through interfering with HIV treatment and increasing risks of exposure.

In the USA, around 20–26 percent of HIV-infected individuals had been incarcerated at some point as of 1997, with HIV prevalence across prisons averaging 1.9 percent but ranging widely and in some states being as high as 10 per cent (Blankenship *et al.* 2005). Interventions to prevent HIV spread are not always well implemented in prison settings, with poor provision of information and low service utilization (Ball 2007). In countries where same-sex sexual conduct is illegal, condom provision in prisons is also highly likely to be banned (Gruskin and Ferguson 2009). Furthermore, sexual contact, drug use, and tattooing may be carried out in a riskier manner than in the outside world (Blankenship *et al.* 2005). Additionally, it has been found that sex

workers are particularly vulnerable to sexual and physical abuse in detention settings (UNAIDS Advisory Group on HIV and Sex Work 2011). Incarcerated individuals with HIV status may also be less likely to adhere to treatment regimens, with a Canadian study indicating that rates of non-adherence to ART increased with multiple incarcerations (Global Commission on Drug Policy 2012).

In addition to conditions within detention settings, incarceration can interfere with public health interventions in other ways. The disruptive effect of incarceration on social networks, for example, may lead to risky behaviors such as a high turn-over of sexual partners and increased risk of drug relapse in drug users (Blankenship *et al.* 2005). The status of being a former convict with a criminal record is also highly stigmatized, thus further compounding the existing stigmatized status of criminalized risk groups (ibid.). In some US states, conviction due to sex work activities can result in being registered as a "sex offender" (UNAIDS Advisory Group on HIV and Sex Work 2011). A criminal record of any kind can adversely affect life chances such as employment, housing and social integration, negatively influencing the success of rehabilitation and likelihood of relapse in drug users (Blankenship *et al.* 2005) and acting as a major barrier for individuals seeking work outside of the sex trade (UNAIDS Advisory Group on HIV and Sex Work 2011).

Ineffective and poorly funded resources

Finally, enforcement of prohibitory policy can sometimes result in indirect damage to public health campaigns, by detracting political willpower and spending away from the most effective interventions.

In general, organizations promoting the rights and health of key vulnerable and marginalized populations often experience difficulty in accessing funds to carry out HIV-related programs that are likely to be beneficial to such groups (Fried and Kowalski-Morton 2008; Needle and Zhao 2010; amfAR and JHSPH 2012). This in turn can lead to poor reach of health education to vulnerable groups. For example, in Pakistan, where sex work is illegal, a survey highlighted that two-thirds of individuals engaged in this type of work had not even heard of HIV (Gruskin and Ferguson 2009).

In the USA, the war against drugs has been an enormously costly campaign that has been waged at the expense of proven health initiatives. Large investment of resources into enforcing strict criminal policies on drugs has detracted funding from harm reduction strategies with established effectiveness such as needle exchanges (Elliott *et al.* 2005). In fact, the USA recently reinstated a ban on federal funding for syringe exchange programs that was originally lifted in 2009 (Global Commission on Drug Policy 2012). Furthermore, the need to justify this spending has resulted in an obsession with evidence for success in the form of intercepted drug hauls and numbers of arrests, which detracts from the most important measures of success at the level of the health of communities and populations. The need to be seen as consistent in the implementation of strict criminal policies may also reduce the political willpower to consider harm reduction or public health measures as supplementary approaches to enforcing general law and order.

The failure to target interventions at key vulnerable groups also results in a highly ineffective utilization of resources. According to a Global Resource Needs report produced by UNAIDS, of a subset of 38 countries with a detailed breakdown of their financing for HIV programs, around 1 percent was earmarked for prevention programs dealing with commercial sex workers, 1.2 percent was aimed at MSM, 2 percent was intended for harm reduction programs for drug users, and the remaining 96 percent was for non-targeted prevention (Mofizul Islam *et al.* 2012). In light of the difficulties in engaging marginalized groups in prevention efforts and the

disproportionate amount of the HIV burden these groups often bear, resources for tackling HIV are not being effectively utilized. In countries with very strict criminal law, it is likely that these sub-groups will be overlooked altogether.

Toward Protecting the Rights of Most-at-Risk Populations

> In countries without laws to protect sex workers, drug users, and men who have sex with men, only a fraction of the population has access to prevention. Conversely, in countries with legal protection and the protection of human rights for these people, many more have access to services. As a result, there are fewer infections, less demand for antiretroviral treatment, and fewer deaths. Not only is it unethical not to protect these groups: it makes no sense from a health perspective.
>
> (Ban Ki-moon, Secretary-General of the United Nations, in a speech at the 2008 International AIDS Conference in Mexico)

In his seminal writing on health and human rights, Mann noted that in every society, regardless of how HIV entered the community, the epidemic has evolved along predictable lines: Members of groups who before HIV were marginalized, stigmatized, and discriminated against came over time to bear the brunt of the epidemic. Accordingly, he argued, policies that further marginalized these groups and undermined their human rights would likely also undermine efforts to curb the epidemic (Mann 1999).

Fundamentally, access to the full range of HIV services is integral to a rights- and evidence-based approach to HIV among key vulnerable and marginalized populations, and the legal framework should serve primarily to safeguard such access, promoting an enabling environment for HIV prevention. To this end, several best practices – structural and programmatic – can be recommended:

- Confronting stigma and discrimination against key vulnerable and marginalized populations through legal reform.
- Combating violence against key populations.
- Promoting an enabling environment for HIV prevention and treatment services.
- Involving key populations at all levels of programming.
- Empowering individual members of key populations to demand fulfillment of their rights.

Good structural interventions in key HIV-affected populations must acknowledge the presence and human dignity of people who live outside conventional expectations, safeguarding their individual rights to safety and freedom from violence. Often this involves the provision of safe spaces for people whose behaviors put them at risk from both state and non-state violence – including provision of safe spaces for injectors, as exist in Switzerland; safe street areas for prostitution; or community drop-in centers for those who identify as homosexual, as provided by the Humsafar Trust, with city and state support, in Mumbai, India (Altman 2005). In order for harm reduction initiatives to really be implemented successfully at the global level, however, changes need to happen. Key entities within the UN system need to be more active in promoting science-based public health approaches, and reports emphasizing the importance of harm reduction for health and the preservation of human rights should be submitted to commissions explicitly involved in formulating resolutions on international approaches to key risk groups.

Ultimately, both top-down programs including legal reform and ground-up empowerment and mobilization programs are essential to ensuring that the rights of HIV-affected people and

communities are protected and to ensuring the long-term success and sustainability of health services. In particular, sex workers who have greater control over their lives and conditions of work are better able to address risk and vulnerability to HIV (Shahmanesh *et al.* 2008). Evidence suggests that effective support for sex worker programs can change police behavior, impacting HIV/AIDS outcomes, and that there are demonstrated health benefits to sex workers when they organize and collectivize. To wit, evidence from the Bill Gates-funded AVAHAN project demonstrates that the collectivization of sex workers translates into more effective HIV interventions (Blankenship *et al.* 2010). Further, sex worker organizations in a number of countries have demonstrated that if they are empowered to organize themselves into collectives, they can ensure high levels of condom use without repressive measures (Jana *et al.* 2004).

Moreover, where protective legislation on HIV/AIDS discrimination is in place, support for enforcement and targeted information campaigns for stakeholders about rights afforded by such legislation should be provided. For example, the Street Lawyers (*Gadejuristen*) of Copenhagen provide one model of legal assistance to street-based drug users. In addition to sterile injecting equipment, this organization distributes pocket-sized cards with questions and answers about drug laws and harm reduction (HCLU Films 2009). Another service in Indonesia trains PLWHA and drug users to know their rights and advocate on behalf of themselves and their peers when they are arrested or harassed by the police or refused access to services (Davis 2009). Similarly, organizations in countries such as Kenya and South Africa, for example, have integrated legal support into gender-based violence recovery services in order to improve access to HIV post-exposure prophylaxis and other post-rape care. Such services can improve health outcomes for sex workers who are victims of sexual violence, in addition to helping them navigate the legal system (Ezer 2007; Kim *et al.* 2007).

A paradigm shift is sorely needed to encourage the formulation of strategies that proceed from an understanding of who is vulnerable and include meaningful participation of those persons in decision-making to ensure that HIV prevention services correspond to their realities. Several – though still too few – examples of such approaches exist. Country-level structures created to make proposals to the Global Fund to Fight AIDS, Tuberculosis, and Malaria, for example, have in some cases brought vulnerable persons, including women and people who use illicit drugs, into national HIV policy-making for the first time, resulting in program breakthroughs for vulnerable populations (Canadian HIV/AIDS Legal Network and Open Society Foundations 2011). Additionally, over US$180 million in Global Fund support from 2004 to 2008 for programs for people who use illicit drugs, as inadequate as it still may be, represents an important turnaround for some countries that might not otherwise have focused on this population's needs (Atun and Kazatchkine 2010).

Directions for future law, policy, and practice reform

> We must protect human rights because we want to effectively control AIDS as well as to protect rights for their own sake.
>
> (Mann 1988)

As we have seen, the criminal justice system risks undermining health and human rights where the targets of punitive laws overlap with the key targets of health interventions, fanning the flames of stigma and mistrust. With this in mind, anchoring strategies in human rights through the application of a rights-based approach strengthens programs by drawing attention to the legal and policy context in which they operate. A rights-based approach also allows for the incorporation of core human rights principles into the delivery of services and can secure the

participation of affected communities in the design, implementation, monitoring, and evaluation of interventions. In addition, human rights approaches assist in holding governments and inter-governmental agencies publicly accountable for their actions and inactions in relation to HIV programming (Tarantola and Gruskin 2009).

In 2006, governments agreed upon a Political Declaration on HIV/AIDS that outlined some of the principles that should drive a human rights-based response with specific regard to HIV. As summarized by the UNAIDS Reference Group on HIV and Human Rights, these principles are as follows (UNAIDS Reference Group on HIV and Human Rights 2009):

- Ending the criminalization of HIV transmission and exposure.
- Promoting a social and legal environment that is supportive of and safe for voluntary disclosure of HIV status.
- Removing any legal barriers to provision of HIV prevention measures, including comprehensive age-appropriate sex education and harm reduction services, such as needle-exchange programs and opioid substitution treatment.
- Enacting and enforcing comprehensive anti-discrimination laws that protect people living with HIV or at risk of infection.
- Reviewing and repealing laws that criminalize or further marginalize vulnerable groups such as sex workers, people who use illicit drugs, and MSM.

Ultimately, rather than embark on punitive laws, the goal of law, policy, and practice reform in the realm of HIV/AIDS should be to create an enabling and non-discriminatory environment in which a legal and policy framework ensures respect for and protection of the right to health, as well as civil and political rights such as autonomy, privacy, the right to be protected from violence, rights to speech and assembly, and access to justice for HIV-affected populations. Such policy development should focus on the reform and monitoring of laws that impact the prevention of HIV transmission and the provision of care for those infected. Accompanying interventions may also include advocacy for the enactment of laws that guarantee confidentiality of health information, including HIV status, and laws that prohibit discrimination on the basis of HIV or other status (Barr *et al.* 2011).

Legal reform programs should also focus on the improvement of access to justice for people whose rights have been violated, and could include support for the establishment of human rights commissions and user-friendly courts or alternative dispute resolution mechanisms. Efforts should also be made toward provision of legal services for PLWHA and members of affected and/or socially excluded population sub-groups. Such services could include legal advice and representation, strategic litigation, legal information and referral, or assistance with informal or traditional legal systems (e.g. village courts) (ibid.).

Legal reforms designed to align criminal justice activities with public health efforts are sometimes necessary, but are never sufficient to fully shift street-level law enforcement practice. Overcoming powerful cultural, political, and economic inertia necessitates additional education and further efforts. For example, human rights training for health care workers focusing on informed consent, confidentiality, non-discrimination, duty to treat, and universal precautions is also essential. Similarly, law enforcement agents must be trained and sensitized on HIV and the human rights of vulnerable populations, particularly in terms of supporting access to services, non-discrimination, non-violence, and freedom from harassment, arbitrary arrest, and detention.

As important as policy developments aimed at improving the legal and policy environment, however, are those that promote change from the ground up. These programs should focus on

empowering those affected by HIV to know their rights in the context of the epidemic and draw them to formulate concrete demands for access to services and non–discrimination on the basis of HIV and other social status. In the context of treatment for prevention, it is of particular importance that individuals and communities are empowered and mobilized to claim their rights, health–related and otherwise.

Conclusion

The HIV/AIDS epidemic has heralded a fundamental change in the way public health researchers and policy-makers conceptualize disease. It has compelled the public health community to consider the relationship between disease and broad social factors in greater depth and from new perspectives, with human rights as a central guidepost (Mann *et al*. 1999; Burris and Gostin 2003). Although rights-based strategies have by no means been universal, it is now generally accepted by public health policy-makers that, because those who are infected with HIV or at risk of infection are socially vulnerable and fear agencies of the state, every effort should be made to engage with, rather than threaten, them (Klein 2009).

Yet practical actions have lagged behind conceptual recognition. In some countries, steps have been taken to enact more progressive, health and human rights-oriented HIV/AIDS policy and legal framework (e.g., Vietnam) (USAID Task Order 1 2009). By and large, though, efforts have been small-scale, half-hearted, and haphazard – primarily due to higher-level influences such as laws, public policies, social norms, and culture. In many cases, social conservatism, political legacy, and legislative inertia together configure an environment that is hostile to the integration and needs of key risk groups. Progress has been particularly stymied in resolving conflicts between co-equal laws, such as laws on HIV prevention and laws to control drug use and sex work, and in taking active steps to reduce stigma and discrimination not only against PLWHA but also against the most at-risk populations who are still associated with perceived "social evils."

The high degree of stigma and discrimination associated with HIV/AIDS has made human rights protection not only a priority to ensure the rights of people living with and at risk for HIV, but to address public health goals as well. Without sufficient human rights protection, it is impossible to meet HIV public health goals, nor would those goals have any meaning. Conversely, the failure to meet public health goals represents a serious threat to the human rights of people affected by HIV. Successful responses to HIV depend upon articulation of models that drastically increase use of HIV testing, prevention, treatment, and support services *and* do so in ways that foster human rights protection, reduce stigma and discrimination and encourage the sustained engagement of those directly affected by HIV.

In order to reach public safety goals while preserving health and human rights, it is ultimately necessary to forge closer ties between criminal justice and public health systems. Both criminal justice and public health sectors possess expertise and infrastructure that can be used by the other sector to further their goals, while improving overall community health and safety. Yet greater attention must be paid to how the interplay between law and social values may impede access to essential health services and compromise the effectiveness of HIV programs. In many ways, criminal justice and public health professionals share key core values and a detailed understanding of the complex structural problems that complicate their work. Focusing on these similarities and mutual strengths can help facilitate discussion and frame collaborative efforts that, in the end, benefit both sectors and the public at large.

What is needed in the context of HIV/AIDS is a concerted move toward an evidence–informed, rights-based practice of public health criminology – a more effective collaboration between international public health and international law communities. It is imperative that

governments adopt a comprehensive approach to HIV treatment and care, which must take into account the peculiar needs of vulnerable and marginalized groups including women, prisoners, people who use illicit drugs, sex workers, and sexual-minority groups. To this end, laws that might fuel discriminatory practices against vulnerable and socially marginalized groups while exacerbating health inequalities, especially in the context of HIV/AIDS, must be revised or repealed and more concrete efforts made toward upholding the human rights of all – including and hinging upon the fundamental right to health.

Discussion questions

1   On what basis is the success or failure of specific criminal statutes currently judged? On what basis *should* they be judged?
2   What is the proper role of the criminal justice system in addressing the burden of HIV/AIDS (and infectious diseases in general)?
3   To what extent does the criminalization of risky health-related behaviors actually affect individuals' attitudes and practices with regard to those risky behaviors?
4   Is it appropriate for the law to equate nondisclosure of (known) HIV-positive status to a sexual partner with rape (as the law does in some jurisdictions)? Can it be justified to treat mere nondisclosure of HIV status as equivalent to the intent to cause harm?
5   To what extent is the law equipped to recognize circumstances that mitigate harm, risk of harm and mental culpability (such as safer sexual practices and low viral load) in mitigating the application of criminal sanctions for HIV transmission and exposure?

Websites

www.gnpplus.net/criminalisation/site/index.php.
www.aidslex.org.
www.aidslaw.ca.
www.avert.org/criminal-transmission.htm.
www.criminalhivtransmission.blogspot.com.

Acknowledgements

References

Altman, D. (2005) "Rights Matter: Structural Interventions and Vulnerable Communities," *Health Human Rights*, 8(2): 203–213.

amfAR and JHSPH (The Foundation for AIDS Research (amfAR), and Johns Hopkins Bloomberg School of Public Health (JHSPH)) (2012) *Achieving an AIDS-Free Generation for Gay Men and Other MSM*, Washington, DC: amfAR and JHSPH.

Aral, S. O., St Lawrence, J. S., Dyatlov, R. and Kozlov, A. (2005) "Commercial Sex Work, Drug Use, and Sexually Transmitted Infections in St. Petersburg, Russia," *Social Science and Medicine*, 60(10): 2181–2190.

Arnott, J. and Crago, A.-L. (2009) "Rights Not Rescue: A Report on Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia, and South Africa," *Open Society Initiative for Southern Africa, Sexual Health and Rights Project*, Open Society Institute.

Asante, A. (2007) "Scaling Up HIV Prevention: Why Routine Or Mandatory Testing Is Not Feasible for Sub-Saharan Africa," *Bulletin of the World Health Organization*, 85(8): 644–646.

Attia, S., Egger, M., Müller, M., Zwahlen, M. and Low, N. (2009) "Sexual Transmission of HIV According to Viral Load and Antiretroviral Therapy: Systematic Review and Meta-analysis," *AIDS*, 23(11): 1397–1404.

Atun, R. and Kazatchkine, M. (2010) "The Global Fund's Leadership on Harm Reduction: 2002–2009," *International Journal of Drug Policy*, 21(2): 103–106.

Ball, A. L. (2007) "HIV, Injecting Drug Use and Harm Reduction: A Public Health Response," *Addiction*, 102(5): 684–690.

Baral, S., Sifakis, F., Cleghorn, F. and Beyrer, C. (2007) "Elevated Risk for HIV Infection Among Men Who Have Sex with Men in Low- and Middle-Income Countries, 2000–2006: A Systematic Review," *PLoS Medicine*, 4(12): e339.

Barr, D., Amona, J. J. and Clayton, M. (2011) "Articulating a Rights-Based Approach to HIV Treatment and Prevention Interventions," *Current HIV Research*, 9: 396–404.

Bennett–Carlson, R., Faria, D. and Hanssens, C. (2010) *Ending and Defending Against HIV Criminalization: A Manual for Advocates:* Vol. 1, *State and Federal Law Prosecutions*, New York: Center for HIV Law and Policy and Positive Justice Project.

Bernard, E. J. (2009) "US: Gay Man in Iowa Gets 25 Years for One-Time Non-Disclosure to a Single Complainant," *HIV Justice Network*, 3 May, available at: http://criminalhivtransmission.blogspot.jp/2009/05/iowa-gay-man-gets-25-years-for-one-time.html (accessed 24 September 2012).

Bernard, E. J., Azad, Y., Vandamme, A.-M., Weait, M. and Geretti, A.M. (2007) *The Use of Phylogenetic Analysis as Evidence in Criminal Investigation of HIV Transmission*, London: National AIDS Trust and NAM.

Beyrer, C. (2010) "Global Prevention of HIV Infection for Neglected Populations: Men Who Have Sex with Men," *Clinical Infectious Diseases*, 50(Suppl. 3) S108–S113.

Blankenship, K. M., Burroway, R. and Reed, E. (2010) "Factors Associated with Awareness and Utilisation of a Community Mobilisation Intervention for Female Sex Workers in Andhra Pradesh, India," *Sexually Transmitted Infections*, 86(Suppl.1): i69–i75.

Blankenship, K. M., Smoyer, A. B., Bray, S. J. and Mattocks, K. (2005) "Black–White Disparities in HIV/AIDS: The Role of Drug Policy and the Corrections System," *Journal of Health Care for the Poor and Underserved*, 16(4 Suppl. B), 140–156.

Burris, S. and Cameron, E. (2008) "The Case Against Criminalization of HIV Transmission," *Journal of the American Medical Association*, 300(5): 578–581.

Burris, S. and Gostin, L.O. (2003) "The Impact of HIV/AIDS on the Development of Public Health Law," in R. O. Valdisseri (ed.) *Dawning Answers: How the HIV Epidemic Has Helped to Strengthen Public Health*, Oxford: Oxford University Press.

Burris, S., Beletsky, L., Burleson, J. A., Case, P. and Lazzarini, Z. (2007) "Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial," *Arizona State Law Journal*, 39: 467.

Cameron, E. (2008) "HIV Is a Virus, Not a Crime: Criminal Statutes and Criminal Prosecutions – Help or Hindrance?," paper presented at the SVII International AIDS Conference, Mexico City, 13 August, available at: http://www.tac.org.za/community/node/2399 (accessed 24 September 2012).

Canadian HIV/AIDS Legal Network, and Open Society Foundations (2011) *Human Rights and the Global Fund to Fight AIDS, Tuberculosis and Malaria*, New York, Toronto, Ontario: Open Society Foundations and the Canadian HIV/AIDS Legal Network.

Chan, M. (2011) "WHO Director-General Reminds Health Officials: Never Forget The People," 16 May, address to the Sixty-Fourth World Health Assembly, available at: http://www.who.int/dg/speeches/2011/wha_20110516/en/index.html (accessed 24 September 2012).

Closen, M. L., Bobinski, M. A., Hermann, D. H. J., Hernandez, J. F., Schultz, G. P. and Strader, J. K. (1994) "Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws," *Arkansas Law Review*, 46: 921–971.

Cohen, J. B. and Coyle, S. L. (1990) "Interventions for Female Prostitutes," in H. G. Miller, C. F. Turner, and L. E. Moses (eds.) *AIDS: The Second Decade*, Washington, DC: National Academy Press.

Committee on Economic, Social and Cultural Rights (CESCR) (2000) *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/21.

Costenbader, E. C., Zule, W. A. and Coomes, C. C. (2010) "Racial Differences in Acquisition of Syringes from Pharmacies under Conditions of Legal but Restricted Sales," *International Journal of Drug Policy*, 21(5): 425–428.

Csete, J. and Elliott, R. (2011) "Criminalization of HIV Transmission and Exposure: In Search of Rights-Based Public Health Alternatives to Criminal Law," *Future Virology*, 6(8): 941–950.

Csete, J., Pearshouse, R., and Symington, A. (2009) "Vertical HIV Transmission Should Be Excluded from Criminal Prosecution," *Reproductive Health Matters*, 17(34): 154–162.

Davis, M. (2009) "Street Lawyering in Jakarta," *Asia Catalyst*, 23 February, available at: http://asiacatalyst. org/blog/2009/02/street-lawyering-in-jakarta.html (accessed 24 September 2012).

De Rosa, C. J. and Marks, G. (1998) "Preventive Counseling of HIV-Positive Men and Self-Disclosure of Serostatus to Sex Partners: New Opportunities for Prevention," *Health Psychology*, 17(3): 224–231.

Dodds, C. and Keogh, P. (2006) "Criminal Prosecutions for HIV Transmission: People Living with HIV Respond," *International Journal of STD and AIDS*, 17(5): 315–318.

Doezema, J. (2002) "Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol," *Gender and Development*, 10(1): 20–27.

Elliott, R. (2002) *Criminal Law, Public Health, and HIV Transmission: A Policy Options Paper*, Geneva: UNAIDS Best Practice Series.

Elliott, R., Csete, J., Wood, E. and Kerr, T. (2005) "Harm Reduction, HIV/AIDS, and the Human Rights Challenge to Global Drug Control Policy," *Health and Human Rights*, 8(2): 104–138.

Ezer, T. (2007) *Work on Women, Law, and HIV/AIDS*, Open Society Foundations, available at: http://www.soros.org/reports/work-women-law-and-hivaids (accessed 24 September 2012).

Fried, S. T. and Kowalski-Morton, S. (2008) "Sex and the Global Fund: How Sex Workers, Lesbians, Gays, Bisexuals, Transgender People, and Men Who Have Sex with Men Are Benefiting from the Global Fund, or Not," *Health and Human Rights*, 10(2): 127–136.

Gable, L., Gostin, L. and Hodge, J. G. (2009) "A Global Assessment of the Role of Law in the HIV/AIDS Pandemic," *Public Health*, 123(3): 260–264.

Global Commission on Drug Policy (2012) *The War on Drugs and HIV/AIDS: How the Criminalization of Drug Use Fuels the Global Pandemic*, Rio de Janeiro: Global Commission on Drug Policy.

Global Network of People Living with HIV/AIDS (GNP+) (2010) *The Global Criminalisation Scan Report 2010: Documenting Trends, Presenting Evidence*, Amsterdam: GNP+.

Gruskin, S. and Ferguson, L. (2009) "Government Regulation of Sex and Sexuality: In Their Own Words," *Reproductive Health Matters*, 17(34): 108–118.

Gurnham, D. (2012) "What Role Should Criminal Justice Play in the Fight Against STIs?," *Sexually Transmitted Infections*, 88(1): 4–5.

HCLU Films (2009) "Gadejuristen: The Danish Street Lawyers," *Drug Reporter*, video, 23 September, available at: http://drogriporter.hu/en/gadejuristen (accessed 24 September 2012).

Holland, W. (1994) "HIV/AIDS and the Criminal Law," *Criminal Law Quarterly*, 36(3): 279–316.

Human Rights Watch (2011) *We Know What to Do: Harm Reduction and Human Rights in North Carolina*, Human Rights Watch, available at: http://www.hrw.org/sites/default/files/related_material/us0911 brochurewebwcover_0.pdf (accessed 24 September 2012).

Iguchi, M. Y., London, J. A., Forge, N. G., Hickman, L., Fain, T. and Riehman, K. (2002) "Elements of Well-Being Affected by Criminalizing the Drug User," *Public Health Reports*, 117 (Suppl. 1): S146–S150.

International Planned Parenthood Federation, GNP+, and International Community of Women Living with HIV/AIDS (2008) *Verdict on a Virus: Public Health, Human Rights and Criminal Law*, GNP+, available at: http://www.gnpplus.net/en/programmes/human-rights/global-criminalisation-scan/1543-verdict-on-a-virus-public-health-human-rights-and-criminal-law (accessed 24 September 2012).

Jana, S., Basu, I., Rotheram-Borus, M. J. and Newman, P. A. (2004) "The Sonagachi Project: A Sustainable Community Intervention Program," *AIDS Education and Prevention*, 16(5): 405–414.

(Johannesburg) Sunday Independent (2009) Brand HIV-Positive People on the Buttocks," 24 May, p. 1, available at: http://www.iol.co.za/news/south-africa/brand-hiv-positive-people-on-the-buttocks-1.444283#.UFTXoaRVLsc (accessed 24 September 2012).

Joint United Nations Programme on HIV/AIDS (UNAIDS) (2010) *UNAIDS Outlook Report 2010*, Geneva: UNAIDS.

Jürgens, R. (1996) *HIV/AIDS in Prisons: Final Report*, Montreal: Canadian HIV/AIDS Legal Network and Canadian AIDS Society.

Jürgens, R., Cohen, J., Cameron, E., Burris, S., Clayton, M., Elliot, R., Pearshouse, R., Gathumbi, A. and Cupido, D. (2008) *10 Reasons to Oppose Criminalization of HIV Exposure or Transmission*, New York: Open Society Institute.

Jürgens, R., Ball, A. and Verster, A. (2009) "Interventions to Reduce HIV Transmission Related to Injecting Drug Use in Prison," *The Lancet Infectious Diseases*, 9(1): 57–66.

Kebonang, Z. (2012) "The Challenges of HIV/AIDS Criminal Legislation in Botswana," *Journal of Politics and Law*, 5(1): 189–195.

Kim, J., Mokwena, L., Ntlemo, E., Dwane, N., Noholoza, A., Abramsky, T. and Marinda, E. (2007) *Developing an Integrated Model for Post-rape Care and HIV Post-exposure Prophylaxis in Rural South Africa*, Rural AIDS and Development Action Research Programme (RADAR), School of Public Health, University of the Witwatersrand; Population Council, Frontiers in Reproductive Health; Tshwaranang Legal Advocacy Centre, available at: http://pdf.usaid.gov/pdf_docs/PNADK615.pdf (accessed 24 September 2012).

Klein, A. (2009) "Criminal Law, Public Health, and Governance of HIV Exposure and Transmission," *The International Journal of Human Rights*, 13(2–3): 251–278.

Kovach, G. (2008) "Prison for Man with H.I.V. Who Spat on a Police Officer," *The New York Times*, 16 May, available at: http://www.nytimes.com/2008/05/16/us/16spit.html (accessed 24 September 2012).

Langley, E. E. and Nardi, D. J., Jr. (2010) "The Irony of Outlawing AIDS: A Human Rights Argument Against the Criminalization of HIV Transmission," *The Georgetown Journal of Gender and the Law*, 11(3): 743–794.

Lazzarini, Z., Bray, S. and Burris, S. (2002) "Evaluating the Impact of Criminal Laws on HIV Risk Behavior," *Journal of Law, Medicine, and Ethics*, 30(2): 239–253.

Mann, J. M. (1988) "Worldwide Epidemiology of AIDS," in A. F. Fleming, M. Carballo, D. W. FitzSimons, M. R. Bailey, and J. Mann (eds.) *The Global Impact of AIDS*, New York: Alan P. Liss.

Mann, J. M. (1999) "Human Rights and AIDS: The Future of the Pandemic," in J. M. Mann, S. Gruskin, M. A. Grodin and G. J. Annas (eds.), *Health and Human Rights: A Reader*, New York: Routledge.

Mann, J. M., Gruskin, S., Grodin, M. A. and Annas, G. J. (eds.) (1999) *Health and Human Rights: A Reader*, New York: Routledge.

Mayhew, S., Collumbien, M., Qureshi, A., Platt, L., Rafiq, N., Faisel, A., Lalji, N. and Hawkes, S. (2009) "Protecting the Unprotected: Mixed-Method Research on Drug Use, Sex Work and Rights in Pakistan's Fight Against HIV/AIDS," *Sexually Transmitted Infections*, 85 (Suppl. 2): ii31–ii36.

Melis, M. and Nougier, M. (2010) *IDPC Briefing Paper: Drug Policy and Development: How Action Against Illicit Drugs Impacts on the Millennium Development Goals*, London: International Drug Policy Consortium.

Merminod, A. (2009) "The Deterrence Rationale in the Criminalization of HIV/AIDS," *Lex Electronica*, 13(3): 1–34.

Mofizul Islam, M., Topp, L., Day, C. A., Dawson, A. and Conigrave, K. M. (2012) "Primary Healthcare Outlets that Target Injecting Drug Users: Opportunity to Make Services Accessible and Acceptable to the Target Group," *International Journal of Drug Policy*, 23(2): 109–110.

Mohammed, Y. (2012) "Campaign of Iraqi Gay Killings by Smashing Skulls with Concrete Blocks," *Organisation of Women's Freedom in Iraq*, 2 March, available at: http://www.equalityiniraq.com/press-release/150-campaign-of-iraqi-gay-killings-by-smashing-skulls-with-concrete-blocks (accessed 24 September 2012).

National AIDS Trust (NAT) (2006) *HIV-related Stigma and Discrimination: Proposals from the National AIDS Trust for the Government Action Plan*, London: UK National AIDS Trust.

Needle, R. H. and Zhao, L. (2010) *HIV Prevention Among Injection Drug Users: Strengthening U.S. Support for Core Interventions*, Washington, DC: Center for Strategic and International Studies (CSIS).

Nyambe, M. (2005) *Criminalisation of HIV Transmission in Europe: A Rapid Scan of the Laws and Rates of Prosecution for HIV Transmission Within Signatory States of the European Convention of Human Rights*, London: GNP+ Europe, and Terrence Higgins Trust (THT).

Oche, M. (2010) "Nigeria: Gwarimpa Women Ready for Showdown with Call Girls," *allAfrica*, 12 December, available at: http://allafrica.com/stories/201012130519.html (accessed 24 September 2012).

Office of the High Commissioner for Human Rights (OHCHR) and UNAIDS (2006) *HIV/AIDS and Human Rights: International Guidelines*, UN Doc. No. HR/PUB/06.9 (first issued 1998).

Onyango-Ouma, W., Birungi, H. and Geibel, S. (2006) *Understanding the HIV/STI Prevention Needs of Men Who Have Sex with Men in Kenya: Horizons Research Summary*, Washington, DC: Population Council.

Pan American Health Organization (PAHO) (2003) *Understanding and Responding to HIV/AIDS-related Stigma and Discrimination in the Health Sector*, Washington, DC: PAHO.

Pearshouse, R. (2007) "Legislation Contagion: The Spread of Problematic New HIV laws in Western Africa," *HIV/AIDS Policy and Law Review*, 12(2–3), 1, 5–11.

Pettifor, A. and Rosenberg, N. (2011) "The Need to Focus on Sex Workers in Generalized Epidemic Settings," *Sexually Transmitted Diseases*, 38(4): 324–325.

Price, J. E. and Cates, W. (2011) "Sex Worker Studies: The Science, Semantics, and Politics of Targeting Our HIV Prevention Response," *Sexually Transmitted Diseases*, 38(5): 395–397.

Radcliffe, K. (2011) "Sexual Health? Public Health!," *Sexually Transmitted Infections*, 87(6): 456–457.

Reidpath, D. D. and Chan, K. Y. (2005) "HIV Discrimination: Integrating the Results from a Six-Country Situational Analysis in the Asia Pacific," *AIDS Care*, 17(Suppl. 2): S195–S204.

Saavedra, J., Izazola-Licea, J. A. and Beyrer, C. (2008) "Sex between Men in the Context of HIV: The AIDS 2008 Jonathan Mann Memorial Lecture in Health and Human Rights," *Journal of the International AIDS Society*, 11(9).

Sarin, E., Samson, L., Sweat, M. and Beyrer, C. (2011) "Human Rights Abuses and Suicidal Ideation Among Male Injecting Drug Users in Delhi, India," *International Journal of Drug Policy*, 22(2): 161–166.

Sergo, E., Sekretareva, E., Nurmamatov, I. and Abramova, G. (2008) *Observance of the Rights of Sex Workers to Obtain Health Care: Monitoring of Human Rights in Medical Institutions in Osh City in the Kyrgyz Republic*, Open Society Institute and Soros Foundation Kyrgyzstan, available at: http://cop.health-rights.org/teaching/163/Observance-of-the-Rights-of-Sex-Workers-to-Obtain-Health-Care-Monitoring-of-Human-Rights-in-Medical-Institutions-in-Osh-City-in-the-Kyrgyz-Republic (accessed 24 September 2012).

Shahmanesh, M., Patel, V., Mabey, D. and Cowan, F. (2008) "Effectiveness of Interventions for the Prevention of HIV and Other Sexually Transmitted Infections in Female Sex Workers in Resource Poor Setting: A Systematic Review," *Tropical Medicine and International Health*, 13(5): 659–679.

Soderlund, G. (2005) "Running from the Rescuers: New U.S. Crusades Against Sex Trafficking and the Rhetoric of Abolition," *The National Women's Studies Association Journal*, 17: 64–87.

Spicer, N., Bogdan, D., Brugha, R., Harmer, A., Murzalieva, G. and Semigina, T. (2011) "'It's Risky to Walk in the City with Syringes': Understanding Access to HIV/AIDS Services for Injecting Drug Users in the Former Soviet Union Countries of Ukraine and Kyrgyzstan," *Global Health*, 7: 22.

Tarantola, D. and Gruskin, S. (2009) "Universal Access: Are National Strategic Plans Sensitive to Human Rights?," in R. G. Marlink and S. J. Teitelman (eds.) *From the Ground Up: Building Comprehensive HIV/AIDS Care Programs in Resource-Limited Settings*, Vol. 1, Washington, DC: Elizabeth Glaser Pediatric AIDS Foundation, pp. 331–349.

Tyler, T. (2008) "Judge's Ignorance of AIDS Draws Fire," *Toronto Star*, 30 January, available at: http://www.thestar.com/news/ontario/article/298672—judge-s-ignorance-of-aids-draws-fire (accessed 24 September 2012).

UNAIDS (2011) *Getting to Zero: 2011–2015 Strategy*, Geneva: UNAIDS.

UNAIDS Advisory Group on HIV and Sex Work (2011) *The Report of the UNAIDS Advisory Group on HIV and Sex Work*, Geneva: UNAIDS.

UNAIDS Reference Group on HIV and Human Rights (2009) *Statement on Criminalization of HIV Transmission and Exposure*, Geneva: UNAIDS.

UNAIDs, and Inter-Parliamentary Union (1999) *Handbook for Legislators on HIV/AIDS, Law and Human Rights: Action to Combat HIV/AIDS in View of Its Devastating Human, Economic and Social Impact*, Geneva: UNAIDS.

UNAIDS, and United Nations Development Programme (UNDP) (2007) *International Consultation on the Criminalization of HIV Transmission: Summary of Main Issues and Conclusions*, Geneva: UN.

UNAIDS and United Nations Development Programme UNDP (2008) *Criminalization of HIV Transmission: Policy Brief*, Geneva: UN.

United Nations General Assembly (UNGA) (2001) *Declaration of Commitment on HIV/AIDS: Global Crisis – Global Action,* UNGA 26th Special Session, UN Doc. No. A/RES/S-26.2, New York: UN.

United Nations General Assembly UNGA (2006) *Political Declaration on HIV/AIDS: Intensifying Our Efforts to Eliminate HIV/AIDS*, UNGA Res. 60/262, UN Doc. No. A/65/L.77, New York: UN.

United Nations General Assembly UNGA (2010) *The Protection Of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS): Report of the Secretary-General, Human Rights Council*, UNGA 16th Session, UN Doc. A/HRC/16/69, New York: UN.

United Nations Office on Drugs and Crime (UNODC) (2012) *World Drug Report 2012*, New York: UN.

United States Agency for International Development (USAID) (2009) *AWARE-HIV/AIDS, 2003–2008: Strengthening West Africa's Response to the Epidemic*, Washington, DC: Family Health International.

USAID Task Order 1 (2009) *On the Right Track: Vietnam Adopts Rights-Based Policies for HIV Prevention, Treatment, and Care*, Washington, DC: USAID.

Visser, M. J., Markin, J. D. and Lehboye, K. (2006) "Stigmatizing Attitudes of the Community Towards People Living with HIV/AIDS," *Journal of Community and Applied Social Psychology*, 16: 42–58.

Wainberg, M. A. (2008) "HIV Transmission Should Be Decriminalized: HIV Prevention Programs Depend on It," *Retrovirology*, 5: 108.

Watchirs, H. (2005) "Public Health, Criminal Law and HIV/AIDS," in *HIV and Hepatitis C- Policy, Discrimination, Legal Issues*, Darlinghurst: Australian Society for HIV Medicine, pp. 71–85.

Webber, D. W. (ed.) (2012) *AIDS and the Law*, 4th edn, New York: Kluwer.

Weitzer, R. (2007) "The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade," *Politics and Society*, 35(3): 447–475.

World Health Organization (WHO) (2003) *Treating 3 Million by 2005: Making it Happen: the WHO Strategy*, Geneva: WHO.

WHO (2011) *Global Health Sector Strategy on HIV/AIDS, 2011–2015*, Geneva: WHO.

Cases cited

People v. Olaybar (2003) *G.R. No. 150630-31.*

R. v. Cuerrier (1998) 2 S.C.R.371.

R. v Konzani (2005) Crim.L.R.763

25

Addressing the "inherent" philosophical and operational dichotomies of corrections from an EpiCrim approach

Mark M. Lanier, David Polizzi and Alexandra L. Wade

Introduction

Regardless of philosophical underpinnings, the single inescapable fact is that inmates are segregated and purposefully isolated from the rest of society. In fact, by definition and design, that is what defines an inmate. In the health professions it is analogous to isolating a disease-causing vector, or pathology, both within the host body or segregating the contagious diseased person from the larger social body. This neglected similarity is where public health and criminal justice may mutually benefit from a synthesis of experiences, practices and theory. This chapter outlines how this synthesis can be achieved.

The history of "corrections," much like the history of criminal justice (as understood to be a system) itself, has a sorted record. The pendulum has swung from punishment to treatment and back to punishment several times. Increasingly, however, court mandates, often rendered on the behalf of complaining inmates, require base levels of both physical and mental health care of inmates. Court mandates do not always translate into practice, however. Budgetary issues, philosophical beliefs and prison realities that take precedence over courtroom legislation often supersede judicial decrees and edicts. Even when well intended, correctional staff often place custody and order maintenance, over legally mandated health (physical and mental) care concerns of inmates. This prison reality is well documented, defended and rationalized as being inevitable. Scholars have been deficient in bridging this seemingly insurmountable tension between custody and health care. It is that neglect that we seek to rectify.

Historical overview

Dobash, Dobash and Gutteridge (1986) provided both a critical, compelling and historically accurate portrayal of the development of the women's penal system in Great Britain. While focused on one country and system, it is relevant since much of the Anglo, westernized correctional and penal systems emulated the English tradition, if not the exact model. The largest difference is that "prisons in North America are organized and administered on a number of

different levels, unlike British prisons which are centrally administered" (ibid.: 3), according to Dobash *et al.* (1986). However, we suggest that some American states, such as Texas, greatly surpass the whole of England in land mass, gross national product and population. This discrepancy may be a moot point anyway since the defining characteristics are identical. Consider just one accepted and rarely questioned yet perhaps detrimental example, to this day, men and women are segregated in correctional settings. This practice itself may be pathological and lead to serious health consequences like same-sex rape, increased depression, and "prison homosexuality." Clearly, having co-ed prisons would also create tensions and problems but that type of custodial setting would better reflect "real-world" experiences and prior socialization, thus better equipping inmates for their eventual release.

The first type of correctional practice was public punishment and what we would consider torture by today's standards. According to Schmalleger and Smykla (2011), the ancient Greek city-states were the first to document public punishment. The city-state of Athens provided the best historical documentation with "execution, banishment, or exile. Greek poets described stoning the condemned to death, throwing them from high cliffs, binding them to stakes (similar to crucifixion) and cursing them ritually" (ibid.: 35). Mutilation was also commonly used in ancient and medieval societies. This form of punishment, or retaliation, was called "Lex talionis" and mirrored the Biblical philosophy of "an eye for an eye and a tooth for a tooth" (ibid.: 39). In medieval Europe, floggings, stocks and even execution were the means to both punish criminals and to deter others from committing crimes. According to Dobash *et al.*, "physical and symbolic punishments, such as whipping, hanging and public ridicule, were the main methods used in pre-industrial societies" (1986: 15). Such disciplinary avenues did in fact have an immediate deterrent effect, leaving both the offender scarred and others assuredly threatened with the price of retribution. However, while the purpose of public punishment was to demean the criminal; the ultimate outcome was barbaric and eventually proved counter-productive to deterring criminals, as it neglected several of, what are recognized today as, the goals of sentencing.

Following the era of public punishment, even including the death penalty, came the emergence of incarceration as punishment (Schmalleger and Smykla 2011: 44). The first 'house of corrections' was established in the 1550s by Edward VI, the son of Henry the VIII, and was named "Bridewell," after the Bridewell Palace, a former royal mansion. Soon thereafter, the term "Bridewell" was coined as a term for workhouses as they expanded and multiplied across the land (Schmalleger and Smykla 2011: 45). During this period there was a major economic shift from an agrarian community to an industrial one, leaving many individuals displaced, and this resulted in growing poverty, as well as a surplus of beggars and vagrants. As the number of vagrants increased, vagrancy became criminalized, and those unable to provide proof of some means of support were imprisoned in a Bridewell (ibid.: 45). In the beginning, prisoners were paid for the work they did, however, as the number of prisoners grew, the workhouse system deteriorated. These workhouses were essentially the transition between the brutal corporal punishments of ancient Greece and what we find today in modern imprisonment.

From the seventeenth century to the dawn of the nineteenth century, growing intellectualism in Europe and America, also known as the Age of Enlightenment, became the driving force behind a shift towards a more humane system of punishment. As a reaction to the savagery of corporal punishment, prisons were implemented for the lengthy incarceration of convicted offenders. Two main elements are believed to have fueled the development of the contemporary prison system we see today. The first of these being a philosophical shift away from the punishment of the body and towards the punishment of the human spirit, or soul, and the second being the passage of laws preventing the imprisonment of anyone except criminals (ibid.: 45–46).

Today, though we have come a long way from flogging and branding, our correctional system still struggles to adhere to and achieve the goals of its infrastructure. One perpetual issue that has yet to receive adequate attention is the issue of corrections and indigenous populations. Research provides that there is an enormous over-representation of indigenous populations within the correctional system worldwide.

Specifically looking at Canada, Australia and South Africa, we find that indigenous populations are over-represented at nearly every stage of the criminal justice system. Following colonization worldwide there was a collision of two worlds. The result of this collision established one powerful population and one subordinate. Unfortunately, it was the indigenous, native people that suffered as collateral. The inability or lack of desire from the indigenous population to adhere to the unfamiliar governing of the colonialist is what cultivated the misrepresentation of such people within the correctional system.

Imprisonment rates of native peoples in Western Australia are currently more than 4.4 percent of the adult population and are among the highest rates recorded worldwide (Cunneen 2011: 309). According to Chris Cunneen, in Canada as well, native people compose only 3 percent of the general population while at the same time native offenders compose nearly 17 percent of inmates in the federal penitentiary system (ibid.: 310). Research provides that this over-representation is largely due to the criminal justice system essentially failing such indigenous populations by rejecting First Nations' social institutions and relying solely on colonialist "whitestream" criminal justice systems (Martel et al. 2011: 236).

In South Africa, we find yet another overrepresentation of the aboriginal population, however, the typical pattern of corrections in general is much different here than in European countries, the United States, and other Western democracies. According to Gail Super, the correctional pattern in South Africa is essentially the reverse pattern of what we consider the norm; having two or three people under community sanctions for every one person confined (2011: 201). In South Africa we find there are approximately ten people incarcerated for every one person on probation; the people in custody outnumber those in the community by more than three to one (ibid.: 201).

Garland (1985) as cited in Super (2011: 218) suggests that "penal discourse is as concerned with its image as it is with regulating actual institutional practices." That being said, we recognize again the aforementioned pendulum between punishment and reform, and the discrepancies by which we define crime. In the United States, crime is essentially defined as the breach of laws and rules placed in regulation by the higher governing power that can then prescribe a conviction to the offender. In the People's Republic of China, the concept of 'dangerousness' (which is yet to be codified) is one of the key factors in both determining if a crime has been committed and what the sentence will be for such criminal behavior (Epstein and Hing-Yan Wong 1996: 472–473). The People's Republic of China, like the majority of nations, focuses primarily on protecting society, and defines criminal behavior on the basis of the extent to which an activity may endanger an individual or society.

Prior to examining the mechanism of theoretical (and subsequent policy) synthesis, operational definitions of both punishment and treatment might prove beneficial. Tony Ward (2010: 4) defines punishment as follows:

> state-inflicted punishment in the criminal justice system involves the intentional imposi-
> tion of a burden on individuals following their violation of important social norms that
> are intended to protect the significant common interests of members of the community
> (Boonin 2008). According to Boonin (2008), punishment exhibits five separate, but collec-
> tively necessary, elements: authorization by the state; intentionality (consciously directed

towards a particular outcome); reprobative (expresses disapproval or censure); retributive (follow a wrongful act committed by the offender); and harmful (result in suffering, a burden, or deprivation to the offender). Any action that does not exemplify these five elements is (arguably) not an instance of punishment.

Punishment of those who violate society's norms and legal codes has changed over time. In our opinion, this change *should* have resulted from the application of scientifically valid means of behavior alteration. In reality, the changes from public, short-term punishment, have been dictated by economics, politics and a desire to punish.

Before prisons and jails were built to confine inmates, the mechanism of social control was mostly symbolic, short-lived and public. "Physical and symbolic punishments, such as whipping, hanging and public ridicule, were the main methods used in pre-industrial societies" (Dobash *et al.* 1986: 15). Only with the development of capitalism, or "mercantile capitalism" did confinement of inmates develop as the correctional practice. The previous short-term discipline has been replaced by lengthy and thus expensive, seemingly harmful, periods of confinement (inmates commonly serve decades for status offenses such as drug possession). Finally, punishments are now private, or at least hidden from public view. For example, the most serious punishment, isolation and segregation: "the hole" removes inmates from the sight of even other captives. Each of these current modifications to correctional practice has detrimental effects on the inmates and on the larger society.

"Researchers usually fail to explore the relationship between historical patterns and contemporary forms of imprisonment" (Dobash *et al.* 1986: 11). Historical analyses of corrections have been performed to provide both information for areas that are lacking and background for the development of future corrections (ibid.: 11). However, today it is still unclear as to what the ultimate goal is, when sentencing an offender. If we still strive only to punish the individual, we are naïvely overlooking the perpetuating factor, which is a lack of reform. Thus, making no advances towards the ultimate goal of a "healthy society."

Theories of incarceration

Correctional strategy and policy are either implicitly or explicitly based on correctional philosophy or criminal justice (not criminological) theory. While the rehabilitation versus punishment paradigms are the most simplistic and thus most often touted, the realities are much more complex. Many factors external to prison and correctional operations impact daily operational practices, which in turn impact inmates. At the macro level, economic trends have often been cited as a cause for increases or decreases in inmate population as a means of controlling surplus labor. For example:

> Critical approaches to prison history have played a significant role in the new investigations and interpretations of the rise of the modern systems of criminal justice and imprisonment. Marxists, feminists and critical scholars have proposed new, revised histories. Some of these explanations rely heavily on economic factors, viewing changes in the modes of production and fluctuations in labour markets as the sole determinants of the forms and severity of criminal justice. They posit that during periods of economic expansion, when labour is in demand, progressive ideas and reactions to crime are more likely. Alternatively, during periods of depression, when there is an abundance of labour, judicial and penal repression is more likely to be used as a means of punishing and absorbing the unemployed.
>
> (Dobash *et al.* 1986: 8)

This is essentially an instrumentalist Marxist argument that state institutions are purposefully employed as tools of government (control and/or repression). Such an argument would likely be lost on a correctional custodian but may provide some explanatory utility (Lanier and Henry 2010).

The above distinction may be further validated by the drastic increases in levels of incarceration in the USA over approximately the past 35 years. Prior to this period, rates of incarceration in the USA were relatively stable from 1930 to the early 1970s, allowing certain researchers to theorize that a degree of stability in punishment had been achieved within the American criminal justice system (Zimring 2010). However, this rather optimistic prediction was quickly shattered beginning in the early 1970s, which saw the start of the most drastic increase in rates of incarceration that the world has ever witnessed. It therefore, should not be surprising that the sudden upswing in American prison populations occurred at approximately the same time as Nixon's declaration concerning his War on Drugs (Polizzi in press). Taken from a more philosophically specific point of reference, the beginning of the War on Drugs and its subsequent causal influence on ever growing prison populations can be viewed by what Giorgio Agamben (2005) has described as the state of exception.

In its most general sense, the state of exception is that moment when "the rule of law has been suspended" (de la Durantaye 2009: 336). As such, the actions of the sovereign or government step outside of the normatively established parameters of their offices to become the law either completely or within a specifically targeted socio–political context. However, Agamben (2005) adds that what makes these exceptions so dangerous is when this process transforms this state of exception into the rule, which in turn, then blurs the relationship between the political and legal orders of a given society. Such a moment occurred in the United States after al-Qaeda terrorists successfully orchestrated the 9/11 attacks, which targeted the World Trade Center in Manhattan and the Pentagon in Northern Virginia. Subsequent to those attacks, then President George W. Bush proclaimed that any noncitizen could be detained indefinitely, if they were suspected of terrorist activities; this declaration ultimately resulted in the creation of the prison facility located in Guantánamo Bay, Cuba, which was constructed for the sole purpose of housing those individuals targeted for indefinite confinement. Some twelve years later, this state of exception has become the rule insofar as the War on Terror is now applied as a global strategy or has become what Agamben has described as "global state of exception" (2005: 86). Agamben continues by observing:

> What is new about President Bush's order is that it radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being. Not only do the Taliban captured in Afghanistan not enjoy the status of POWs as defined by the Geneva Convention, they do not even have the status of persons charged with a crime according to American laws.
>
> (ibid.: 3)

Under such circumstances, the state of exception is applied at the whim of the government and directed at those targeted by this process, which may include American citizens. Agamben warns that, "When the state of exception . . . becomes the rule, then the juridico–political system becomes a machine which may at any moment turn lethal" (ibid.: 86). Most recent examples of this process can be found in the killing of Osama bin Laden, the use of predator drones in the attempt to locate and kill al-Qaeda operatives in Afghanistan, Pakistan and Yemen, and the killing of the US-born cleric Anwar Al-Awlaki, who actively recruited young Muslim extremists to perform acts of terrorism within the United States as well as in the Middle East and Europe.

However, as Agamben instructs, there is no state of exception prior to the necessity that legitimizes its existence.

Included within Agamben's exploration of the state of exception is his discussion of the concept of necessity. Within this context, necessity becomes the rationale or transformative historical moment that provides the state of exception its reason to be.

> Here, the theory of necessity is none other than a theory of exception by virtue of which a particular case is released from the obligation to observe the law. Necessity is not a source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm: "He who acts beyond the letter of the law in the case of necessity does not judge by the law itself but judges by the particular case, in which he sees that the letter of the law is not to be observed."
>
> (ibid.: 25)

In the aftermath of the necessity evoked by the events of September 11th, the War on Terror was declared. Individuals identified as enemy combatants could now be captured and detained indefinitely and forced to endure "enhanced interrogation techniques" all under the auspices of the state of exception created by 9/11. Practices such as enhanced interrogation, extraordinary rendition – the "extralegal" practice of apprehending individuals suspected of terrorist involvement or wanted for alleged terrorist activities – and indefinite confinement were now allowed to exist in a "zone of indifference," in that area of gray between politics and the law (Agamben 2005; Garcia 2009). Add to this list the fact that these individuals could now be held "legally" without official charge and denied the right to have their cases heard in a court of law.

The use of military tribunals, currently in place to adjudicate the likes of Khalid Sheikh Muhammad, has come to be viewed by some as the legitimate legal jurisdiction by which to prosecute these cases. It is important to note, however, that this logic is motivated by the obvious realization that all evidence obtained through the use of "enhanced interrogation techniques" or torture would likely not be admissible in American courts, making it much more difficult to gain a conviction (Garcia 2009). The decision to try these cases within military courts, not only provides an air of "legitimacy" to these proceedings, but also provides a legal venue whereby the rules of evidence are more favorable toward securing a guilty verdict. Taken in total, these practices exemplify what Agamben (2005) has described as the blurring of the boundaries between legalities and politics: the political necessity to secure a conviction supersedes the need to protect the legitimacy of the trial process from which these verdicts will be rendered.

The necessity created by a specific event, and the subsequent state of exception to which it gives rise to, present us with a more difficult question to answer: where does this extralegal state or attitude reside? Agamben (2005) in his attempt to answer this question and resolve what he views as intrinsically and illogically situated within traditional conceptualizations of the state of exception makes the following observation:

> If the state of exception's characteristic property is a (total or partial) suspension of the juridical order, how can such a suspension still be contained within it? And if the state of exception is instead only a de facto situation, and as such unrelated or contrary to law, how is it possible for the order to contain a lacuna precisely where the decisive situation is concerned?
>
> (ibid.: 23)

Agamben answers this question by simply observing that the state of exception should not be viewed as something that exists either external or internal to the legal order, but as that which blurs this relationship, creating instead a zone of indifference. "The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order" (ibid.: 23). The War on Terror does not abolish those legal norms that it seeks to suspend, but neither is it unrelated to the legal order that lends it some degree of "cautioned legitimacy."

What Agamben's nuanced description of the state of exception seems to reveal is that there exists within the juridical order a set of latent extra-legal attitudes or practices that under normal circumstances do not become manifest, or perhaps even admissible, within accepted legal/political discourse. However, when confronted with the conditions provoked by some manner of social or political necessity, these latent and extra-legal considerations are now allowed to exist within a zone of indifference, thereby constituting a specific sector of engagement, whereby traditional normative standards of the legal order may be suspended or in some way used to rationalize a set of desired behaviors or policies that would normally be prohibited by the socio-legal order. This subtler conceptualization of the state of exception can be applied to the state of exception reflected in the War on Drugs.

Nixon's declaration of war put into place the strategic logic by which to engage the emerging threat of illegal drug use and the process of addiction. Though, not technically viewed as a suspension of the law, this policy initiative drastically changed the way in which the problem of illegal drug use would be challenged in the United States. The necessity created by the ever increasing use of illegal drugs and the concomitant political and legal implications this type of lifestyle evoked, provided the rationale from which this "state of siege" could move forward. By doing so, the War on Drugs reflected a specific strategy of social engagement, which was ostensibly focused on addressing the growing acceptance of recreational drug use in the USA starting in the late 1960s.

However, it may also be argued that this same strategy became a helpful tool in lessening the growing influence of counter-culture attitudes and beliefs that were seen by many of that era as an anathema to traditional American values. This blurring of the boundaries between the legal order and the interests of the political establishment helped to construct a zone of indifference that allowed the War on Drugs to pursue its stated target, while further marginalizing those areas of political discourse that had been identified as a potential social threat.

It is interesting to note that the enthusiasm generated by the War on Drugs seems to shift the social focus away from the War on Poverty whose popularity had waned by 1973. The change of governmental strategy reflected in this declaration also seems to reveal that a different conclusion had been reached by policy-makers concerning the issue of poverty. Within this newly configured theater of operations, those previously viewed as the victims of poverty now became the willful procurers of illegal substances and the active participants in the criminal activity this lifestyle helped to foster. As such, the target of this new war was no longer focused on the social conditions related to poverty, but on those who were by and large marginalized by poverty.

When the Economic Opportunity Act was established by the Johnson Administration in 1964, the rate of poverty in America was estimated to be at approximately 17 percent; however, by 1973, poverty in America had dropped to a rate of 11.1 percent, which represented the most significant decrease in poverty since these measures were established beginning in 1958. It could be argued that the War on Poverty simply became the causality of its own success and the waning interest in its continued engagement, the tacit recognition that poverty in America had been defeated. Perhaps, but it seems equally as significant that the culmination of the

War on Poverty also ushers in the era of a new conflict and with it, the historic increase in rates of incarceration.

Agamben, in discussing the rise of the Third Reich, and Hitler's Decree for the Protection of the People and the State, which was used to suspend the personal liberties of German citizens protected by the Weimar Constitution, makes the following observation:

> In this sense, modern totalitarianism can be defined as the establishment, by means of the state of exception, of a legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system. Since, then, the voluntary creation of a permanent state of emergency (though perhaps not declared in the technical sense) has become one of the essential practices of contemporary states, including so-called democratic ones.
>
> (2005: 2)

Agamben's observation is metaphorically instructive in describing the shifting governmental focus from the War on Poverty to the War on Drugs.

Though any comparative analysis with the Third Reich will likely evoke a variety of strenuous objections and outright denunciations by those sympathetic to the concerns of the other partner in this relationship, certain critical observations may still be offered. The shift in governmental focus toward the emerging threat of illegal drug use and away from poverty and the social structures implicated in its continued presence in American society, does reflect a re-formulation or construction of a group of citizens who were and still are, unable to be integrated into the political system. But perhaps more importantly, this shift reflects a state of exception whose zone of indifference becomes most clearly recognized in the ever-increasing rates of incarceration that occurred over the past 35 years within American society.

The state of emergency represented by the War on Drugs and the strategies it evoked in penological practice may also be conceptualized as an example of Freudian repression manifested on the societal level (Freud 1989b). The Freudian concept of repression is described as a psychological process (defense mechanism) that removes painful or unwanted experiences, beliefs or thoughts from conscious awareness and relocates them within the unconscious; thereby rendering them inaccessible to the waking ego (Freud 1938). As such, repression serves as a mode of defense that protects ego consciousness from the harmful effects that these unwanted thoughts or feelings may evoke by relocating this material into the unconscious. The process of repression, then, is normally employed after the individual experiences a painful event or after experiencing specific feelings or thoughts that are viewed as deviant or in some way inconsistent with established normative standards of behavior, thereby evoking a powerful degree of anxiety that can no longer be successfully or even adequately tolerated by consciousness (Freud 1966). Once this threshold has been met, this material is either locked away by unconsciousness processes or in some way integrated into the conscious awareness of the ego.

It will be recalled that Freud's conceptualization of the unconscious emerges after the successful resolution of the Oedipal stage, which in turn makes possible the experience and awareness of guilt or shame. The possibility for such morally driven affective experience becomes predicated upon the internalization of culturally supported norms and values that clearly identify what will be viewed as appropriate and what will not; when experience contradicts these normative standards, the presence of guilt or shame results. For Freud, the experience of anxiety is only possible after a clear distinction between right and wrong has been established, which becomes possible only after the successful completion of the Oedipal stage of personality development. In the absence of this moral distinction, guilt is impossible, for the simple reason one must first

understand the prohibition transgressed before one can be sorry for their actions (Laplanche and Pontails 1973; Freud 1989a; Thwaites 2007). A similar process of repression is analogously employed in the practice of mass incarceration.

When viewed from this perspective, the penitentiary may be conceptualized as a type of societal unconscious that is used to contain a variety of unwanted social "thoughts" or "feelings" that cannot be incorporated into the social consciousness of a given community or culture. The penitentiary, then, becomes that location or depository within the body politic of a given society that removes those aspects of social existence that threaten the "psychological" well-being of those who are unable to tolerate the "social dissonance" these images evoke (Agamben 2009). The continuing debilitating influences of poverty, addiction and ethic bigotry or prejudice evoke a degree of "social anxiety" or dis-ease that is easier to "lock away" than directly confront. Sykes (1958) makes a similar observation in his important text, *The Society of Captives*:

> The prison wall, then, does more than help prevent escape; it also hides the prisoners from society. If the inmate population is shut in, the free community is shut out, and the vision of men held in custody is, in part, preventing from arising to prick the conscience of those who abide by the rules of society.
>
> (ibid.: 9)

Sykes' description of the function of the penitentiary nicely exemplifies the psychological utility employed by the Freudian unconscious. The penitentiary, much like the Freudian unconscious, serves as a barrier between the façade erected by the free community and the fragile "social ego" it seeks to protect. By locking away or repressing those aspects of social life that consciousness fails to address, the social ego is able to live free of guilt, certain in the legitimacy of its own "goodness." However, such guilt-free moments can be quickly disrupted by what Freud has identified as the return of the repressed – the return of that which was formerly unconscious. It is important to note that once this formerly unconscious material has been returned to consciousness, two general responses to this change of events will be required: either the unconscious material is reintegrated into consciousness awareness or another process of repression is required to return this unwanted material back "behind" the walls of the unconscious.

The transition from the War on Poverty to the War on Drugs may reflect a similar type of social psychological process that allows for the repression of certain aspects of social experience (Agamben 2009). Within this context, the War on Poverty comes to represent a variety of affective societal perceptions ranging from anger and contempt, on the one hand, to guilt and shame, on the other. The re-focusing of social priorities and interest, ushered in by the War on Drugs may then be viewed as that "moment" within the American public imagination that was no longer able or willing to address or tolerate the implications that the continuing presence of poverty evoked. With this shift of focus came a new strategic understanding of these related social concerns that now sought to confront the personal pathology located within the individual rather than the structural variables implicated in the perpetuation of poverty.

Whether this transition speaks to a type of social fatigue-related poverty and its concomitant concerns or simply to the (re)emergence of a less than beneficent attitude within the American psyche is of little importance to this discussion. What remains significant is the way in which the event of poverty becomes re-configured and psychologically transformed within the American body politic. Those explanations for poverty most closely related to the reality of failed economic or political structures are now sequestered to the confines of the American unconscious. What remains within the conscious prevue of American social awareness are those characteristics and qualities often attributed to the condition of poverty that now may be

exclusively situated within the personal psychology of the individual. Once the description or explanation of poverty is removed from any discussion related to the structural conditions that make poverty possible, a more exclusively punitive response to this set of circumstances is more easily justified. The evidence of such a transition can be witnessed in the initial stages of this new social campaign.

Then-President Nixon, in his declaration of war against increasing drug use in the United States, unveiled a two-pronged strategy, which entailed a much greater federal and state role in the prosecution of illegal drugs and an expansion of the availability of treatment options for those in need of such services (Polizzi in press). However, the main focus of this new war strategy seemed to be inclined towards constructing the issue of drug use and addiction as a criminal justice issue, rather than a mental health concern. Once the treatment prong of this new war strategy was removed or at the very least only marginally recognized, the subsequent practice of mass incarceration gained further "legitimacy."

Once the strategy for the criminalization of drug use and addiction was in place, the subsequent practice of increasing rates of incarceration became an almost forgone conclusion. What this state of exception reveals is the way in which the criminalization of drug use and the strategy of incarceration used to address this necessity, helped to solve the political dilemma concerning this group of citizens "who for some reason could not be integrated in the political system" (Agamben 2005: 2). The incarceration machine, which became central to this strategy, helped to pave the way for the legitimate removal of large numbers of citizens who were no longer deemed as necessary to the existing political system.

Though perhaps not comparable to the Camps in any literal way, the act of mass incarceration does unmistakably target a group of individuals who are not viewed as legitimate participants within the political order, and are often viewed as a threat to that system. Such an observation is reflected in the current number of incarcerated individuals, the creation of the rehabilitation machine, which seeks to fabricate these social "corpses" into a more marginal quasi-legal entity, the loss of voter rights upon the return to the community and the unchanged status of ex-offender (see Chapter 11 in this volume). Though a few of these stated conditions are being addressed, and their debilitating effect somewhat lessened, it does not appear unreasonable to conclude that a majority of these citizens have been placed in a near ongoing state of exception that evokes a zone of indifference that envelops those who have been so confined.

As bleak as such observations can be, it is important to note that the state of exception may also be used to connote an emerging space within this zone of indifference that seeks to reclaim that which necessity has taken away. Seen from this vantage point, the state of exception is transformed or inverted into a type of unclaimed and unarticulated potential that is always ready to inhabit these zones of indifference constructed by some type of juridico-political necessity. However, the one does not necessarily replace the other; rather, this one seeks to create within this existing zone of indifference an alternative necessity, a necessity that seeks to subvert the "rule," thereby evoking another type of exception: an exception of the exception perhaps. An example may be helpful to clarify this distinction.

The state of exception reflected by the War on Drugs was motivated by the necessity of the increasing use of illegal substances, which in turn, justified the practice of mass incarceration. As such, penitentiary life and the culture that it constructs include within it a set of strategies and practices that are employed to manage and objectify those under its control. These practices help to define what has been called by some the paradigm of the extreme situation or the limit situation (Agamben 1999). The extreme situation or limit situation has been defined by Agamben as follows:

> The function of this paradigm is analogous to the function ascribed by some jurists to the state of exception. Just as the state of exception allows for the foundation and definition of the normal legal order, so in light of the extreme situation – which is, at bottom, a kind of exception – it is possible to judge and decide on the normal situation.
>
> (ibid.: 48)

However, within this extreme situation, pockets of subversive possibility still remain reflecting an alternative necessity.

Once this paradigm of the extreme becomes the norm of daily life, the necessity created by this exception may usher in another set of possibilities for those confined, as they attempt to adapt to their new surroundings. Within this context, a variety of strategies or opportunities may become available that helps to lessen or blunt certain aspects of this extreme situation. Though these moments of liberation certainly do not have the power to displace these extremes in their totality, it does help to construct a space from which a glimpse of the human may still be witnessed (Polizzi and Brown 2012).

It is important to note that Agamben (1999) rejects such a possibility, given that it represents a type of unrealistic hope based upon a dishonest or inaccurate appraisal of one's current plight. However, it appears equally ineffective and perhaps even fatalistically naïve to ignore those moments that occur within these extreme situations that may help to provide the individual a modicum of temporary relief. Such opportunities reveal the presence of "inhabitable moments" that may help to hold off the totalizing influence of these zones of indifference.

It may be observed that this "exception of exception" becomes the very necessity that emerges from these extreme situations in the attempt to recall or reclaim some aspect of human existence that has been lost. The state of exception, and the extreme situation of the penitentiary which becomes its rule, create its own need through the practices it employs. From this vantage point, necessity becomes viewed as a type of remnant, something that has been left behind. A remnant is a concept that can apply not only to an entire people, but also to its individual members, and for this reason Agamben can claim that "the subject is a sort of remnant . . . It is something that is left over it represents a difference" (de la Durantaye 2009: 300).

Contemporary custodial practice

There are several defining features of modern corrections practice that are vestiges of the history of corrections. Each of these practices serves to counter one another and aid either in custody or treatment. First, the overriding concern is control of often-dangerous inmate populations. Second, is that the correctional staff work in relative isolation and autonomy. Third, staff turnover is frequent and often training is inadequate. This is true at all levels from "guards" to the highest-ranking professionals hired to provide treatment. One of the co-authors of this chapter has considerable first-hand experience working in correctional settings.

As Polizzi was completing his pre-doctoral internship in clinical psychology at a maximum-security penitentiary in the Pennsylvania (PA) Department of Corrections, one of his first assigned clients was an individual who was currently being held in the administrative custody unit of that facility. As was stipulated by Pennsylvania Department of Corrections (DOC) regulations, such individuals were required to be handcuffed, which were secured at the waist by a leather belt to prevent free movement of the hands as well as shackled at the feet also with the purpose of restricting free movement. This individual who was well known by the DOC due to prior incarcerations, reported that upon his return to the PA DOC system, he was immediately sent to the restricted housing unit and classified as a dangerous prisoner due to an alleged incident

that took place in the local county jail while he was awaiting transfer to the state system and the facility at which he would serve out his sentence. The following narrative describes the chain of events.

Case study 25.1

Our initial meeting went well and the individual was both cooperative and engaged in the process. "Jose" carefully described for me his family background, his initial introduction into the violent life of organized street gangs and his involvement in the sales of illegal narcotics, which ultimately resulted in his most recent incarceration. He also shared the brutal details of an encounter with a DOC officer while handcuffed that resulted in the permanent loss of nearly 80 percent of his hearing. He reported that while hand-cuffed and unable to properly defend himself, he was brutally beaten by his lone correctional officer, but was never allowed to press these allegations further, though the severity of his injuries were unquestioned and did indeed occur after he was taken into custody to serve his sentence.

During this interview, Jose also stated that he believed he was being illegally held in disciplinary custody for no reason and was never given the opportunity to be placed in general population, a requirement that is clearly stated in the DOC's operating procedure manual for incoming inmates. He reported that the DOC's actions were based on his prior incarceration and were therefore currently illegal because he had not violated any penitentiary regulation upon his arrival back to the system. When Polizzi inquired about this issue to his supervisor, he was told that his "understanding of the facts" was not true and that he was trying to manipulate "the new guy," essentially trying to get Polizzi to work on his behalf to perhaps change the unpleasant circumstances of his current situation.

When Polizzi returned the following week, he reported that he had looked into the situation and was told that his version of the story was incorrect and that he was being held in disciplinary custody due to a dangerous altercation, which had taken place in the local county jail. The official account that was recorded in the client's penitentiary chart stated that my client had gotten into a fight in the bathroom of his cellblock with another inmate. During this fight, Jose, Polizzi's client, was alleged to have cut the throat of the other participant in this altercation, causing serious physical injuries. Based on this encounter and the potentially life-threatening implications of his actions, he was deemed too dangerous for general population and was immediately placed in solitary confinement under disciplinary custody.

When the official version was stated to him, Jose responded by simply saying that the institution's account was untrue and they were simply using this as an excuse to keep him in the "hole." "Dave, you can call over to the jail and ask for John (not his real name) he'll tell you. I didn't cut anyone's throat. That's bullshit, call John, he'll tell you." Though Polizzi was somewhat skeptical (and in retrospect naïve) about his claims, he was hopeful to get to the bottom of this matter because Polizzi personally knew the individual he encouraged Polizzi to contact. As soon as Polizzi returned to his office (his cubicle actually, interns don't warrant an actual office), he contacted the county jail and spoke with the individual recommended by Jose.

Polizzi read the official account of the altercation over the phone and he responded by saying, "Dave that didn't happen. As a matter of fact, I know that it didn't happen because I was the individual who was in charge of that block and investigated the situation myself." Polizzi

terminated the conversation by asking this individual if he would speak to penitentiary officials on this matter if they called him, but they never did. Polizzi then spoke to a number of administrative officials employed by this institution up to the superintendent and spoke with anyone who would listen that the account detailed on the official misconduct that justified this individual to be placed in disciplinary custody was untrue and that this conclusion would be supported by the individual who was actually in charge of the investigation of this incident at the jail in question.

Polizzi continued to pursue this situation up to the final week of his involvement with that facility, but was unable to see a successful resolution to this problem. Though he was informed by the newly assigned psychotherapist that a plan was in place to begin the process by which Jose would be allowed to serve his sentence in general population, it never occurred. It is likely that he was required to serve the majority of his eight-year sentence in disciplinary custody. Not only was this misrepresentation of events the rationale for placing this individual in disciplinary custody, it also prevented any possibility for parole, given that individuals confined in restrictive housing cannot be released from disciplinary custody.

Clearly, the case above, while illustrative and compelling, cannot be applied uniformly across correctional systems. It does, however, document that inmates are always assumed to be dangerous by correctional staff, automatically placing them at an unfair disadvantage.

Second, both Polizzi and all the officers involved enjoyed autonomy and their version of events was accepted as "truth" while inmates were always considered to be "liars" or trying to manipulate the system to their advantage. However, it is also important to recognize that within the penitentiary culture, there also existed a hierarchy of autonomy among prison staff, which valued "truth claims" differently based on their position within that hierarchy. For example, correctional staff more often than not were seen as more loyal to the institutional sensibilities of penitentiary administrators and those within the uniformed ranks of correctional officers. Professional staff, such as those working as clinical psychologists or those providing psycho-therapeutic services, though more educated than the general staff, were often viewed as being too "inmate-friendly" or inmate-orientated for their version of the truth to be validated in the same way as it was for other correctional staff (Polizzi 2010; 2012). To advocate for one's client was often viewed as being potentially complicit with the "lie" trying to be perpetrated by the inmate and therefore was often viewed with some suspicion. Polizzi recalls a conversation with another prison employee who believed that liberal prison staff were the most likely to actually help an inmate escape from the institution. Another example of this institutional hierarchy was indirectly experienced by Polizzi concerning the various ways the issuing of misconduct sanctions were used within the penitentiary.

The use of misconducts – the "ticket" issued to inmates who are convicted of violating some type of institutional regulation – is a common tool employed by penitentiary systems to better control and police inmate compliance. When the inmate violates one of these regulations, he or she is issued a misconduct and is sent to disciplinary custody for a specified period of time as punishment for this infraction. In the Pennsylvania system, the inmate is required to serve the totality of his or her misconduct sentence in solitary confinement unless otherwise dictated by prison administrators. Once housed in disciplinary custody the individual is disqualified from any consideration for parole, given that an inmate can only be released from the penitentiary while housed in the general population; a fact that has not been lost by certain correctional officers.

When an inmate has been officially notified by the state of his release date, he or she receives what is known in the system as a green sheet. The green sheet, perhaps the most anticipated piece of paper in the inmate portfolio, is often closely guarded by the individual for fear that something or someone will attempt to disrupt this process. A common and well-known practice within this system is the fabrication of misconducts by correctional officers for the sole purpose of preventing an individual to be released on the date identified in the green sheet. Though the inmate may appeal such convictions, the sanction will stand unless another correctional officer is willing to speak on the inmate's behalf, resulting in the misconduct and any subsequent time in disciplinary custody to be overturned. If no officer is willing to intercede on the individual's behalf, the parole date will be rescinded, and the individual can accept to receive a "twelve month hit" – that is, a twelve-month extension for parole eligibility – before he can apply again for possible release.

The presence and strength of such prevailing attitudes within the institutional culture of the penitentiary helped to create a hierarchy of validity that not only validated the specific "truth claim" in question, but seemed to reinforce the degree of autonomy enjoyed by the individual making this claim. As the above example reflects, even when it had been proven that the version of events officially recorded in the inmate's file was inaccurate, nothing was changed. The hierarchal autonomy of the treating therapist was viewed as having less institutional import than was the desire to keep the inmate in question in disciplinary housing, even if such a strategy actually was in violation of existing institutional policy. Even though the therapist was able to verify the account provided by the inmate, nothing was resolved and the matter remained unchanged.

What the above description seems to reveal is not only the presence of an obvious imbalance of autonomy between the penitentiary staff and inmate, which should not be unexpected; but an obvious imbalance within the hierarchy of institutional staff concerning the degree of autonomy enjoyed by various employees within the structure of the penitentiary. Perhaps stated more simply, the more willing prison staff were to challenge certain aspects of inmate treatment, the more likely they would be viewed with some degree of suspicion by the institutional culture of the facility (Polizzi 2009).

Third, even though he was a highly educated and experienced forensic psychotherapist, Polizzi was uncertain of the degree of clinical autonomy he would be allowed as a correctional psychological specialist intern. He recalls a conversation with another staff psychotherapist during his first few weeks of his pre-doctoral clinical internship with the Department of Corrections; "Dave, the difference between you and me is that I am an employee of the DOC who happens to be a psychotherapist and you are a psychotherapist who happens to be an employee of the DOC" (Polizzi 2010).

The notion of hierarchical autonomy discussed above is clearly reflected in the observation shared by this penitentiary employee. To be one of us is to be able to agree with us on what is necessary and how the "truth" helps to legitimate that necessity. Though Polizzi had the autonomy of an institutional employee, he was still unable to exercise that autonomy in a way that was able to resolve the situation. Such a difference of authoritative autonomy is clearly reflected in the second example concerning the fabrication of misconducts. In that example, the misconduct would be immediately removed, if another officer spoke on the inmate's behalf. Polizzi, for example, was able to keep the issue of the exaggerated misconduct an ongoing administrative concern, yet it was still unresolved as he prepared to leave that internship site for another within the system six months later.

Polizzi experienced another illustrative situation at the penitentiary where he finished his clinical internship and was subsequently hired as a psychotherapist. As is probably known, disciplinary custody – also euphemistically called the "hole" – is the place where disruptive or potentially disruptive individuals are housed to allow prison authorities to better manage their

institution. One of his clients, one of the more notorious inmates in the system, had been housed in disciplinary custody for some time based on the alleged belief that he forcibly raped two individuals, while in the general population, a charge that was not that unbelievable, but still was one that was never formally charged and adjudicated by the penitentiary authorities.

At the time that Polizzi took over his case, he had been in administrative custody for approximately ten years and had received "psychotherapy" at his cell door, but had not actually been removed from his cell to meet with a psychotherapist one-on-one for over 18 months. Much like the individual described above, he was removed from his cell fully shackled to insure the security staff and was allowed to participate in psychotherapy, as long as the session could be constantly observed by block officers. Here are Polizzi's recorded observations.

Case study 25.2

Initially, as one would imagine, "Frank" was somewhat reluctant to leave his cell and would often talk to me from the shadows of his darkened housing unit. Once we established some rapport, I met with him once a week until I left that position some three years later. Though we talked about a variety of concerns: the circumstances of Frank's official charge of rape that resulted in his incarceration, the additional criminal charges he received while serving his sentence and his continued administrative custody status due to his alleged sexual assaults on other inmates, he remained almost unaware of his aggressive stance or the way in which his comportment was read by others around him; a fact that was likely a contributing factor that resulted in his initial arrest. He actually incurred more prison time for infractions taking place while incarcerated than he did for his initial sentence of rape.

Frank's long confinement within disciplinary custody had made him very short-tempered and far more potentially violent than he had been prior to his incarceration. This is not to say that this client was a well-composed and emotionally stable person prior to his placement in disciplinary custody, he clearly was not. His years of substance abuse and violent acting out would make such a claim absurd. However, his subsequent decade-long incarceration in solitary confinement had certainly exacerbated his condition, a condition that would most likely be the one that he would ultimately take to the street upon his release from the penitentiary.

It was difficult to make much headway with him, given that the conditions of his confinement really never changed and he knew it was highly unlikely that he would be allowed to return to the general population. Toward the end of my employment with the PA DOC, this client had the opportunity of early release given that the judge had thrown out one of his sentences that could potentially reduce his sentence. He did have regular contact with his family, but it was difficult to imagine how he would be able to overcome the degree of harm he experienced during his incarceration, some of which was due to his own self-destructive actions, but also due to the way in which he was simply placed in administrative custody without any recourse or legitimate plan that could better his situation.

What seemed to be most therapeutic was simply having him taken from his cell; however, any true lasting therapeutic gains seemed constantly thwarted by the daily realities of his situation. Though I have no idea what ultimately became of this individual, it is likely that by the time of this writing he has been released, assuming of course that he did not receive any additional prison time. "I can't think of any individual less prepared for release than this fellow who simply learned how to be more violent and unforgiving during his lengthy incarceration."

This second illustrative narrative shows the detrimental effects of long-term incarceration in several areas. According to Scheff (1966), primary deviance is considered transitory and unstable, not embedded in lifestyle or character. Yet, in the late 1960s, Robert Merton proposed his concept of the "self-fulfilling prophecy," in which he explains that in the beginning there is "a *false* definition of the situation evoking a new behavior which makes the originally false conception come *true*" (Merton 1968). Frank Tannenbaum was likely the earliest scholar to propose that state intervention was in fact criminogenic, in that it "dramatizes evil" (Tannenbaum 1938). Linking the ideas of both Tannenbaum and Merton, along with Edwin Lemert's insights between the two types of deviance, led to the emergence of a new theory as an explanation for criminal behavior, *labeling theory*. Labeling theory focuses on the relationship between self-identity and behavior. Borrowing Merton's concept of the "self-fulfilling prophecy," labeling theory asserts that being labeled as a "deviant" may in fact lead an individual to engage in deviant behaviors.

In conclusion, we echo the sentiment that "Historical and contemporary evidence suggests rather that imprisonment per se is both an irrelevant and a damaging response to (women's) crime" (Dobash *et al.* 1986: 214). We next move beyond this historical analysis and present one theoretical device that may serve to help rectify some of the contemporary prison dilemmas and pains of imprisonment.

Epidemiological criminology

Epidemiological criminology or "EpiCrim" is a relatively new attempt intended to improve the social and individual health of communities and individuals (both employees and unwilling participants) who are often negatively impacted by Criminal Justice practice and policy. Epidemiological criminology is one means of providing a linking framework since it was specifically created to serve as a bridging mechanism and synthesizing framework between public health and criminal justice. Lanier noted:

> It is ironic that the core of both criminal justice and public health – the correlates to crime and to health disparities – are identical (e.g., poverty, minority status, lack of education, family history, neighbourhood characteristics, geography, and other psycho–social indicators, etc.) . . . the contemporary practice is that crime causation and health behaviours are only discussed from a particular ideological perspective.
>
> (2009: 64)

The dilemmas faced by female inmates with HIV/AIDS provide an excellent illustration of the utility of EpiCrim and how the two academic fields might mutually benefit from a uniting focus.

EpiCrim is a relatively new idea even though Emile Durkheim first identified crime as being a "health" issue and used crime as an indicator of the health of an overall society in 1897 (Durkheim [1951] 1966). Donald Cressey first linked the two domains of epidemiology and criminology in 1960, and actually used the term though in a different context. Akers and Lanier then outlined the need for and coined the phrase "epidemiological criminology" in 2009. The term was operationally defined and applications listed later the same year (Lanier 2009). According to Lanier,

> Epidemiological Criminology is the explicit merging of epidemiological and criminal justice theory, methods and practice. Consequently, it draws from both criminology and public

health for its epistemological foundation. As such, EpiCrim involves the study of anything that affects the health of a society, be it: crime, flu epidemics, global warming, human trafficking, substance abuse, terrorism or HIV/AIDS.

(2010: 72)

Historically health care workers and correctional staff have been at odds and often served competing agendas (e.g., custody vs. care). For example, HIV/AIDS has caused correctional staff and health care workers to consider, and appreciate, the value of the other. The seriousness of HIV/AIDS at many levels – the fiscal cost to government, the social cost to society and the individual loss of life and health for victims as well as the impact this has on family members and friends of those with HIV/AIDS – necessitate a reconceptualization of how we address health care issues within criminal justice and correctional systems. The unique problems facing unhealthy inmates only strengthen the argument for this synthesis. There are several reasons this is important.

First, there is the fact that correctional systems have Machiavellian means of defining and using health (Lanier 2010). Polizzi asked if

the health concerns of incarcerated individuals is fundamentally predicated upon the way in which these individuals find themselves constructed by the meaning-generating process of the criminal justice system. If we construct this group of individuals as dangerous but damaged, our strategies of intervention can become overly focused on the assessment of risk and less on the humanity of the individual.

(Lanier 2010: 78)

This observation provides further affirmation of the conflicting demands of treatment and custody. Incarcerated populations, compared to "free" citizens, have their mental and physical health even more negatively impacted by the terms and conditions of their incarceration.

The first narrative illustration above showed that the common correctional attitude that "all inmates are dangerous" has consequences. Clearly the safety and well-being of correctional staff are what motivates this attitude, if not actual policy. It is not an unreasonable practice due to the often violent nature of captive people. However, EpiCrim would serve to mitigate the unintended ill effects if officer safety were linked to humane and civilized care. If this could be achieved, correctional facilities may actually experience less violence. For example, rather than isolate and segregate both Jose and Frank, the correctional systems and society would have been better served by a humane and health-based (psychological) response to their situations. Isolation serves to punish and traumatize (and perhaps immediately protect staff and other inmates) but in the long term does more harm than good.

Conclusion

Institutions, be they prisons or jails, are harsh environments. Certain concerns override all others by necessity and mandate correctional policy and practice that strive to achieve a "safe" environment for both custodial staff and inmates. This is perhaps the single most important consideration, and correctional staff go to great lengths to achieve a safe working environment. One detrimental consequence is that some practices, while achieving safety in the short term, may act as detriments to individual inmate health, and upon their social health, on their eventual release. Isolation for extended periods provides one graphic example. This chapter provided case studies that illustrated some of these practices and ill effects. We suggest a critical examination

of this practice from a health perspective as well as a custodial one. Isolation, while often useful in the short term, is not a long-term panacea.

Institutional history and correctional officer attitudes perpetuate the idea that all inmates are dangerous. Again, this mindset is cognizant of the inherent dangers posed by many inmates. It is, in practice, probably a safe assumption to make under the current practice. However it is based on an us-versus-them war mentality that has permeated American politics for several decades, as we argued above with the War on Drugs, the War on Poverty, the War on Terror, etc. Decades of practice and attitudes – most of which are based on reality and have good intentions – require reexamination as more and more people worldwide find themselves under correctional supervision. We suggest a new paradigm based on health and healing, and not founded on war metaphors, since words do have meaning and consequence.

It is obviously easy for scholars to make grandiose pronouncements about treating inmates humanely from the relative safety of their offices (and ivory towers). It is quite another thing to engage often hostile, physically fit, offenders in an environment where status is measured by brutality, and where many "lifers" have little to lose. Nonetheless we still venture to suggest that more humane treatment is ultimately in the best interest of the inmates, the custodial staff, the treatment staff and society. We presented two case studies where treatment by custodial staff resulted in detrimental mental and physical health. While there is no panacea or easy solution, one policy that would provide balance would be to mandate that any custodial change for an inmate (e.g., placement in isolation, change in status or conditions of confinement) must be made by a committee that is equally comprised of treatment and custodial staff.

Another long-range policy objective might be an eventual blurring of the lines of demarcation between custodial and treatment staff. This would require cross-training, higher educational degrees for many and would therefore be expensive. However other similar occupations have undergone requirements for better training, more professionalization and advanced degrees. Nursing is one obvious example. This change has resulted in better patient care and higher salaries and better working conditions. Firefighters and law enforcement are in the midst of a similar "upgrading."

Finally, as we stated earlier, a war mentality should be replaced. If the Civil Rights movement of the 1960s had relied on violent protest instead of non-violent means, it is unlikely that the fundamental changes our society has experienced would have occurred. Ironically it is the government who has promoted the war metaphors.

Epidemiological criminology might provide a starting point for such a paradigm shift. EpiCrim stresses a reconsideration of current and previous correctional practice. As an example, health staff should be afforded the same level of institutional respect that is afforded custodial staff. One impediment to this has been the longevity of correctional staff (guards) compared to the rapid turnover of treatment staff who are often better educated and have more opportunities for alternative employment. Disparate pay is another factor. Polizzi provides a prime illustration since he is now a university professor and he documents the transformation in Polizzi (2012). The EpiCrim solution would be the retention of health experts through incentive programs, educational opportunities and long-term research grants to be conducted within correctional settings.

These few examples might serve to foster discussion and debate. Space precludes us making longer and greater suggestions; we leave that to the reader.

Discussion questions

1   Define and describe epidemiological criminology.
2   Briefly describe the history and evolution of corrections.

3   In your opinion, what has been the greatest era in the field of corrections?
4   How might EpiCrim help both the field of criminal justice and public health?
5   What are the primary conflicts facing corrections? How can these be resolved?
6   In each of the case studies presented, what would have been a better solution?

Websites

Correcting corrections worldwide: http://www.washdiplomat.com/index.php?option=com_content&view=article&id=8192:correcting-corrections-worldwide-best-practices-reforming-prisons&catid=1483:february-2012&Itemid=428.

Epidemiological criminology (EpiCrim): http://www2.cohpa.ucf.edu/crim.jus/doc/MarkLanierEpicrim revised.pdf.

Epidemiological criminology: http://www.freewebs.com/vcec/.

Information on corrections today: http://www.corrections.com/.

Rehabilitate or punish?: http://www.apa.org/monitor/julaug03/rehab.aspx.

Why epidemiological criminology matters to health professionals: http://www.ncchc.org/pubs/CC/epicrim.html/

References

Agamben, G. (1999) *Remnants of Auschwitz: The Witness and the Archive*, New York: Zone Books.

Agamben, G. (2005) *State of Exception*, trans. K. Attell, Chicago: University of Chicago Press.

Agamben, G. (2009) *The Signature of All Things*, trans. L. D'Isanto and K. Attell, New York: Zone Books.

Akers, T. and Lanier, M. (2009) "Epidemiological Criminology: Coming Full Circle," *American Journal of Public Health*, 99(3): 397–402.

Boonin, D. (2008) *The Problem of Punishment*, New York: Cambridge University Press.

Cunneen, C. (2011) "Indigeneity, Sovereignty, and the Law: Challenging the Processes of Criminalization," *The South Atlantic Quarterly*, 110(2): 309–327.

De la Durantaye, L. (2009) *Giorgio Agamben: A Critical Introduction*, Stanford, CA: Stanford University Press.

Dobash, R. P., Dobash, R. E. and Gutteridge, S. (1986) *The Imprisonment of Women*, New York: Basil Blackwell.

Durkheim, E. ([1951] 1966) *Suicide*, New York: Free Press.

Epstein, E. J. and Hing-Yan Wong, S. (1996) "The Concept of 'Dangerousness' in the People's Republic of China and Its Impact on the Treatment of Prisoners," *British Journal of Criminology*, 36(4): 472–497.

Freud, S. (1938) *Basic Writings of Sigmund Freud*, ed. and trans. A.A. Brill, New York: The Modern Library.

Freud, S. (1966) "Resistance and Repression," in J. Strachey (ed. and trans.) *Introductory Lectures on Psychoanalysis*, New York: W.W. Norton & Company, pp. 286–302.

Freud, S. (1989a) "An Autobiographical Study," in P. Gay (ed.) *The Freud Reader*, New York: W.W. Norton & Company, pp. 3–41.

Freud, S. (1989b) "Repression," in P. Gay (ed.), *The Freud Reader*, New York: W.W. Norton & Company, pp. 568–572.

Garcia, M. J. (2009) "Renditions: Constraints Imposed by Laws on Torture (7-5700)," Washington, DC. Available at: the Congressional Research Service, www.crs.gov.

Garland, D. (1985) *Punishment and Welfare: A History of Penal Strategies*, Aldershot: Ashgate.

Lanier, M. M. (2009) "Epidemiological Criminology: A Critical Cross-Cultural Analysis of HIV/AIDS," *Acta Criminologica*, 22(2): 60–73.

Lanier, M. M. (2010) "Epidemiological Criminology (Epicrim): Definition and Application," *Journal of Philosophical and Theoretical Criminology*, 2(1): 63–103.

Lanier, M. M. and Henry, S. (2010) *Essential Criminology*, 3rd edn, Boulder, CO: Westview Press.

Laplanche, J. and Pontails, J-B. (1973) *The Language of Psycho-Analysis*, New York: W. W. Norton & Company.

Martel, J., Brassard, R. and Jaccoud, M. (2011) "When Two Worlds Collide: Aboriginal Risk Management in Canadian Corrections," *British Journal of Criminology*, 51: 235–255.

Merton, R. K. (1968) *Social Theory and Social Structure*, New York: Free Press.

Polizzi, D. (2009) "Developing Therapeutic Trust with Court-Ordered Clients," in D. Polizzi and M. Braswell (eds.) *Transforming Corrections: Humanistic Approaches to Corrections and Offender Treatment*, Durham, NC: Carolina Academic Press, pp. 213–229.

Polizzi, D. (2010) "Doing Therapeutic in Incarcerated Settings," in D. Polizzi and M. Draper (eds.) *Surviving Your Clinical Placement: Reflections, Suggestions and Unsolicited Advice*, Durham, NC: Carolina Academic Press, pp. 13–29.

Polizzi, D. (2012) "Re-Discovering Possibility: Humanistic Psychology and Offender Treatment," in L. M. Johnson (ed.) *Experiencing Corrections: From Practitioner to Professor*, Thousand Oaks, CA: Sage, pp. 73–87.

Polizzi, D. (in press) "The Phenomenology of Crime and Addiction," in J. Helfgott (ed.), *Criminal Psychology*, New York: ABC-CLIO Praeger.

Polizzi, D. and Brown, M. (2012) "In Search of the Ethical in Criminal Justice Practice," *Journal of Theoretical and Philosophical Criminology*, 4(2): 65–90.

Scheff, T. J. (1966) *Being Mentally Ill*, Chicago: Aldine.

Schmalleger, F. and Smykla, J.O. (2011) *Corrections in the 21st Century*, New York: McGraw-Hill.

Super, G. (2011) "'Like Some Rough Beast Slouching Towards Bethlehem to Be Born': A Historical Perspective on the Institution of the Prisons in South Africa, 1976–2004," *British Journal of Criminology*, 51: 201–221.

Sykes, G. (1958) *The Society of Captives: A Study of a Maximum Security Prison*, Princeton, NJ: Princeton University Press.

Tannenbaum, F. (1938) *Crime and the Community*, New York: Columbia University Press.

Thwaites, T. (2007) *Reading Freud: Psychoanalysis as Cultural Theory*, London: Sage.

Ward, T. (2010) "Is Offender Rehabilitation a Form of Punishment?," *British Journal of Forensic Practice*, 12: 4–13.

Zimring, F. (2010) "The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects," *The Journal of Criminal Law & Criminology*, 100(3): 1225–1245.

Part XI

The political economy of crime and justice

The trade in colonialism, nationalism, and globalism

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26

Crimmigration

Criminal justice, refugee protection and the securitisation of migration

Alison Gerard and Sharon Pickering

'Crimmigration' (Stumpf 2006) is a 'determining context' (Scraton 2007) of vulnerability for refugees and migrants. Analysing migration frameworks in the United States context, Stumpf coined the phrase 'crimmigration' to capture the rapid conflation of immigration and criminal justice practice. This phenomenon is not restricted to the USA; internationally we are witnessing increased reliance on criminal justice imagery and practices, and their application to certain groups of classed, racialised and gendered refugees and migrants. This construction of refugees and migrants as 'criminal' makes the application of criminal justice responses to irregular migration seem appropriate (Mountz 2010). It atomises the structural issues that affect migration trends, such as globalisation, violent conflict and the global economy, and reduces irregular migration to the single rational decision of an individual to cross a border extra-legally. The lived experience of crimmigration has been the focus of our empirical research in the European Union (EU), Australia and the USA, and informs the analysis of global practices of crimmigration and their impact presented in this chapter.

This chapter charts the trajectory of crimmigration practices in five key sections. The first section provides an overview of the global phenomenon of irregular migration, illustrating the challenges of defining and statistically accounting for irregular migration (Andreas and Greenhill 2010), and exploring Koser's (2010) framework for understanding irregular migration trends at the micro and macro levels.

The second section surveys the three areas of scholarship most relevant to an understanding of refugee and migrant vulnerability: the securitisation of migration, refugee protection, and criminal justice practice. Borders, primarily those of the Global North (Richmond 1994), have undergone significant transformations, with securitisation now the dominant paradigm (Bigo 2001). The 'securitisation of migration' (Huysmans 2000; 2006) is reinvigorating sovereign power by excluding certain groups of irregular migrants at the border. Refugees are frequently placed on the same security continuum alongside not only illegal migrants but also drug traffickers and terrorists. The securitisation of migration conflicts with the central tenets of refugee protection to produce three main tensions explored in the second section. First, the requirement to cross an international border to obtain refugee protection conflicts with the expanding regimes of non-entrée enacted by governments to prevent refugees from arriving and applying for asylum

– exemplifying an application of the principle of risk reduction. Risk reduction is exemplified by policies to 'police at a distance' (Bigo and Guild 2005), also referred to as 'remote control' policing (Guiraudon and Lahav 2000). Second, deterrence is exercised through strategies to reduce access to the rights and entitlements prescribed under the international legal refugee protection framework (Bloch and Chimienti 2011) and through the provision of diluted forms of refugee protection. Additionally, criminalising the means of travel through people-smuggling legislation typifies deterrence, as it compounds the difficulties of reaching a country in which to apply for asylum. Third, the requirement of international refugee law regarding non-penalisation for illegal entry is compromised by state provisions prescribing administrative detention – punishment – upon arrival (Hailbronner 2007). These and other practices previously thought of as 'exceptional' are becoming normalised and commonplace aspects of criminal justice practice targeted at citizens and non-citizens alike (Zedner 2010: 394).

Scholarship investigating the impact of crimmigration practices on irregular migrants is captured in the third section. This section links the impact of increased border control and securitisation to the corresponding increase in the risk of harm to irregular migrants, including fatalities incurred by crossing borders (Carling 2007; Michalowski 2007; Grant 2011; Weber and Pickering 2011). The third section will consider two main 'functionally mobile' border sites (Weber 2006): physical border crossings and administrative detention.

The next section will suggest possible future research directions. The need for more empirical research to document and analyse the lived experience of crimmigration in varying contexts, and on the expanding foreign-born prison population form important areas of inquiry. Finally, the fifth section considers the key issues warranting international policy attention: in particular, the increased use of dispersal and deportation, and the incarceration of young people. It argues that the protracted and piecemeal nature of refugee protection is harmful and a future of outsourcing refugee protection to smaller, less resource-rich countries is no future at all for some of the most vulnerable people across the globe.

Before commencing, a note on the concept of 'vulnerability'. Asylum seekers and refugees are immediately recognisable as a potentially vulnerable population. Many have experienced torture and trauma, whether psychological, physical or emotional (Mackenzie et al. 2007). However, in the context of writing a chapter on vulnerability, it is important that we acknowledge both vulnerability and agency when analysing the experiences of refugees and irregular migrants (McDowell and Wonders 2009; Khosravi 2010; Pickering 2011; Vecchio 2012). Anderson and Ruhs (2010) underscore the importance of structural analysis – by considering labour market regulation and segmentation, for example – in conjunction with a focus on individual agency in research on irregular migration. They cogently argue that unless one addresses the resistance and coping mechanisms adopted by subjects, one will be over-simplifying the perception of irregular migrants as either 'victims' of exploitation or 'villains' who break the law (ibid.: 177). With this in focus, we begin to explore the definitional and statistical limitations in scholarship on irregular migration, and understand the frameworks put forward by scholars to understand irregular migration trends.

Crimmigration and global mobility

Definitions and statistics on irregular migration are hotly contested; a reflection of the intense political debate the subject arouses (Anderson and Ruhs 2010). The phenomenon of migration is not new, but the recent acceleration in global mobility and the ascription of certain groups of migrants into conventional binary categorisations – legal and illegal, regular and irregular – have created new paradigms of law enforcement. Migration is as 'old as history itself' (Richmond

1994: 32), as is its regulation (Torpey 2001; Weber and Bowling 2008). Mobility has increased as a result of a number of factors which must be accounted for, and on which there is no single agreed theory (Massey et al. 2005). Some discourses use the terminology of 'mixed flows' of irregular migrants (Koser 2010: 182) to describe people who cross borders in search of work and those fleeing persecution using similar migration routes and methods. While a 'global and visible phenomenon' (Bloch and Chimienti 2011: 1), irregular migration is conceptually difficult to define and definitions are loaded. Falling foul of the 'legal' migration categories, however, results in labelling that connotes migrant criminality. The conflation of crime and migration is creating a 'specific dynamic of social exclusion', transforming traditional social boundaries and producing an 'illegalized global underclass' (Aas 2011: 377).

In the study of people who cross borders extra-legally, defining 'the migrant' is a process of exclusion or inclusion enacted by states, often involving racial 'othering' (Kofman et al. 2000: 8; Mountz 2010). As Kofman et al. describe: 'the major criteria used to label migrants becomes that of the visible marker of "race"' (2000: 8). While irregular migration to Europe was previously dominated by people from Eastern Europe in a context in which émigrés were politically valuable, most irregular migrants into Europe now come from further parts of the globe (Bloch and Chimienti 2011). Scholars point to the ethnic background of the majority of those viewed as 'irregular' and 'illegal' within the EU to argue that a 'colour bar' (Balibar 2002) is being enforced at the European border. Similarly, Australia's treatment of asylum seekers has historical antecedents in its 'White Australia' policy and reflects entrenched cultural and political xenophobic othering (Grewcock 2009). Bosworth and Kaufman (2011: 441) write how crimmigration in the US context creates 'new sites for social control', with foreign nationals as the new enemy and non-white communities targeted by crimmigration practices.

Statistically accounting for irregular migration is another challenge that hinders understanding of the complexity of the issue (Anderson and Ruhs 2010). Those under examination are by definition outside accepted legal frameworks, and are therefore less likely to be detected or to want to be detected (Koser 2006). People may move in and out of legal or illegal status (Grant 2006). Only recently has there been some improvement in the collection of statistics disaggregated by gender (Pickering 2011). Close analysis of irregular migration statistics is important as it has been argued the selection and use of numbers are the 'stuff of politics' (Andreas and Greenhill 2010: 2). Indeed, there is a tendency in some quarters to use statistics to alarm rather than inform (Koser 2010). An additional consequence of the unreliability of data is that irregular migrants are vulnerable to assumptions that remain uncontested. For example, despite the fact that irregular migrants are a heterogeneous group, they are commonly perceived as homogenous (Grant 2006).

Understanding irregular migration trends

Koser (2010) proposes several frameworks for explicating irregular migration trends at both the macro and micro levels. The first is based on an understanding of the influence of structural issues within both receiving and sending countries (Castles and Miller 2003; Koser 2007). In this regard, numerous scholars have highlighted the economic impact of the labour of irregular migrants (Melossi 2003; Wonders 2006). As Zedner argues, 'migration has been no less vital to rich economies whose labour needs have been met by the influx of both the highly educated and the unskilled willing to take up jobs that native workers decline to fill' (2010: 380). Additionally, globalisation has enhanced networks and led to a greater awareness of the opportunities existing in other countries. It has heightened levels of mobility, but also increased 'personal contacts, complexity of familiar and residential arrangements and forms of belonging

to diverse socio-cultural and political communities' (Yuval-Davis et al. 2005: 517). Technology has played a role in making it easier for people to travel greater distances (Koser 2007), and indeed to return home, leading to an increase in temporary and circulatory migration.

The second framework sees the increase in irregular migration as an 'unintended consequence of restrictive asylum and immigration policies' (see Castles 2004, cited in Koser 2010: 188). While not yet establishing a 'causal link', this body of research has noted the growth in people-smuggling agencies devoted to circumventing restrictions on immigration (Michalowski 2007; Pickering and Weber 2006). Problematically, it has become almost impossible to migrate legally, especially for work (Dauvergne 2008). These processes result in increased exposure to risk and harm, as we will later explore.

The final framework, closely related to the other two, examines the expanding migration industry (Koser 2010: 188). Koser extends Salt and Stein's (1997: 467) conceptualisation of migration as a business with 'institutional networks', a complex profit and loss system and a clear pathway to financial gain. Transversality is centred on the business model of migration (Pickering 2004). Adopting this angle, criminologists have analysed how the construction of people smuggling as an issue of national security by law enforcement agencies has fuelled the migration industry and bolstered sovereign powers extraterritorially. Thus, restrictions on immigration and asylum have contributed to the emergence of an industry dedicated to circumventing those very restrictions. The development of this migration industry has created a significant profit motive and hence a great deal of momentum, increasing demand and the number of agents who actively recruit individuals. In addressing the micro- and macro-level determinants of irregular migration, Koser's framework provides a background to the securitisation of migration and the criminal justice practices deployed to respond to irregular migration.

The securitisation of migration, refugee protection and criminal justice practices of risk reduction, deterrence and punishment

This section builds the scaffolding on which the parameters of the international debate on crimmigration can best be understood. Scholarship on the global reach of the securitisation of migration will be examined before turning to the tensions between this framework and the central tenets of the international legal framework on refugee protection. This section will conclude with an analysis of the criminal justice practices that have come to dominate government policy on irregular migration globally: risk reduction, deterrence and punishment.

The securitisation of migration

Globalisation has created new dilemmas for sovereign states (Sassen 1996). While it lacks a settled definition, globalisation can be broadly defined as increased 'international connectedness' (Hirst and Thompson 2002). This connectedness potentially poses a challenge to the traditional notion of sovereignty that underpins our modern state system (Giddens 1985). Wachspress defines sovereignty as constituting a 'boundary or framing device that is both physical – the sovereign is considered responsible for the spatial integrity of the state – and legal – the reach of sovereignty is co-extensive with the reach of its laws, and that structures a global order' (2009: 317). Critically, this physical and legal power entails the ability to include and exclude people, subject to minimal international legal obligations. Refugee protection constitutes one such obligation (Juss 2004).

For the EU, migration and cultural identity constitute the 'new security agenda' (Waever 1993). Huysmans (2006: 64) has identified three themes that he argues comprise this

'multidimensional process' of securitising migration in the context of an integrating EU: 'internal security, cultural identity and welfare'. Internal security entails the institutionalisation of police and customs cooperation, its expansion within and across Member States, and its current operation as a semi-autonomous structure that, in conjunction with governments, determines asylum and refugee policies. Cultural identity in this context refers to discourses that assume that homogeneity already exists within a nation-state, and thus present migration as culturally a 'challenge to political and social integration' (Huysmans 2006: 73). Cultural identity is also reinforced through migration policies that have cultural consequences, such as legal preferences for skilled over unskilled labour which attract applicants from certain countries who possess tertiary or other recognisable qualifications. Finally, increased competition for access to welfare has initiated a political struggle which has turned asylum seekers and refugees into scapegoats. These practices are evident not only within the EU but also internationally.

Characterising the mobility of certain groups as illegal has historical resonance. Melossi (2003: 371) argues that subjecting migrants to criminalisation and penalisation is one of the most 'ancient and recurring features of the modern world'. Various scholars have traced the history of merging criminal and immigration law practices in the USA (Hamlin 2012; Stumpf 2006), Canada (Mountz 2010), the EU (Bigo 2001) and Australia (Finnane 2009). To illustrate citing the EU context, European integration has fuelled the securitisation of migration through the elevation of 'illegal migration' – phraseology that has come to include asylum seekers – to a security risk purportedly warranting regional-level policing and cooperation (Grewcock and Green 2002; Huysmans 2006). Strategies aimed at reducing asylum applications and policing irregular migration became the priority of intergovernmental policing agencies from the 1970s. The economic recession of that decade brought an end to labour agreements between Western Europe and its sending countries which had benefited from rebuilding projects in Europe after World War II (Huysmans 2006). Until that time, two ways to legally migrate to Western Europe had existed: labour migration and asylum. Some say there were fewer refugees reaching Europe during this period (Mole 2005), although statistics would not recognise the extent of 'crypto refugees' – those who could apply for asylum but used other channels such as labour migration (see McMaster 2002). Those who did migrate as labourers were supporting the high demand for labour, or what Hathaway and Neve refer to as the 'interest convergence' (1997: 119). At the same time that asylum applications were rising, the accessibility of air travel improved and conflict intensified in countries such as Argentina, Chile, Uganda and Vietnam, bringing more refugees to Europe (Joly 1996).

Emerging criminological work on the border is mapping reassertions of sovereignty through the disaggregation of border functions to 'de-localise the border' (Salter 2004: 10; Pickering and Weber 2006; Weber 2006; Green 2006). The securitisation of migration has both explicitly and implicitly made borders more selective and targeted in their policing of irregular migrants. Static definitions of borders as lines on a map are thus being replaced by reconfigured definitions of the border as disaggregated (Bigo 2005). Weber (2006) categorises borders as functionally mobile, spatially mobile, temporally mobile, and personalised. Of note here, 'functionally mobile borders' are borders that are not only enforced at express geographic locations but which also 'transcend the constraints of physical borders and operate both outside and within them' (ibid.: 24). Functionally mobile borders provide the conceptual foundation for analysis of criminal justice practices beyond the physical borders of the Global North.

Various 'technologies of control' have been introduced under the guidance of security professionals, to boost police surveillance processes (Pickering and Weber 2006; Bigo 2005; Aas 2011). This has involved policing the border with military apparatus (Carpenter 2006; Michalowski 2007). Grewcock (2009) has argued that Australia's People Smuggling Taskforce, established following the Tampa crisis of 2001 during which a commercial vessel rescued 438

asylum seekers at sea and was refused access to dock in Australia, was run in a manner akin to a war cabinet. Moreover, satellite technology is now used to detect movement off the coast of Spain and the Central Mediterranean, and through North Africa (Aas 2011; Wolff 2008). Database information systems have mushroomed across Europe and fuelled interagency policing cooperation. Aas (2011) provides a comprehensive inventory of all the surveillance processes introduced by the European community, including SIS, EURODAC and EUROSUR. The latter, EUROSUR, or the European Border Surveillance System, is not yet operational but is intended to create a technical framework for external border surveillance in the Southern Mediterranean and eastern EU borders, and lead to greater information sharing between Member States (ibid.).

The categorisation of citizens and non-citizens increases the vulnerability of refugees and migrants. Most recently, Aas (ibid.) has examined irregular migration through the lens of surveillance and sovereignty, challenging the assumption of the universality of citizenship. This literature, which is critical of citizenship, interprets immigration controls through the spectre of the binary between citizen and non-citizen, or as Hyndman puts it, 'supracitizens' and 'subcitizens' – categories that are linked but have 'unequal identities' (Hyndman 2000: 111). The scholarship on 'denizens' – those with partial legal rights short of full citizenship – has re-emerged in the context of EU integration as a result of the attribution of quasi-legal status through subsidiary and other complementary forms of protection that fall short of refugee status.

Notably, the terrorist attacks in the USA, London and Madrid in the 2000s have accelerated the progress of the securitisation of migration (Bigo 2005; Huysmans 2006; Bosworth and Guild 2008). Kapur (2005) argues that the events of September 11, 2001, and the subsequent War on Terror have created a 'heightened anxiety about the Other' as a threat to national security. Moreover, an inability to define the target in this war has led to the targeting of particular groups and communities. Of concern to criminologists is the increased use of criminal justice (namely law and order) rhetoric and practices in the securitisation of migration. Crime 'does not exist' but is 'created' by labelling certain acts as criminal (Christie 1998: 121, cited in Scraton 2007: 231). Those who arrive without documentation are labelled 'illegal' and synonymous with the criminal justice imagery of 'dangerous, undeserving and criminal' (Bosworth 2008: 205). This problematic trend conflicts with the central tenets of refugee protection as will now be explored.

Refugee protection

Conceptually and analytically it is important to highlight the key tensions between legal frameworks of refugee protection and the securitisation of migration. The *1951 UN Convention Relating to the Status of Refugees* (the 1951 Refugee Convention), together with its amending 1967 Protocol, are the main sources of international refugee law. Globally, 145 nations were party to one or both of these conventions as at July 2012 (UNTC 2012). The 1951 Refugee Convention provides individual legal status for a 'refugee', defined in Article 1A as applying to any person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such a fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Article 1A has been criticised for its overly narrow definition, reflecting the dynamics of post–World War II Europe (Mole 2005; Chimni 2004). The definition fails to include gender as a recognised basis for persecution, and does not apply to natural disasters or 'people fleeing war' (Van Hear 1998: 234). In response, some, such as the Organisation of African Unity, have sought to expand the definition to include a wider range of experiences of persecution.

The dynamics of conflict within the country of origin significantly predict the make-up of population groups seeking asylum. The three countries that produce the greatest number of refugees across the globe are all known for their international involvement in security operations or humanitarian operations: Afghanistan, Iraq and Somalia (UNIE 2010). Box 26.1 contextualises these figures by providing a snapshot of the conflict in each of these countries. The overwhelming majority of refugees, at 95 per cent from Afghanistan, were residing in the Republic of Iran and Pakistan (UNHCR 2011). Indeed, Pakistan is the country that hosts the majority of the world's refugees. The country with the next highest number is Iran, with half that of Pakistan. The first European country to make this list is Germany, at number 4, with 571,700 refugees. The USA is ranked 10th and Australia is ranked 46th. Clearly the majority of refugees originate from and stay in the Global South.

The most controversial aspect of the refugee protection framework is the obligation it places on states to process and potentially recognise refugees who cross their international borders. A successful determination of refugee status operates to partially nullify state sovereignty (Pickering 2005b; Dauvergne 2008). Many governments have responded by developing policies aimed at restricting access to asylum (Hathaway and Neve 1997). Some scholars explain this move as evidence of ethnocentrism, or an aversion to asylum seekers from the Global South (Chimni 1998; Fekete 2009). Hathaway and Neve (1997) observe that governments have two primary complaints about the 1951 Refugee Convention. First, they feel it forces them to relinquish migration control and accept the costs of granting asylum. Second, the costs associated with adjudicating and deciding upon individual claims are burdensome. Thus, Hathaway and Neve have concluded that refugee law is in crisis, as it can no longer achieve its fundamental purpose: 'balancing the rights of involuntary migrants and those of the states to which refugees flee' (ibid.: 116).

Afghanistan

The US-led invasion of Afghanistan is in its twelfth year and a withdrawal of US and NATO troops is planned for December 2014 (ICG 2012). In the lead-up to the troop withdrawal the Afghan Government is increasing the size of its national army and police forces (HRW 2011). Human Rights Watch contends that this process is arming irregular forces, including 'armed groups working for tribal leaders to private security companies, criminal gangs and insurgent groups' (HRW 2011: 1). A political settlement in Afghanistan has proved elusive for the past 35 years (ICG 2012: 5). According to the ICG:

> Each stage of the conflict, starting with the violent coup against Prime Minister Sardar Mohammad Daoud Khan in 1978, has been capped by government programs to reconcile parties to the conflict. In each case, the attempt to broker a peace has suffered from intrinsic design flaws and lack of adequate support from the international community that has allowed external actors to undermine it.

> (ibid.: 5)

This legacy has had disastrous consequences for the country and its people. Afghanistan is ranked 172 out of 187 countries on the Human Development Index (UNDP 2011). Life expectancy is 48 years of age. Landmines, malnutrition, displacement and indiscriminate shelling are only some of the challenges of daily life in Afghanistan (MSF 2012).

Iraq

Iraq is ranked 132 on the Human Development Index (UNDP 2011). Bombings, assassinations, violence and the fear of violence are having a significant physical and psychological impact on Iraqis as the US-led war enters its ninth year (MSF 2011). During the Arab Spring, protesters were violently repressed, at least 12 were killed and more than 100 were injured. Secret detention facilities are a feature of governance of the new regime (HRW 2012). Gender-based violence is also an issue, with honour crimes and domestic abuse facing women and girls. Life expectancy is 69 years (Amnesty International 2012). Attacks on media workers are commonplace, as is the use of torture in prison and detention centre facilities.

Somalia

The situation in Somalia represents a humanitarian and security crisis (ICG 2008). Life expectancy was 46.2 years for the period 2002–2005 (EC 2011b: 4). A major dynamic affecting the famine and famine relief in Somalia, historically and now, is the protracted conflict embroiling the country and parts of neighbouring countries (de Waal 1997). Somalia has had no effective government since 1991, when Siyaad Barre's government was overthrown after 16 years in power (ICG 2009). Violence, insecurity and instability have created significant numbers of internally displaced persons inside Somalia, and contributed to expanding refugee populations in neighbouring countries (UNIE 2010).

Identifying the key tensions between legal frameworks of refugee protection and the securitisation of migration highlights the criminality of state practice (Pickering 2005a). The three key tensions, identified in Table 26.1, train our criminological gaze on how refugee protection principles are diluted, eroded and weakly implemented, producing human rights violations and state deviance. In principle, the international refugee protection framework contemplates transgressions of national immigration laws as one must be outside the borders of one's country of origin to claim asylum. The 1951 Refugee Convention expressly provides for this scenario in three key ways: (1) non-penalisation for illegal entry (Article 31); (2) the prohibition on refoulement (Article 33); and (3) access to rights and entitlements following recognition as a refugee (see Chapters III, IV and V of the Convention). However, the application of international law in implementing these principles of refugee protection is interpreted by many governments of the Global North as a threat to national security. Analysing their responses – acts of punishment through administrative detention, risk reduction through visa requirements and interdiction, and deterrence through reduced access to rights and entitlements – allows us to consider refugee vulnerability in a new light, placing responsibility for these practices upon a deviant and thus criminal state (Pickering 2005a). This process also constitutes a rebuttal of the law and order rhetoric used by governments in determining and implementing refugee policy.

Table 26.1 Key tensions between legal frameworks of refugee protection and the securitisation of migration

Refugee protection	The securitisation of migration	Criminal justice practice
Requirement to cross an international border	'Regimes of non-entrée' – interdiction/ visas/carrier sanctions	Aggregate risk reduction
Rights and entitlements	Diluted rights and entitlements	Deterrence
Non-penalisation for illegal entry	Penalisation – administrative detention	Punishment

We turn now to examining state practices of aggregate risk reduction, deterrence and punishment across the Global North.

Risk reduction techniques

The criminal justice practice of aggregate risk reduction has become a popular tool of governments in seeking to prevent irregular migration. The risk reduction philosophy underpins criminal justice discourses, objectives and techniques (Feeley and Simon 1994), one of several characteristics of an increasingly technocratic and calculated system of governing adopted by the state (Hannah-Moffat 1999: 72). Risk reduction places greater emphasis on classifying, sorting and managing 'dangerous' populations, and installing proactive responses (Feeley and Simon 1992: 452). Risk reduction as a 'new' penology is seen by some commentators as overtaking the 'old' penology of punishment and deterrence (Feeley and Simon 1992, 1994); we do not explore this argument here, but note that some contest this distinction (Hannah-Moffat 1999; Sim 2009). For Feeley and Simon (1992), this new penology explains the increase in incarceration rates which are unmatched by both the modest increase in reported crime and the decrease in victimisation rates. This new penology represents a move away from an 'individualised criminal process to an actuarial system' of managing crime (Simon and Feeley 2003: 91). As such, risk reduction is closely linked to 'situational crime prevention' – a popular crime control strategy among neoconservative governments (O'Malley 2003), and a typical 'rationalist' approach to crime policy (Garland 1990). The technical approach to risk reduction in relation to migration, however, has not involved community involvement as is the case with some crime prevention strategies. Rather, it has been adopted as part of securitisation of migration policy to disaggregate the border and prevent irregular migrants from entering countries and regions in the Global North.

Exploring the similarities between risk reduction and the securitisation of migration, several manifestations are apparent. First, risk reduction techniques – such as visa requirements and carrier sanctions – are used to stop people from arriving and submitting an application for refugee protection. Some European countries introduced visa requirements during the Cold War (Chimni 1998), but their use has now become mandatory across all Member States. The common visa list, applicable to all EU Member States, reflects economic and racial prejudices (Bigo and Guild 2005). All the Horn of Africa countries are on the list, meaning that citizens of those countries must apply for a visa to enter Member States of the EU. For several countries, such as Afghanistan, Iraq, the Democratic Republic of the Congo, Eritrea, Somalia, and Sri Lanka – the principal source countries for asylum seekers – a visa is required even if the individual is only transiting through an EU Member State. In the UK, the government press release that

accompanied the introduction of these provisions expressly stated that its twin aims were to reduce the numbers of both asylum applications and visa over-stayers (Guild 2005).

Visa requirements are not only enforced by the border police of a Member State, but also by private carriers – ferries, trains and airlines – through the introduction of carrier sanctions (Athwal and Bourne 2007). If the carrier transports a person to an EU Member State without the requisite travel documents and visas, the carrier must assume responsibility and return that person, and will be fined. Such fines in the UK can amount to £2000 (ibid.). Carrier sanctions thus enlist a network of transnational private companies to enforce visa requirements and effect border control.

The second main risk reduction strategy is interdiction. The practice of interdiction creates numerous tensions with the obligation to protect refugees. All regions of the globe are subject to the phenomenon of what Türk and Klug (2012) refer to as 'irregular maritime movements' of migrants and refugees. Interdiction at sea involves intercepting boats and taking them back to their point of disembarkation without investigating the refugee protection claims of those on board. Interdiction at airports does occur but interdiction at sea has attracted more criticism and media attention. There is an obligation on states to temporarily admit asylum seekers intercepted at sea and not to commit refoulement by returning them to a country where they may face persecution or which may in turn refoule them (UNHCR 1981, cited in Frelick 1993). Yet examples from many parts of the globe reveal that interdiction is widely practised. Italy's interdiction policy began in earnest in 2009, resulting in 900 asylum seekers and migrants being returned to Libya in a two-month period (HRW 2009: 23–24). Perhaps not surprisingly, the European Court of Human Rights recently struck down Italy's interdiction practices in the Mediterranean in the case of *Hirsi v Italy*. In a unanimous verdict, the Court decided that Italy's conduct in returning boats to Libya without reviewing the asylum claims of those on board breached Articles 3, 4 and 13 of the European Convention on Human Rights. Interdiction constitutes a human rights violation by states against asylum seekers, yet often constitutes a strategic component of the security arsenal deployed to stop irregular migration.

Deterrence

Internationally, many countries use criminal justice principles of deterrence to curb irregular migration. Migration is constructed as a rational choice to be 'deterred by rapidly expanding preventative infrastructures' (Bosworth and Guild 2008: 711). The securitisation of migration applies theories of deterrence in attempts to control and influence the mobility of irregular migrants. The threat of punishment lies at the core of theories of deterrence (Nagin 1998), as explained by Zimring and Hawkins:

> Punishment can make some people, who otherwise would have been willing to commit crimes, fearful enough of punishment to avoid it by refraining from committing crimes. When punishment of a particular person causes that person to subsequently refrain from crime, it is called 'specific deterrence' and when punishment of criminals in general causes people in general, punished or unpunished, to refrain from crime, it is called 'general deterrence'.
>
> (Zimring and Hawkins 1973, cited in Kleck 2003: 292)

Deterrence hinges upon perceptions of the risk of punishment – without such a perception there can be no deterrent effect. However, deterrence has a questionable impact on actual behaviour (Achen and Snidal 1989). Moreover, deterrence has attracted criticism from 'welfare

state criminologists', who have argued that a range of other underlying factors drive crime and therefore a legal threat of punishment is meaningless (Garland 1996: 187).

Deterrence is exemplified in the dilution of the rights and entitlements of asylum seekers and refugees upon arrival in countries of asylum. Access to social and economic rights mediates belonging (Huysmans 2006). Since the 1970s, the issue of immigration in Europe has featured in debates around the crisis of the welfare state (see Bauman 2004: 55). As Huysmans writes, this resulted in an increase in 'welfare chauvinism' (2006: 77). The policy of exclusion of third-country nationals from accessing welfare has now been extended to all migrants, regardless of their legal status (Guild 2005). The portrayal of migrants as abusing welfare has been used to legitimate state moves to limit their access to welfare benefits, and curb asylum applications (Minderhoud 2007, cited in Bigo *et al.* 2008: 298). In effect, refugees and migrants are represented as having no legitimate right to social and welfare benefits. This welfare chauvinism has been documented in the UK setting, where reduced access to rights and entitlements forms part of the state's deterrence policy (Bosworth and Guild 2008). In the UK, asylum seekers are prevented from working and receive 70 per cent of the benefits received by Britons on social welfare, an amount that is administered through vouchers (Athwal and Bourne 2007). Restrictions on reception conditions, policies implemented upon arrival, illustrate a strategy of deterrence, aimed at countering what the government perceives are incentives to reach the UK and apply for asylum (Bosworth and Guild 2008).

Australia has developed several policies within its refugee framework that have made deterrence the 'raison d'être of Australian refugee policy' (Pickering and Lambert 2002). The system is chiefly informed by deterrence strategies; those who arrive by boat will be subject to mandatory detention, while those who arrive by plane may obtain a bridging visa and subsist in the community until their claim is determined (Pickering 2005b). Before their abolition, those who arrived by boat and had their claims for asylum recognised were only given temporary protection visas. While the language of deterrence may have been replaced, the re-enactment of the Pacific Solution, triggered by the reopening of offshore processing in Nauru and Manus islands, demonstrates that this philosophy prevails (see Houston *et al.* 2012). Throughout this process, government policy has been supported by media constructions of refugees as a 'deviant problem' (Pickering 2001).

Deterrence is also enacted through the implementation of diluted forms of refugee protection. In the EU, one of the major changes to refugee protection has been the codification of more temporary forms of legal status such as subsidiary and temporary protection (McAdam 2005). The laws on subsidiary protection in the EU entrench a hierarchy that separates refugees from beneficiaries of subsidiary protection, with the latter entitled to fewer benefits, and protection that is subject to periodic review (ibid.: 461). Since its introduction, governments have shown a preference for awarding subsidiary protection over refugee status (Hathaway 2003). In Malta, an EU Member State on Europe's southern edge, recognition rates for refugees contrast dramatically with those for subsidiary protection. In 2008, for example, 19 people received refugee status whereas 1394 received subsidiary protection (NSO 2009). This amounts to 0.07 per cent of applicants receiving refugee status, and 50 per cent receiving subsidiary protection. No gender breakdown of these statistics is available. Overall, war and conflict have continued globally, but recognition of persecution has reduced. The political climate, Bhabha and Shutter argue, is the only factor that has changed (1994: 241).

The increased use of forms of complementary protection gives rise to questions about the gendered impact of the dilution of legal protections under deterrence paradigms. Seeking asylum is a challenge to illegality, but diluted protection ensures only partial protection (Coutin 2005; McAdam 2005). One of the key implications for women is the inaccessibility of family

reunification under complementary protection provisions (Bhabha and Shutter 1994). Family reunion is not mentioned in the 1951 Refugee Convention, but other human rights instruments combine to make it an obligatory consideration for states. In the Australian context, Pickering (2005b) has drawn attention to the increase in the number of women and children coming directly to Australia by boat as a result of the introduction of temporary protection visas in 2001. These visas did not allow family reunification; thus, unless women and children joined their spouses on the boats, they would not gain entry to Australia. This increased women's and children's exposure to dangerous and risky border crossings. The gendered dimension of the impact of diluted legal protection warrants further examination.

Significant penalties have been introduced to punish the agents who transport people to the EU to apply for asylum. The legal framework designed to prosecute and deter smugglers comprises two main protocols: the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime* (the Palermo Protocol) (Segrave *et al.* 2009); and the *Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the UN Convention against Transnational Organised Crime*. The latter protocol focuses on criminalising illegal immigration by organised groups. A growing number of scholars argue that the growing use of people-smuggling networks is a consequence of the increasingly restrictive nature of migration policy in relation to refugees and other migrants from the Global South (Koslowski 2001; Nathwani 2003; Michalowski 2007). For many, this is the only way to escape their country or region of origin to seek asylum (Morrison and Crosland 2001; Khosravi 2010).

Punishment

The institution of punishment is regularly brought to bear on irregular migrants, for the most part without justification or evidence of any criminal activity. The 'crimes of arrival' (Webber 1996) committed by irregular migrants who arrive at the border and seek asylum are understood by many states to be an affront to the community, for which they must be punished. Punishment as a social institution is dynamic and cannot be reduced to a single meaning or purpose (Garland 1990: 17). Punishment scholars note that it is 'in times of high insecurity that the myths of crime and punishment are most effective, that the most punitive responses are evoked' (Freiberg 2001: 269). In the current moment, states and other agencies are fuelling perceptions of increasing insecurity to reassert their sovereignty, creating fertile ground for more punitive responses.

Punishment in relation to border control is not explicit but is enacted through administrative policies and practices that result in punishment. The chief example discussed here is administrative detention. Detention serves other purposes including deterrence, but its representation as an instrument of punishment is examined here. Administrative detention functions as a mechanism of 'governance and social control' (Bosworth 2008: 207). The expansion of the use of incarceration of migrants has been documented elsewhere (Scraton and McCulloch 2009; Bosworth and Kaufman 2011). Securitisation of migration policies has extended the application of penal populism to asylum seekers – a practice described as more pernicious given that asylum seekers cannot access the checks and balances available to citizens within the criminal justice system (Bosworth and Guild 2008).

Administrative detention has become the cornerstone of securitisation of migration policy for many states (Pickering and Lambert 2002; Malloch and Stanley 2005; De Giorgi 2010; Bosworth and Kaufman 2011). Monitoring of detention is inadequate in the EU, with a lack of reliable data on the number of detainees (De Giorgi 2010). Malta has a policy of mandatory detention that allows for incarceration for a maximum of 18 months. Reflecting the dual purposes

of detention in this context, the Maltese Government imposes mandatory detention as a deterrent policy (Abela 2011), yet the policy also acts as an instrument of punishment by exposing people to deplorable conditions, in addition to taking away their freedom of movement (MSF 2009). The Maltese Government argues that its mandatory detention policy is based on 'the national interest and more specifically, for reasons concerning employment, accommodation and maintenance of public order' (MJHA and MFSS 2005: 6). This policy reflects the narrative that irregular migrants who arrive by boat have committed a crime and are dangerous (Huysmans 2000; Malloch and Stanley 2005). It also removes any opportunity for irregular migrants to interact with the local population, through which they might directly challenge this perception. The ramifications of these policies reverberate widely. Indeed, the European Commission against Racism and Intolerance has criticised the Maltese Government for 'seriously reinforcing perceptions of immigrants as criminals and increasing levels of racism and xenophobia among the general population' (ECRI 2008: 27). We move now to consider in more detail the impact of the securitisation of migration on those most directly affected, irregular migrants.

Frameworks of harm

Criminological scholarship is linking the impact of increased border control and securitisation to the corresponding increase in the risk of harm to irregular migrants, including fatalities posed by crossing borders (Carling 2007; Michalowski 2007; Grant 2011; Weber and Pickering 2011). Two main 'functionally mobile' (Weber 2006) border sites are considered here: physical border crossings and administrative detention. Analysis of the gendered impact of escalating border controls has highlighted the potential risks for women. This extract by a Somali woman who successfully arrived in the EU Member State of Malta after leaving Tripoli captures some of the dangers presented by such sea crossings:

> There were lots of people on my boat to Malta. I couldn't sleep on the boat. We were on the boat for three days and two nights. When we were rescued it was fantastic! We all thought we were going to die. I have lost many friends at sea. Twice my boat was turned back before I successfully arrived in Malta. We all didn't know where we were going on the boat. We had a driver who was very smart. He stopped the boat so we could wait out a storm. When it was clear we kept going.
>
> (Sena, cited in Gerard 2012)

Travel by sea involves heightened 'exposure to death' (Khosravi 2010). Although migrant deaths at sea are not systematically recorded (a reflection of government priorities in this area – see Weber and Pickering 2011), it is estimated that around 10,000 migrants have perished in the Mediterranean and Atlantic Oceans over the past two decades (ibid.: 99). Sea crossings in other areas are similarly dangerous. In 2007, an estimated 7 per cent of those crossing from the Horn of Africa to Yemen perished (MMTF 2009). However, a gender breakdown of these statistics is not publicly available.

Counting border deaths has become an important project for academic researchers and non-government organisations (NGOs) alike (Weber and Pickering 2011). The border is intrinsic to how these deaths occur. As Weber and Pickering (2011) set out, a number of methodologies have been engaged to undertake this dreadful task. UNITED is a coalition of NGOs which in 1993 built a database of deaths at the European border. Since the organisation began counting, its numbers have totalled 14,037 border deaths, as at early 2011 (ibid.: 39). The most common cause of death at European borders is drowning, at around 70 per cent (UNITED 2011, cited

in Weber and Pickering 2011: 40). Official reports of fatalities along the US–Mexico border put the total number at 4375 between 1998 and 2009 (Anderson 2010, cited in Weber and Pickering 2011: 42), increasing from 263 in 1998 to 417 in 2009. However, two-thirds of the deaths in Arizona occur outside the zone where the US Border Patrol collects death statistics, so the real number is likely to be much higher (Rubio-Goldsmith *et al.* 2007, cited in Weber and Pickering 2011: 43). The impact of border policy in the US–Mexico context is clear: government policy has led irregular migrants to cross borders in more inhospitable locations, resulting in more deaths and a greater uptake of the use of people smugglers (Guerette and Clarke 2005, cited in Weber and Pickering 2011: 47), the latter of which has driven up the costs of crossing the border.

As we write this from Australia, in the past month there have been 18 confirmed deaths at sea, with 83 people declared missing. Weber and Pickering are now the collators of a border deaths database which is hosted by borderobservatory.org. The database has been established as a way of maintaining a record of all known deaths associated with Australia's border protection policy and dates from 1 January 2000 to the present. In that time, the number of known deaths at the border has reached 787. The number could be as high as 880 if the 93 people declared missing from incidents in June 2012 are counted. In the space of one week in late June, two boats capsized en route to Australia north of Christmas Island. One boat was carrying 200 Sri Lankan asylum seekers and the other was carrying 134 Afghani asylum seekers. Frustratingly, border deaths are not counted by the lead criminology body in Australia – the Australian Institute of Criminology (Powell *et al.* 2012).

Detention

The nature of gendered violence against women in detention, in transit and upon arrival is receiving increasing attention among scholars (Hamood 2006; Pickering 2011). Hamood's research in Libya found that men and women were kept separately in detention, and that both reported being subject to beatings and racist taunts, while women reported being threatened with rape (Hamood 2006). Some evidence emerged that men were treated more harshly than women, with beatings that were more frequent and more severe than the violence committed against the women (ibid.: 32). Conditions in the Libyan detention centres have been criticised by various human rights groups (JRS 2009; HRW 2009; Amnesty International 2010) as overcrowded, unhygienic and violent. No health care is provided and there is minimal access to food and water. Ailments such as scabies, dermatitis and respiratory problems are endemic (JRS 2009).

Sexual violence against women in detention was documented in the US case of *Kasinga* (Pickering 2011: 58), where a 17-year-old minor from Togo was a victim of abuse by detention centre guards, identified as part of a system of 'capricious cruelty'. Since *Kasinga*, other border guards in the USA have been subject to sexual assault charges for offences against women in detention (ibid.: 58). Whether in transit or upon arrival, conditions in detention have been found to perpetuate gendered violence against women.

Detention in both the country in which asylum is sought and in a country traversed en route is increasingly common. In our research with women who had transited through Libya, only two out of 27 women spoke about their direct experience of detention in Libya. In both cases, the women were arrested while in the process of boarding a boat headed for the southern Member States of the EU:

> I was in Libya for one year and two months. I was arrested one time and spent one month in detention. I was arrested trying to get onto a big boat to go to Europe. There were 160

on board and 30 were arrested. I was arrested because I was in the car waiting to get on the boat. The boat eventually left and made it to Italy and the people made it to Italy.

(Sena, cited in Gerard 2012)

I was held in detention for nine months after being arrested. I was about to catch a big boat. I think because it was a big boat the police heard us. Detention in Malta is not as bad as Libya, you don't get beaten in Malta.

(Syrad, cited in Gerard 2012)

Detention serves to implicitly punish those seeking to get to the EU by boat. The detention centres in Libya are partially funded by the Italian Government (Brothers 2007). The role of individual EU Member States in collaborating on the construction and use of detention centres illustrates the functional mobility (Weber 2006) of the EU external border.

Internationally there is a considerable body of scholarship that examines the impact of detention on the health of asylum seekers and refugees (Becker and Silove 1993; Steel and Silove 2001; Robjant *et al.* 2009; Bull *et al.* 2012), including the risk of mental health deterioration. Mandatory detention was introduced in Australia in 1992, and until recently was extended to children. Major depression, suicidal ideation and post-traumatic stress disorder have been found in children in detention (Mares and Jureidini 2004). As we write, there are still children in detention, although many have been released into the community. Australia's detention centres have been labelled 'factories for mental illness' by prominent Australian psychiatrist Dr Patrick McGorry (Taylor 2010, cited in Welch 2012: 339). The specific long-term effects of indefinite detention are gaining recognition within the literature (Bull *et al.* 2012). For example, Bull *et al.*'s work draws out the parallels between the impacts of long-term detention and long-term incarceration, with particular regard to the long-term mental health implications. Researchers have collected significant evidence on the frameworks of harm produced by the securitisation of migration. However, there is still a lack of empirical research on the experiences of irregular migrants and this constitutes an important future research direction, as will now be outlined.

Avenues for future research on crimmigration

Several avenues emerge as key areas for future research on crimmigration. First, Bosworth (2012: 126) argues that there is a dearth of bottom-up approaches to the study of crimmigration to capture the 'lived experience of border control'. Indeed, many scholars have acknowledged the considerable gap in the existing criminological literature in relation to the use of empirical research aimed at capturing the lived experience of those seeking refugee protection and migrating without documentation (Bosworth 2012: 126; Barker 2012; Gerard and Pickering 2012). It is important for scholars in this area to establish an evidence base on global mobility to counter prevailing narratives. Hartry (2012) makes the case for greater attention to gender in intersections of immigration and criminal justice practice. Her research into undocumented women migrants in the USA shows how crimmigration practices disproportionately affect women and families. Hartry argues that focusing on individual impacts has negated a focus on structural determinants such as gender. A gendered analysis of the securitisation of migration is developing, but more needs to be done to capture dis/similarities among women's experiences.

Second, greater research inroads are needed into what Weber (forthcoming) calls 'peace at the border'. Weber's forthcoming work will examine what peace at the border looks like from economic, security, human rights and other perspectives. The book aims to be creative in conceptualising and identifying the 'conditions of possibility for a relaxation of border defences'.

It argues that creative solutions are needed to establish how the present conflict can be transformed to minimise harm, and build peace at the border for those seeking global mobility.

Third, there is a need for research that addresses source country conditions, including the role played by countries and institutions of the Global North in fuelling and exacerbating these conditions that give rise to the need to flee – specifically scholarship considering state crime accounts of the nature and extent of state-sponsored violence, torture and persecution (Green and Ward 2009). Conflict analysis of the situation in such source countries attests to the involvement of external agencies in funding and fuelling the conflict (see Box on pp. 593–594). A contextual exploration of these issues would give policy-makers a broader understanding of how irregular migration is impacted and how we might address the underlying causes of such migration.

Fourth, more research is required to document and attempt to reverse the dramatic increase in the foreign-born prison population in particular countries. Almost without exception, incarceration rates within the European democracies have increased since 1990 (Barker 2012). As a corollary, there is an over-representation of foreign nationals (Barker 2012). In Greece, the foreign national prison population stands at 50 per cent. Sweden, thought of as a country with de-carceration frameworks, has a foreign-born prison population of 28 per cent. This increasing number of foreign nationals in prison in EU Member States is another consequence of the securitisation of migration (see Wacquant 1999; Melossi 2003; Fekete 2009; Fekete and Webber 2010). Although there is precedent for the incarceration of foreign nationals in US prisons, this number has increased dramatically in recent decades (Bosworth and Kaufman 2011: 437). A key mechanism underpinning this growth in the foreign-born prison population has been the increase in the capacity to detain administratively. Further, a major demographic trend sees black and ethnic minorities included in the numbers of those detained for immigration law offences or criminal offences, or while their asylum cases are pending.

Finally, where immigration and criminal justice practice differ is also an area for further research. Traditional criminal law safeguards are understood to be 'melting away' where immigration-related offences are concerned (Chacón 2009: 137). Stumpf (2011) describes those who are prosecuted in the USA for immigration offences, as receiving a life sentence in the form of deportation. Their sentence attracts none of the traditional punishment adjuncts such as proportionality (Stumpf 2009: 1683), or an evaluation of their prospects of reintegration into the community. Stumpf also points out that these punishments are imposed not by the judges but by the legislature (ibid.: 1709). Moreover, there is no system of graduated punishment like the criminal justice system (Stumpf 2011: 1748).

Crimmigration – the global policy impact

In this section, we ask: what are the international policy implications of increased crimmigration and the impact on refugees, asylum seekers and migrants? The results are troubling. First, the shrinking availability of refugee protection, the increased use of detention, and the outsourcing of refugee protection to poorer countries, or countries along the border in the case of the EU, are examined. Second, the readiness of countries in the Global North like Australia to lock up children as part of their expanding crimmigration regime is questioned. Finally, we argue that there needs to be greater recognition of the stratification of mobility at the border and a subsequent relaxation of border controls. This would involve an acknowledgement of the structural determinants of migration, including economic and non-economic factors, and an expansion of the legal avenues to migrate. This would also include an increase in resettlement numbers or quotas which, alongside a relaxation in border controls, could greatly improve the safety of irregular migrants along transit routes.

Outsourcing refugee protection and human rights

The spectre of wealthier states outsourcing their refugee obligations to other countries has significant international policy implications. The delegation of the control of borders from rich states to poor ones is thus a feature of the new EU (Snyder 2000: 221). The wealthier countries of Western Europe have deputised Eastern Europe through a web of readmission agreements that smooth the way for Western Europe to conduct deportations to various states termed a 'safe third country' (Snyder 2000). This practice is again about to become operational in Australia. The government is set to begin offshore processing in Papua New Guinea and Nauru in a re-enactment of John Howard's Pacific Solution (Houston *et al.* 2012). However, two key considerations have been left out of this package. First, this arrangement breaches Australia's obligations under the 1951 Refugee Convention. Second, the urge to flee is invariably greater than the government's desire to stop boats arriving or to reduce the incentive for boats to arrive. People will continue to expose themselves to harm because, as one of our respondents said of the alternative, life in Somalia:

> Yes, some know of the danger [crossing borders]. But you do not know when you are going to die. We run away from our country. There is more trouble in our countries. Any day you could die in Somalia.
>
> (Hibo, cited in Gerard 2012)

The women participants in our previous research experienced the situation in Somalia as not simply dangerous but as life-threatening; they lived with the constant threat of being killed (Pickering and Gerard 2011; Gerard and Pickering 2012). Countries of the Global North claim to observe their refugee protection obligations, yet place refugees in detention, disperse their claims to other countries and/or ensure they reside in deplorable conditions with protracted uncertainty over their future.

An offshore processing arrangement was proposed in the EU. Under the auspices of 'safe havens', camps were actively pursued as a solution to refugee flows by the former UK Prime Minister Tony Blair from early 2003 (Statewatch 2003). The UK Government sought to establish 'safe havens', so that it could deport asylum seekers who arrive in the UK to an external processing site for six months to await the restoration of stability in their country of origin (BBC 2003). Those who could not return would be distributed among the UK and other Member States through a quota system. This external processing site would be located near a country that generates large refugee flows, such as Morocco, Turkey or Northern Somalia (Prasad 2003). Bauman argues that naming these sites 'safe havens' did not hide their purpose: to place people 'in the region and at a safe distance from Britain' (2004: 68). The notion of extraterritorial or regional processing was proposed by the previous Blair government as an obligatory model; however, these 'safe havens' have not yet eventuated.

In response to these UK proposals, the European Commission developed pilot Regional Protection Programmes (RPPs) (EC 2005), aimed at enhancing the 'protection capacity of the regions involved' and offering 'better' protection by providing 'durable solutions': repatriation, local integration or resettlement. Resettlement was only an option where the first two solutions were unavailable. Two areas seen as distinct regions were selected to host the pilot: the Great Lakes region of Tanzania was selected as a region of origin for asylum seekers and refugees; and the Western Newly Independent States of Moldova, Ukraine and Belarus were selected as a region of transit (ECRE 2008). The location of one of the RPPs in such close proximity to the EU suggests that its purpose was to prevent asylum seekers and refugees from entering the

EU (Haddad 2008). These pilot programs have been continued and another two have been initiated in the Horn of Africa and North-Eastern Africa (EC 2011a). There is a need for further independent research to examine how these programs are operating and whether they are achieving their stated goal of improving protection for refugees, and not merely intervening to stop refugee flows to the EU.

The propensity for countries in the Global North to deport and disperse asylum seekers in processes characterised as expedited has enormous international policy implications. The prohibition on refoulement is the cornerstone of the 1951 Refugee Convention, reflected in the inability of states to place reservations on this article (see Article 42.1). Non-refoulement is a concept that 'prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion' (Article 33). While European integration has led to the harmonisation of refugee policy among Member States, this process has been criticised for making the most restrictive approach 'enshrined as a possible approach for all' (Bhabha 2004: 222). There are doubts, however, as to how successful this project has been, with many pointing to inconsistencies in practice among Member States (OAN 2006; Freedman 2008). Whereas the international refugee protection regime places an onus on signatories to receive and assess applications from asylum seekers, the legal trend now is to expedite claims where it can be determined that another country ought to provide a substantive review of the claim (Hailbronner 2007). For example, Britain is increasingly returning asylum seekers to safe third countries or territories (Bosworth 2008: 205). The harmonisation of restrictive asylum strategies across the EU and the dispersal of legal protections have the potential to increase the incidence of refoulement (Freedman 2008).

Scholars have already mooted the 'end game in refugee protection' (Morrison and Crosland 2001). At the heart of this argument is the assertion that refugees can only use illegal methods of entry to many countries because of the restrictions placed on arrival. Our recent article on the EU context and the experiences of women arriving in Malta revealed that women are kept in a 'constant state of arrival' (Pickering and Gerard 2011). They leave Malta for elsewhere in the EU but many are returned under the operation of the Dublin II Regulation, which forces applicants to lodge their application for asylum in their first country of entry to the EU. Many then choose to leave again and become caught in a cycle of trying to stay undercover in other European Member States to avoid detection by law enforcement. As a result of the operations of non-entrée, more migrants will become 'stuck' in transit countries with fewer safe options to exit.

The incarceration of children for people-smuggling offences

Australia's handling of young and vulnerable Indonesian children caught in people-smuggling operations between Australia and Indonesia has recently been the subject of critique in Australia. An increasing number of boats carrying asylum seekers have left Indonesia for Australia in recent years. Over a three-year period up to the end of 2011, 180 young Indonesians who identified as children were crew members on board these ships and landed in Australia (AHRC 2012: 7). In 2012, the Australian Human Rights Commission produced a report on the incarceration of Indonesian children in detention and adult jails in Australia after being charged with people-smuggling offences. The Commission found that the average period spent in detention *without being charged* was 5.4 months (ibid.: 1). The report took aim at the Australian Federal Police practice of X-raying wrists to determine the age of the offender – a method that has been

discredited. The average detention period for young Indonesian crew members who had been X-rayed and charged, but for which the prosecution did not go ahead in many cases, was on average 14.4 months. 'The longest period that an individual in this class was held was just over two years, of which over 21 months were spent in an adult correctional facility' (ibid.: 1). A review is currently being conducted into 22 cases where young people were convicted of people smuggling offences based on evidence produced from wrist X-ray methods.

The prosecution of people smugglers for carrying asylum seekers to Australia forms a key part of the deterrence strategy of the Australian Government. We know from existing research that the stricter the regulations, the more organised and entrenched the migration industry becomes in seeking to circumvent the restrictions (Salt and Stein 1997; Koser 2010). Poverty in Indonesia is another important factor fuelling the phenomenon. Organisation for Economic Co-operation and Development (OECD) figures from 2010 suggest that the average wage in Indonesia is around 1,400,000 rupiah, or US$150 (OECD 2012). Australia's conduct towards young Indonesian crew members has resulted in numerous breaches of both the *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights*.

Conclusion

This chapter has captured the main global structural determinants of the 'ever-present vulnerability' (De Genova 2005: 246–248) of refugees, asylum seekers and migrants. The securitisation of migration has contributed to the militarisation of border controls and the rise in the use of criminal justice practices to respond to irregular migration. As others have noted (Bosworth and Kaufman 2011), Simon's (1998) original prediction that borders would become the new criminal justice frontier has materialised in several ways that are traced by this chapter. But it is not just at the physical border that criminal justice practices are taking effect. Crimmigration is causing criminal justice practices to ripple beyond the destination country to diverse, functionally mobile border sites. These practices are exacerbating refugee, asylum seeker and migrant vulnerability at every point of their migratory journey. International legal obligations around refugee protection are selectively and narrowly observed, demonstrating the priority placed on the sovereign's ability to exclude and include.

There is a need for scholars to continue to interrogate the suitability of traditional criminal justice responses such as punishment, risk reduction and deterrence in addressing irregular migration. This chapter has called for more innovative and contextualised responses that take into account the key structural economic and political determinants affecting migration. These need to be evidence-based and supported by empirical research. Justice and peace at the border are conceivable and refugee protection need not be confined to less resource-rich countries in the Global South. Analysis of the frameworks of harm produced by the securitisation of migration stands to contribute to minimising fatalities and other harms, and promoting a greater understanding of the lived experience of irregular migration.

Discussion questions

1   How are immigration and criminal justice practices merging at different locations across the globe?
2   What is the impact of the securitisation of migration on irregular migrants?
3   How are definitions of 'borders' changing?
4   How suitable are criminal justice practices in responding to irregular migration flows?

Websites

Borderobservatory.org.
migrantsatsea.wordpress.com/.
womenontheborder.org/.
www.unitedagainstracism.org/.
www.sievx.com/.

References

Aas, K. (2011) '"Crimmigrant" Bodies and Bona Fide Travellers: Surveillance, Citizenship and Global Governance', *Theoretical Criminology*, 15(3): 331–346.

Abela, G. (2011) 'Multiculturalism Does Not Mean We Have to Renounce Our Beliefs', *Times of Malta*, April 17.

Achen, C. H. and Snidal, D. (1989) 'Rational Deterrence Theory and Comparative Case Studies', *World Politics*, 41(2): 143–169.

AHRC (2012) 'An Age of Uncertainty: Inquiry into the Treatment of Individuals Suspected of People Smuggling Offences Who Say that They Are Children,' Sydney: Australian Human Rights Commission.

Amnesty International (2010) *Seeking Safety*, *Finding Fear: Refugees*, *Asylum-Seekers and Migrants in Libya and Malta*, London: Amnesty International.

Amnesty International (2012) *Amnesty International Annual Report 2012: Iraq*, London: Amnesty International.

Anderson, B. and Ruhs, M. (2010) 'Researching Illegality and Labour Migration', *Population*, *Space and Place*, 16(3): 175–179.

Andreas, P. and Greenhill, K. (2010) *Sex*, *Drugs and Body Counts: The Politics of Numbers in Global Crime and Conflict*, Ithaca, NY: Cornell University Press.

Athwal, H. and Bourne, J. (2007) 'Driven to Despair: Asylum Deaths in the UK', *Race and Class*, 48(4): 106.

Balibar, E. (2002) *Politics and the Other Scene*, London: Verso.

Barker, V. (2012) 'Global Mobility and Penal Order: Criminalizing Migration, a View from Europe', *Sociology Compass*, 6(2): 113–121.

Bauman, Z. (2004) *Wasted Lives: Modernity and Its Outcasts*, Cambridge: Polity Press.

BBC (2003) 'Asylum "Havens" Considered by UK,' *BBC News World Edition*, available at: http://news.bbc.co.uk/2/hi/uk_news/politics/2728491.stm (accessed 22 November 2011).

Becker, R. and Silove, D. (1993) 'The Psychological and Psychosocial Effects of Prolonged Detention', in M. Crock (ed.) *Protection or Punishment: The Detention of Asylum Seekers in Australia*, Sydney: The Federation Press.

Bhabha, J. (2004) 'Demography and Rights: Women, Children and Access to Asylum', *International Journal of Refugee Law*, 16(2): 227–243.

Bhabha, J. and Shutter, S. (1994) *Women's Movement: Women Under Immigration*, *Nationality and Refugee Law*, Oakhill: Trentham Books.

Bigo, D. (2001) 'Migration and Security', in V. Guiraudon and C. Joppke (eds) *Controlling a New Migration World*, New York: Routledge.

Bigo, D. (2005) 'Frontier Controls in the European Union: Who Is in Control?', in E. Guild and D. Bigo (eds) *Controlling Frontiers: Free Movement Into and Within Europe*, Aldershot: Ashgate Publishing.

Bigo, D. and Guild, E. (2005) 'Policing in the Name of Freedom', in D. Bigo and E. Guild (eds) *Controlling Frontiers: Free Movement Into and Within Europe*, Aldershot: Ashgate Publishing.

Bigo, D., Carrera, S., Guild, E. and Walker, R. B. J. (2008) 'The Changing Landscape of European Liberty and Security: The Mid-Term Report of the CHALLENGE project', *International Social Science Journal*, 59(192): 283–308.

Bloch, A. and Chimienti, M. (2011) 'Irregular Migration in a Globalising World', *Ethnic and Racial Studies*, 78: 1–15.

Bosworth, M. (2008) 'Border Control and the Limits of the Sovereign State', *Social & Legal Studies*, 17(2): 199–215.

Bosworth, M. (2012) 'Subjectivity and Identity in Detention: Punishment and Society in a Global Age', *Theoretical Criminology*, 16(1): 23–40.

Bosworth, M. and Guild, M. (2008) 'Governing Through Migration Control: Security and Citizenship in Britain', *British Journal of Criminology*, 48: 703–719.

Bosworth, M. and Kaufman, E. (2011) 'Foreigners in a Carceral Age: Immigration and Imprisonment in the United States', *Stanford Law and Policy Review*, 22(2): 429–454.

Brothers, C. (2007) 'Obscurity and Confinement for Migrants in Europe', available at: http://www.nytimes.com/2007/12/30/world/europe/30iht-greece.html?pagewanted=all (accessed 22 November 2011).

Bull, M., Schindeler, E., Berkman, D. and Ransley, J. (2012) 'Sickness in the System of Long-Term Immigration Detention', *Journal of Refugee Studies*.

Carling, J. (2007) 'Migration Control and Migrant Fatalities at the Spanish-African Borders', *International Migration Review*, 41(2): 316–343.

Carpenter, J. (2006) 'The Gender of Control', in S. Pickering and L. Weber (eds) *Borders, Mobility and Technologies of Control*, New York: Springer.

Castles, S. and Miller, M. J. (2003) *The Age of Migration*, New York: Guilford Press.

Chacón, J. M. (2009) 'Managing Migration Through Crime', *Columbia Law Review* 10(9): 138–148.

Chimni, B. S. (1998) 'The Geopolitics of Refugee Studies: A View from the South', *Journal of Refugee Studies*, 11(4): 350–374.

Chimni, B. S. (2004) 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems', *Refugee Survey Quarterly*, 23(3): 55–73.

Coutin, S. (2005) 'Contesting Criminality: Illegal Immigration and the Spatialisation of Legality', *Theoretical Criminology*, 9: 5–33.

Dauvergne, C. (2008) *Making People Illegal: What Globalisation Means for Migration and Law*, Cambridge: Cambridge University Press.

De Genova, N. (2005) *Working the Boundaries: Race, Space, and "Illegality" in Mexican Chicago*, Durham, NC: Duke University Press.

De Giorgi, A. (2010) 'Immigration Control, Post-Fordism, and Less Eligibility: A Materialist Critique of the Criminalisation of Immigration Across Europe', *Punishment and Society*, 12(2):147–167.

de Waal, A. (1997) *Famine Crimes: Politics and the Disaster Relief Industry in Africa*, London: James Currey.

EC (2005) *Communication from Commission to the Council and the European Parliament on Regional Protection Programmes*, Brussels: European Commission.

EC (2011a) *Annual Report on Immigration and Asylum*, Geneva: European Commission.

EC (2011b) *Somalia Joint Strategy Paper for the period 2008–2013*, Brussels: European Commission.

ECRE (2008) *The European Funding Priorities for Refugee Protection, Migration Management and Border Reinforcement*, London: European Council on Refugees and Exiles.

ECRI (2008) *European Commission against Racism and Intolerance: Third Report on Malta*, Strasbourg: Council of Europe.

Feeley, M. and Simon, J. (1992) 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications', *Criminology* 30(4): 449–474.

Feeley, M. and Simon, J. (1994) 'Actuarial Justice: The Emerging New Criminal Law', in P. Nelkin (ed.) *The Futures of Criminology*, London: Sage.

Fekete, L. (2009) *A Suitable Enemy: Racism, Migration and Islamaphobia in Europe*, London: Pluto Press.

Fekete, L. and Webber, F. (2010) 'Foreign Nationals, Enemy Penology and the Criminal Justice System', *Race and Class*, 51(4): 1–25.

Finnane, M. (2009) 'Controlling the "Alien" in Mid-Twentieth Century Australia: The Origins and Fate of a Policing Role', *Policing and Society*, 19(4): 442–467.

Freedman, J. (2008) 'Women's Right to Asylum: Protecting the Rights of Female Asylum Seekers in Europe?', *Human Rights Review*, 9: 413–433.

Freiberg, A. (2001) 'Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice', *Punishment and Society*, 3(2): 265–278.

Frelick, B. (1993) 'Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection', *Cornell International Law Journal*, 26(3): 675.

Garland, D. (1990) *Punishment and Modern Society*, Oxford: Clarendon Press.

Garland, D. (1996) *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford: Oxford University Press.

Gerard, A. (2012) 'The Securitisation of Migration and Refugee Women', PhD thesis, Monash University.

Gerard, A. and Pickering, S. (2012) 'The Crime and Punishment of Somali Women's Extra-Legal Arrival in Malta', *British Journal of Criminology*, 52(3): 5–14.

Giddens, A. (1985) *A Contemporary Critique of Historical Materialism: The Nation-State and Violence*, Berkeley, CA: University of California Press.

Grant, S. (2006) 'GCIM Report: Defining an "Ethical Compass" for International Migration Policy', *International Migration*, 44(1): 13–19.

Grant, S. (2011) 'Recording and Identifying European Frontier Deaths', *European Journal of Migration and Law*, 13(2): 135–156.

Green, P. (2006) 'State Crime Beyond Borders', in S. Pickering and L. Weber (eds.) *Borders, Mobility and Technologies of Control*, Dordrecht: Springer.

Green, P. and Ward, T. (2009) 'The Transformation of Violence in Iraq', *British Journal of Criminology*, 49: 609–627.

Grewcock, M. (2009) *Border Crimes: Australia's War on Illicit Migrants*, Sydney: Institute of Criminology.

Grewcock, M. and Green, P. (2002) 'The War Against Illegal Immigration', *Current Issues in Criminal Justice*, 14(1): 87–101.

Guild, E. (2005) 'The Legal Framework: Who Is Entitled to Move?', in D. Bigo and E. Guild (eds) *Controlling Frontiers: Free Movement Into and Within Europe*, Aldershot: Ashgate Publishing Ltd.

Guiraudon, V. and Lahav, G. (2000) 'Comparative Perspectives on Border Control: Away from the Border and Outside the State', in P. Andreas and T. Synder (eds) *The Wall Around the West: State Borders and Immigration Controls in North America and Europe*, Lanham, MD: Rowman and Littlefield.

Haddad, E. (2008) 'The External Dimension of EU Refugee Policy: A New Approach to Asylum?', *Government and Opposition*, 43(2): 190–205.

Hailbronner, K. (2007) 'Detention of Asylum Seekers', *European Journal of Migration and Law*, 9: 159–172.

Hamlin, R. (2012) 'Illegal Refugees: Competing Policy Ideas and the Rise of the Regime of Deterrence in American Asylum Politics', *Refugee Survey Quarterly*, 31(2): 33–53.

Hamood, S. (2006) 'African Transit Migration Through Libya to Europe: The Human Cost', Cairo: The American University in Cairo, Forced Migration and Refugee Studies.

Hannah-Moffat, K. (1999) 'Moral Agent or Actuarial Subject', *Theoretical Criminology*, 3(1): 71–94.

Hartry, A. (2012) 'Gendering Crimmigration: The Intersection of Gender, Immigration, and the Criminal Justice System', *Berkeley Journal of Gender Law and Justice*, 27(1): 1.

Hathaway, J. (2003) 'What's in a Label?', *European Journal of Migration and Law*, 5(1): 1–21.

Hathaway, J. and Neve, R. (1997) 'Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection', *Harvard Human Rights Journal*, 10:155–169, 173–187.

Hirst, P. and Thompson, G. (2002) 'The Future of Globalization', *Cooperation and Conflict*, 37(3): 247–265.

Houston, A., Aristotle, P. and L'Estrange, M. (2012) *Report of the Expert Panel on Asylum Seekers*, Canberra: Australian Government.

HRW (2009) *Pushed Back, Pushed Around*, New York: Human Rights Watch.

HRW (2011) 'Just Don't Call It A Militia: Impunity, Militias and the "Afghan Local Police"', in *Race and Class*, New York: Human Rights Watch.

HRW (2012) *World Report 2012: Iraq*, New York: Human Rights Watch, available at: http://www.hrw.org/world-report-2012/world-report-2012-iraq (accessed 28 July 2012).

Huysmans, J. (2000) 'The European Union and the Securitisation of Migration', *Journal of Common Market Studies*, 38(5): 751–777.

Huysmans, J. (2006) *The Politics of Insecurity: Fear, Migration and Asylum in the EU*, London: Routledge.

Hyndman, J. (2000) *Managing Displacement: Refugees and the Politics of Humanitarianism*, Minneapolis, MN: University of Minnesota Press.

ICG (2008) 'Somalia: To Move Beyond the Failed State', in *Africa Report*, Brussels: International Crisis Group.

ICG (2012) 'Talking About Talks: Toward a Political Settlement in Afghanistan', in *Asia Report*, Brussels: International Crisis Group.

Joly, D. (1996) *Haven Or Hell? Asylum Policies and Refugees in Europe*, New York: Macmillan Press Ltd.

JRS (2009) *Do They Know? Asylum Seekers Testify to Life in Libya*, Valetta: Jesuit Refugee Service.

Juss, S. (2004) 'Free Movement and World Order', *International Journal of Refugee Law*, 16(3): 289–335.

Kapur, R. (2005) 'Travel Plans: Border Crossings and the Rights of Transnational Migrants', *Harvard Human Rights Journal*, 18:107–138.

Khosravi, S. (2010) *Illegal Traveller*, Stockholm: Palgrave Macmillan.

Kleck, G. (2003) 'Constricted Rationality and the Limits of General Deterrence', in T. Blomberg and S. Cohen (eds) *Punishment and Social Control*, New York: Aldine de Gruyter.

Kofman, E., Phizacklea, A., Raghuram, P. and Sales, R. (2000) *Gender and International Migration in Europe*, London: Routledge.

Koser, K. (2006) 'Irregular Migration', in B. Marshall (ed.) *The Politics of Migration: A Survey*, London: Routledge.

Koser, K. (2007) *International Migration: A Very Short Introduction*, Oxford: Oxford University Press.

Koser, K. (2010) 'Dimensions and Dynamics of Irregular Migration', *Population, Space and Place*, 16(3): 181–193.

Koslowski, R. (2001) 'Personal Security and State Sovereignty in a Uniting Europe', in V. Guidraudon and C. Joppke (eds) *Controlling a New Migration World*, New York: Routledge.

Mackenzie, C., McDowell, C. and Pittaway, E. (2007) 'Beyond "Do No Harm": The Challenge of Constructing Ethical Relationships in Refugee Research', *Journal of Refugee Studies*, 20(2): 299–319.

Malloch, S. and Stanley, E. (2005) 'The Detention of Asylum Seekers in the UK: Representing Risk, Managing the Dangerous', *Punishment and Society*, 7(1): 53–71.

Mares, S. and Jureidini, J. (2004) 'Psychiatric Assessment of Children and Families in Immigration Detention: Clinical, Administrative and Ethical Issues', *Australian and New Zealand Journal of Public Health*, 28: 520–526.

Massey, D. S., Arango, J., Hugo, G., Kouaouci, A., Pellegrino, A. and Edward Taylor, J. (2005) *Worlds in Motion; Understanding International Migration at the End of the Millennium*, Oxford: Oxford University Press.

McAdam, J. (2005) 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime', *International Journal of Refugee Law*, 17(3): 461– 516.

McDowell, M. and Wonders, N. (2009) 'Keeping Migrants in Their Place: Technologies of Control and Racialized Public Space in Arizona', *Social Justice*, 36(2), 55–70.

McMaster, D. (2002) *Asylum Seekers: Australia's Response*, Melbourne: Melbourne University Publishing.

Melossi, D. (2003) '"In a Peaceful Life": Migration and the Crime of Modernity in Europe/Italy', *Punishment and Society*, 5: 371–397.

Michalowski, R. (2007) 'Border Militarisation and Migrant Suffering: A Case of Transnational Social Injury', *Social Justice*, 34(2): 62–122.

MJHA and MFSS (2005) *Irregular Immigrants, Refugees and Integration: Policy Document*, Valetta: Ministry of Justice and Home Affairs and Ministry of Family and Social Services.

MMTF (2009) 'Strengthening the Regional Approach to Migration', Geneva: Mixed Migration Task Force Update, Aug.

Mole, N. (2005) *Asylum and the European Convention on Human Rights*, London: Council of Europe.

Morrison, J. and Crosland, B. (2001) 'The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?' in *New Issues in Refugee Research*, Geneva: UNHCR.

Mountz, A. (2010) *Seeking Asylum: Human Smuggling and Bureaucracy at the Border*, Minneapolis: University of Minnesota Press.

MSF (2009) *Not Criminals: Médècins Sans Frontières Exposes Conditions For Undocumented Migrants and Asylum Seekers in Maltese Detention Centres*, Rome: Médècins Sans Frontières.

MSF (2011) *Iraq: International Activity Report*, Brussels: Médècins Sans Frontières. Available at: http://doctorswithoutborders.org/publications/ar/report.cfm?id=5011andcat=activity-report (accessed 28 July 2012).

MSF (2012) *Focus on Afghanistan*, Brussels: Médécins Sans Frontières. Available at: http://www.msf.org.uk/afghanistan.focus (Accessed 28 July 2012).

Nagin, D. S. (1998) 'Criminal Deterrence Research at the Outset of the Twenty-First Century', *Crime and Justice*, 78: 231–42.

Nathwani, N. (2003) *Rethinking Refugee Law*, The Hague: Martinus Nijhoff Publishers.

NSO (2009) 'World Refugee Day: 2009', Valetta: National Statistics Office – Malta.

OAN (2006) 'Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States', Brussels: Odysseus Academic Network.

OECD (2012) *Southeast Asian Economic Outlook 2011/12*, Paris: OECD.

O'Malley, P. (2003) 'Risk, Power and Crime Prevention', in E. McLaughlin, J. Muncie and J. Hughes (eds.) *Criminological Perspectives: Essential Readings,* New York: Sage.

Pickering, S. (2001) 'Common Sense and Original Deviancy: News Discourse and Asylum Seekers in Australia', *Journal of Refugee Studies*, 14(2): 169–186.

Pickering, S. (2004) 'The Production of Sovereignty and the Rise of Transversal Policing: People Smuggling and Federal Policing', *Australian and New Zealand Journal of Criminology*, 37(3): 362–373.

Pickering, S. (2005a) 'Crimes of the State: The Persecution and Protection of Refugees', *Critical Criminology*, 13(2): 141–163.

Pickering, S. (2005b) *Refugees and State Crime*, Sydney: Federation Press.

Pickering, S. (2011) *Women, Violence and Borders*, London: Sage.

Pickering, S. and Gerard, A. (2011) 'The Journey to the Border: Continuums of Crossing', in S. Pickering (ed.) *Women, Borders and Violence: Current Issues in Asylum, Forced Migration and Trafficking*, London: Springer.

Pickering, S. and Lambert, C. (2002) 'Deterrence: Australia's Refugee Policy', *Current Issues in Criminal Justice*, 14(65): 65–76.

Pickering, S. and Weber, L. (2006) *Borders, Mobility and Technologies of Control*, Dordrecht: Springer.

Powell, R., Weber, L. and Pickering, S. (2012) 'Counting Border Deaths as Deaths in Custody', *Border Crossings Research Brief*, 5 edn, Melbourne: Border Crossing Observatory.

Prasad, R. (2003) 'Refugee Camps Don't Work: "Protection Areas" for Asylum Seekers in the Developing World Are a Recipe for Humanitarian Disaster', *The Guardian* (accessed 22 November 2011).

Richmond, A. (1994) *Global Apartheid*, Toronto: Oxford University Press.

Robjant, K., Hassan, R. and Katona, C. (2009) 'Mental Health Implications of Detaining Asylum Seekers: Systematic Review', *The British Journal of Psychiatry*, 194(4): 306–312.

Salt, J. and Stein, J. (1997) 'Migration as a Business: The Case of Trafficking', *International Migration*, 35(4): 467.

Salter, M. B. (2004) 'Passports, Mobility, and Security: How Smart Can the Border Be?', *International Studies Perspectives*, 5(1): 71–91.

Sassen, S. (1996) *Sovereignty in an Age of Globalisation*, New York: Columbia University Press.

Scraton, P. (2007) *Power, Conflict and Criminalisation*, New York: Routledge.

Scraton, P. and McCulloch, J. (2009) *The Violence of Incarceration*, New York: Routledge.

Segrave, M., Milivojevic, S. and Pickering, S. (2009) *Sex Trafficking: International Context and Response*, Portland, OR: Willan Publishing.

Sim, J. (2009) *Punishment and Prisons: Power and the Carceral State*, London: Sage.

Simon, J. (1998) 'Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States', *Public Culture*, 10(3): 577–607.

Simon, J. and Feeley, M. (2003) 'The Form and Limits of the New Penology', in T. Blomberg and S. Cohen (eds.) *Punishment and Social Control*, New York: Aldine de Gruyter.

Snyder, T. (2000) 'Conclusion: The Wall Around the West', in P. Andreas and T. Snyder (eds.) *The Wall Around the West*, Oxford: Rowman and Littlefield Publishers.

Statewatch (2003) 'UK Asylum Plan for "Safe Havens": Full-Text of Proposal And Reactions', available at: http://www.statewatch.org/news/2003/apr/10safe.htm (accessed 22 November 2012).

Steel, Z. and Silove, D. (2001) 'The Mental Health Implications of Detaining Asylum Seekers', *Medical Journal of Australia*, 17(5): 596–623.

Stumpf, J. (2006) 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power', Bepress Legal Series.

Stumpf, J. (2009) 'Fitting Punishment', *Washington and Lee Law Review*, 66(1): 68–73.

Stumpf, J. (2011) 'Doing Time: Crimmigration law and the Perils of Haste', *UCLA Law Review*, 58(1): 70–75.

Torpey, J. (2001) *The Invention of the Passport*, Cambridge: Cambridge University Press.

Türk, V. and Klug, A. (2012) 'Introductory Note to the Djibouti Summary Conclusions on Refugees and Asylum-Seekers in Distress at Sea', *International Journal of Refugee Law*, 24(2): 482–484.

UNDP (2011) *International Human Development Indicators,* New York: UNDP. Available at: http://hdrstats.undp.org/en/countries/profiles/AFG.html (accessed 28 July 2012).

UNHCR (2011) *Global Trends 2011*, Available HTTP: http://www.unhcr.org/pages/4fd9a0676.html (accessed 28 July 2012).

UNIE (2010) 'Report of the Independent Expert on the Situation of Human Rights in Somalia, Shamsul Bari', New York: United Nations Human Rights Council.

UNTC (2012) *Convention Relating to the Status of Refugees*, United Nations Treaty Collection. Available: http://treaties.un.org/pages/ViewDetailsII.aspx?andsrc=TREATYandmtdsg_no=V~2andchapter=5andTemp=mtdsg2andlang=en (accessed 28 July 2012).

Van Hear, N. (1998) *New Diasporas: The Mass Exodus*, *Dispersal And Regrouping Of Migrant Communities*, London: UCL Press.

Vecchio, F. (2012) '(Un)Wanted People in Hong Kong: How Global Cities Force Migrants to Cope with Illegality', PhD thesis, Monash University.

Wachspress, M. (2009) 'Rethinking Sovereignty with Reference to History and Anthropology', *International Journal of Law in Context*, 5(3): 315.

Wacquant, L. (1999) '"Suitable Enemies": Foreigners And Immigrants in the Prisons of Europe', *Punishment and Society*, 12–15.

Waever, O. (1993) 'Societal Security: The Concept', in B. Buzan, M. Kelstrup and P. Lemaitre (eds.) *Identity*, *Migration and the New Security Agenda in Europe*, London: Pinter Press.

Webber, F. (1996) 'Crimes of Arrival: Immigrants and Asylum-Seekers in the New Europe', StateWatch.

Weber, L. (forthcoming) *Peace at the Border.*

Weber, L. (2006) 'The Shifting Frontiers of Migration Control', in S. Pickering and L. Weber (eds.) *Borders*, *Mobility and Technologies of Control*, Dordrecht: Springer.

Weber, L. and Bowling, B. (2008) 'Valiant Beggars and Global Vagabonds: Select, Eject, Immobilize', *Theoretical Criminology*, 12(3): 55.

Weber, L. and Pickering, S. (2011) *Globalization and Borders: Death at the Global Frontier*, London: Palgrave.

Welch, M. (2012) 'The Sonics of Crimmigration in Australia: Wall of Noise and Quiet Manoeuvring', *British Journal of Criminology*, 52(2): 324–344.

Wonders, N. (2006) 'Global Flows, Semi-Permeable Borders and New Channels of Inequality', in S. Pickering and L. Weber (eds.) *Borders*, *Mobility and Technologies of Control*, Dordrecht: Springer.

Yuval-Davis, N., Anthias, F. and Kofman, E. (2005) 'Secure Borders and Safe Haven and the Gendered Politics of Belonging: Beyond Social Cohesion', *Ethnic and Racial Studies*, 28(3): 513–535.

Zedner, L. (2010) 'Security, the State, and the Citizen: The Changing Architecture of Crime Control', *New Criminal Law Review*, 13(2): 379–403.

27

Personhood, legal judgment and sovereignty at the Cape, 1793–1810

Jennifer Hardes, Patrick McLane and George Pavlich

Introduction

Members of the Cape Court of Justice *circa* 1795 held to a particular conception of justice. For them, society was a hierarchy of different types of people, at different stages of refinement. As such, law – especially law directed to crime – had to be applied differentially in order to take account of the purported classes of person that comprised social hierarchies. As such, the so-called 'Distinction of Persons' was a basic element of calculations made to 'ascertain' the 'atrocity' of specific crimes and to compute appropriate punishments (Theal 1897, vol. 1: 298ff). The members of the Court of Justice's emphasis on categories of persons is readily reflected through an extraordinary exchange of letters between the commander of the occupying British forces, General Craig, and members of the Court of Justice regarding the Court's use of torture, which will be discussed below.

The following analysis explores how different categories of person were conceptualized in crime-focused law at the Cape through close readings of select records of crimes and punishments produced there between 1793 and 1810.[1] This analysis allows us to consider the question of how crime-focused law at the time created distinctions of persons and produced a contextually specific social hierarchy within an emerging sovereignty politics. Insofar as the Court distinguished between persons 'on behalf' or 'in the name of' a distant colonial sovereign (first Dutch and then British), the Court's distinction of persons also helped to author a particular sovereignty politics. By bringing Cape concepts of personhood, sovereignty and law together, this chapter works to understand how colonial images of the sovereign were significantly fashioned through naturalized images of 'nations' (an early precursor to concepts of race) and classes of persons. In making this case, the chapter draws on Foucault's (2003) notion that sovereignty is constituted from below, Derrida's (2009) conception of sovereignty as performatively generated, and Esposito's (2012b) conception of sovereignty as intricately bound to legal categorizations of persons.

Through our attempts to render the relation between law, sovereignty and personhood explicit, we turn first to Foucault and Derrida's discussions of sovereignty before elaborating upon Esposito's account of personhood. These scholars provide for an approach to the confluence of crime-focused legal judgments, concepts of persons and images of the colonial sovereign along

three axes. First, this chapter examines select idioms by which personhood was recognized in criminal law, indicating how particular subjects were categorized as different 'types' of person in order to bring them under Cape law's jurisdiction as legal subjects. Second, it examines how categorizations of personhood affected calculations of a given crime's severity and the 'appropriate' punishment. Such calculations both constructed persons and served to 'depersonalize' specific subjects. Third, we reflect on how the discussed legal idioms and calculations of punishment framed a sovereignty politics in which 'personhood' emerged as a key construct for shaping and contouring the colonial sovereign.

These considerations provide insight into the colonial history of South Africa while offering an understanding of colonial sovereignty which pays more attention to the actions of specific actors *within* the colony in shaping images of the imperial powers than is sometimes the case. The significance of such historical understanding for current political efforts cannot be overstated.

At the same time, insofar as the concepts of personhood and images of colonial sovereignty which animated the Court of Justice at the Cape are situated at some distance from contemporary norms and meaning horizons, examining them allows dynamic relations between criminal law, hierarchies of personhood and sovereignty to emerge more readily than might be the case than in the exploration of contemporary criminal law – tied as it is to norms and modes of thought to which we are often more attached than we might care to admit. We may then reflect on the extent to which such dynamics between criminal law, personhood and sovereignty are similar and different within contemporary crime-focused practices.

An approach: sovereignty, law and persons

Foucault's (1990; 2003) 'shift in emphasis' from sovereignty politics to the new logics of rule, such as governmentality and discipline, is well known. For our purposes, though, Foucault's (2003: 89–99) discussion of Thomas Hobbes provides a starting point. Foucault points out that in Hobbesian sovereignty politics, sovereign formations of rule are forged through constant relational struggles, regardless of whether sovereign power is established by conquest or contractual agreement. In this interpretation, sovereign political arrangements are not imposed from the top-down; rather, Hobbesian sovereignty politics is constituted through local struggles understood as 'a theatre of presentations' in which images of threat and danger play key roles (ibid.: 92). According to Foucault's analysis of Hobbes, sovereignty politics results when individuals 'recognize' that a sovereign model of governance, in which an uncontested ruler sits at the apex of a hierarchical social order and enforces an accompanying system of law, is more advantageous than the life they would have if left without law. For Foucault, then, the Leviathan exists because subjects desire that it exist. In Foucault's paraphrase, Hobbesian sovereignty politics says to us 'It's what you wanted, it is you the subjects who constituted the sovereign that represents you' (ibid.: 98).

As the Cape Colony was conquered by Britain, returned to the Netherlands (under the guise of the Batavian Republic) and re-conquered by Britain between 1795 and 1806, the idea of the need for a powerful sovereign to ensure order through law may have had some purchase (Pavlich 2011). We know that this idea operated explicitly in the thought of J.A. de Mist during the brief Batavian interregnum (Pavlich 2012b).

From a related though different vantage, Derrida (2009) contends that the logic of sovereignty is embedded in all formations of power – a point that the later Foucault (2007; 2008) perhaps recognizes when he formulates a 'triangle' of sovereignty, discipline and governance. In any case, Derrida's (2009) reflections on sovereignty as a deconstructable and forever-deferred idea also suggest that sovereignty appears only through performances staged 'from below'. Derrida

likens sovereignty to a 'prosthesis'; an always simulated rather than natural political condition. In particular, sovereignty emerges as an outcome of performances. As opposed to sovereignty being a condition imposed by the strong upon the weak, sovereign power appears through repeated enactments by the very subjects over whom the sovereign is to rule. The many functionaries who claim to act in the name of the sovereign play influential roles in ritual enactments which enable a 'sovereign' to appear as sovereign. At the Cape these functionaries included judicial agents such as 'His Majesty's Fiscal', in charge of Prosecutions, and members of the Council of Justice (renamed the Court of Justice under the British), who proclaimed repeatedly, in case summaries read out loud at a public place, that they pursued justice in the name of the sovereign (du Toit and Giliomee 1983). For Derrida, the Hobbesian idea that a sovereign may be needed to ward off lawlessness and disorder is a consistently reiterated element in the play of presentations by which the sovereign comes to appear as real, necessary and even unavoidable.

According to Derrida (2009: 11, 61), performances that evoke a sovereign occur partly through a framing sense that 'man is wolf to man', subsequently dividing subjects from the sovereign, and casting subjects as akin to beasts or criminals. Such bestial subjects are said to require an all-powerful sovereign to intervene to keep the 'wolves' at bay and to secure order (Derrida 2009: 74, 96). The advent of sovereignty politics thereby allows new divisions among people, as those who follow the law and welcome the sovereign are proclaimed to be uplifted from the state of nature. These subjects are regarded as 'rational', since they acknowledge the need for a sovereign power to guarantee order (ibid.: 30, 56). Those who do not follow the law are cast variously as 'criminal' or 'enemy' others, as fallen or lesser beings who elide the sovereign's power. Sovereignty politics thus institutes 'a configuration that is both systematic and hierarchical: at the summit is the sovereign, master, king, husband, father . . . and below, subjected to his service the slave, the beast, the woman, the child' (ibid.: 29–30). The law – and especially crime-focused law – plays an important role in promoting hierarchical sovereign orders and historically attendant subjects (law-abiding, criminal, traitor, etc.).

The sovereign–subject hierarchies posited by Foucault and Derrida's approaches to sovereignty politics appear more explicitly in Esposito's (2012a; 2012b) recent work on 'personhood'. If law is to establish sovereignty as 'absolute' or impenetrable power, it does so by positing the sovereign against, and in relation to, other 'subjects'. For Esposito, the classification of types of people derives from a distinction between the idea of 'the person', as a legal and political category, and 'the human' as a living thing (2012a: 21–22; 2012b: 91–93). The person corresponds to the subject who constitutes and obeys a sovereign power; by contrast, the human as a living thing is conceptualized within sovereignty politics as a mere entity to be dominated if possible and destroyed if it proves too dangerous. For Esposito, this is not simply a distinction between the citizen and the foreigner, or the lawful subject and the criminal; rather, the creation of persons and non-persons results in a whole gradation comprising many different, historically defined subjects.

Esposito reminds us that in ancient Rome, to which we owe the legal concept of person (*persona*), persons were to be distinguished first and foremost from slaves (2012a: 22; 2012b: 77ff). His analysis of slavery and legal personality in ancient Roman law is especially pertinent to understanding the classification of persons at the Cape Colony given its economy of slavery (Shell 1994; Ross 1979, 1980; 2008) and the Dutch East India Company's reliance on Roman law by way of Roman Dutch law (see Fine 1991; Pavlich 2012: 210). Despite important differences, the underlying logic of slavery – as a legal category denoting a human being who was declared equivalent to chattel – operated in both Roman and Roman Dutch law (Shell 1994). Esposito quotes several early modern jurists to illustrate the doctrinal clarity with which

the distinction between person and slave was retained in the civil law tradition of the early modern period. For example, he refers to the work of Hugues Doneau (1517–1591) who argued that 'a slave is a man, not a person; man is a term of nature, person is a term of civil law' (2012b: 81). A distinction of persons influenced by Roman practice was maintained in the Cape where members of the Court of Justice argued that such a distinction was the basis of any effective and just criminal law. They write:

> the distinction of persons is one of the essential points by which the degree of punishment is measured in most civilised Nations, and this distinction is especially founded upon the Imperial Laws of the Roman Law, from which its exactness is not only acknowledged as Law when other Laws are silent, but is particularly recommended as such in the Statutes which have been successively issued in the Dutch Indies, relative to Slaves, and are observed here
>
> (Theal 1897, vol. 1: 304)

The Court's members also claimed to apply the precepts of its distinction of persons impartially to variously defined persons (Theal 1897, vol. 1: 302). As indicated by several commentators on the institution of slavery at the Cape (e.g., Ross 1979, 1980, 2008; Shell 1994; Worden and Groenewald 2005), and explicitly by the members of the Court of Justice, Roman Dutch law 'gave to the slave no *persona in judicio* . . . he was regarded as a mere chattel' (Wessels 2005: 409).

Perhaps most revealing, members of the Court of Justice, soon after the 1795 British occupation, refused a pointed request by the occupying commander (General Craig) to desist from torture, especially with respect to condemned 'blacks' who were subjected to gradual, excruciatingly painful death sentences. It is instructive here to note that the Court members' response returned to Roman law, arguing that 'the Romans' treated slaves as 'creatures',

> [who] from their enured bodies & from the rude and uncultivated habits of thinking were much more difficult to correct & to deter from doing evil, than others, who from better education & better habits measure the degree of punishment by their internal feelings rather than by bodily pain: and this reasoning may be justly applied to our modern Slaves, many of whom are descended from wild and rude Nations, who hardly consider the privation of Life as a punishment, unless accompanied by such cruel circumstances as greatly aggravate the bodily Sufferings.
>
> (Theal 1897, vol. 1: 304)

The evocation of 'wild and rude Nations' perhaps foreshadows later discourse on race, but it certainly indicates a clear distinction of persons, rendering 'slaves' as closer to nature, and different from persons with 'better education & better habits' (ibid.).

Esposito frames such distinctions of persons against the idea of the sovereign as a person, arguing that this produces a 'conceptual tangle' that in effect renders ideas of the sovereign contingent upon the idea of the person and vice versa (2012b: 84). The sovereign represents selected subjects' desire for laws and for a separation between themselves as lawful persons as against lesser persons, beasts and criminals, variously located in a state of nature. As such, for Esposito, subjects establish a sovereignty politics (2012b: 85–86). Yet, at the same time, if person is a term of civil law, then it may be constituted only in relation to sovereignty, which as noted above, is figured as creating and enforcing law (2012b: 86–87). The institution of a sovereign order thus makes it possible for corporeal bodies variously to become persons through different subjections to law.

In combination, Foucault's call for us to understand sovereignty as constituted from local relational clashes, Derrida's emphasis on linguistic rituals and performances that sustain sovereignty, together with Esposito's sense of the relations between law, personhood and sovereignty provide an overarching theoretical approach for our analysis. In concert, they allow us to investigate how legal distinctions of persons became a key tool for crime-focused law at the Cape, and how legal idioms of personhood helped to constitute particular forms of colonial sovereignty. To highlight the relations between personhood, crime-focused law and colonial sovereignty, our discussion now tackles the three previously mentioned themes: namely, Cape law's idioms and distinctions of persons, its calculations of crime and punishment, and the legal idioms that shaped contextual images of the colonial sovereign.

Cape legal idioms and persons

Consider the following record indicating a trial and outcome at the Cape of Good Hope on June 15, 1797 (Court of Justice Records 1797). The record begins with a detailed account of the accused person's position in the community. He is described as, 'February of Bengal, male Slave of the Deacon of the protestant Church, John Matthew Hertzog, about 40 years of age, now detained in prison' (ibid.: 225). As revealed by an examination of 150 'criminal' judgments from the period 1790 to 1810, such descriptions of accused persons were somewhat of a standard opening for Court of Justice Records at the Cape. In effect, this language opened each case by identifying a 'prisoner' through specific categories of personhood that corresponded to contingent images of social hierarchy and order.

With this in mind, February was defined in the Court record as a 40-year-old 'male slave of the Deacon'. He is charged with stabbing his 'proprietor', Hertzog, after Hertzog struck him with a broom for perceived 'impertinence' (ibid.: 225–226). The Court found that 'such designed attacks of murder, especially made by a Slave to his master, cannot be suffered in a country where justice is duly administered' (ibid.: 227). Here, February's ascribed status is that of a 'slave' who had attacked his 'master', a European of far higher status within a privileged version of the Cape's social hierarchy. The relative contrast in social standing was considered an aggravating factor that seemingly rendered the offence more 'atrocious' such that it attracted a harsher sentence than might have been the case, for instance, if the victim had been another person designated as 'slave'. Within the context of the Cape Court's sense of social hierarchy, justice demanded that law take account of purported, and supposedly natural, distinctions of persons.

Thus, February's transgression lay not only in his act (stabbing someone), but in challenging the hierarchy and his ascribed status as a 'slave' by confronting his 'proprietor'. The strict enforcement of differential statuses of persons was understood to be at one with conceptions of the Cape as 'a country where justice is duly administered'. Within the Court's conceptual framework, February's trial and punishment served as rhetorical 'proof' that the Cape was a country of well-administered justice (ibid.: 229). Relying on the Court's calculations of 'justice', to which we return in the next section, the members of the Court sentenced February to death by public hanging and ordered his corpse 'to be transported to the gallows near Saltriver, there to be hung again and remain, until it shall be consumed by the air and the birds of prey' (ibid.: 230).[2] From this case, one may begin to understand that idioms of the Cape's crime-focused law emphasized a 'distinction of persons', viewing the latter as foundational for calculations of 'justice'.

On reviewing Cape Court records from 1795–1810, we note several recurring 'distinctions' of person delineated at the beginning of cases. These give insight into legally privileged versions of hierarchies to which different categories of person were attached, and served the Court as a

key component of calculations of crime and punishment. At its broadest, and in the context of a slave society, 'European or free persons' were distinguished from 'slaves'. However, the Cape's legal lexicons distinguished more finely between 'persons' within its purportedly ordered social hierarchy. For example, 'Europeans' were distinguished and identified in different ways as 'burghers', 'slave owners', and 'company officials'. They were also frequently linked to job categories (e.g., cooper, servant, coppersmith) as well as military occupation (e.g. sailor, soldier) and rank. The distinction between 'free burghers' and Dutch East India company (VOC) officials, who had for many years served as the elites at the Cape, was muted by the collapse of company rule and with the British occupation. However, the category of 'burgher' appeared in many of the cases throughout our sample. Usually persons classified as 'burghers' appeared as owners of a person of bondage, a farm, or residence, or as a credible person providing testimony regarding a given crime. In one rather unusual and revealing case, a person classified as a burgher with the name of Gerrit Bezuidenhout, was found to have stabbed and killed a 'white servant' (Court of Justice Records 1801a). In view of the relative hierarchical categories of the persons involved, Bezuidenhout was not punished with his life as he might have been had the victim been a 'burgher'; nor was he let off lightly as might have been the case were the victim a person of bondage. In the end, he was sentenced to this punishment:

> the Executioner . . . shall place him underneath the Gallows with a halter round his neck for the view of the public, after which, he the said prisoner shall be tied to a Stake, receive a Severe Flogging and a mark on his bare back with a red hot Iron, and be banished from this Colony for life.
>
> (ibid.: 221)

At a different register in the privileged social hierarchy of the day, the Cape's crime-focused law worked through idioms that declared 'non-European' persons to inhabit various categories of personhood, including 'free black', 'emancipated slave', 'Hottentot', 'bastard Hottentot', and 'slave'.

The category of person designated as a 'free black' within VOC rule has not attracted much scholarly attention. Indeed, as Groenewald notes, '[t]he Free Blacks at the Cape of Good Hope during the VOC era are probably the least understood of all the groups in its history' (2010: 970). However, as he also notes, 'free blacks were essentially freed slaves' (ibid.). This category of person appears in five cases. In one case, a man categorized as a 'free black' brings subjects categorized as 'slaves' to the authorities on allegations of theft (Court of Justice Records 1798a; 1799a; 1808a). Another case makes reference to a 'Free Black's Maart' or market (Court of Justice Records 1808b). Still other cases involve this type of person being accused of a crime (e.g. Court of Justice Records 1808c). All such cases appear at around the time that the British had banned the slave trade, though not yet slavery itself. Associated with this category in the law was that of 'emancipated slaves', who appeared in cases around the same time, but who were doggedly identified with direct reference to 'former masters'. For instance, in one case, we are told of 'Tobias of the Cape emancipated Slave of Bernard Rudelof' (Court of Justice Records 1809). Another case refers to a 54-year-old woman, Lena, as a 'free girl' and also as an 'emancipated Slave of the Bookkeeper Ekhard' (Court of Justice Records 1812). The cases suggest some social latitude granted to these categories of person, as indicated by Lena being free enough to be able to allegedly conceal stolen goods at her home, and reference made to Tobias running a Tailor's shop that employed a number of 'Work Boys'.

Also reflected in many criminal cases was a category of 'Hottentot', used to reference indigenous Khoikhoi people. Originally herders, this category of persons is typically described

in the literature as initially enjoying relative degrees of freedom, though these freedoms were significantly eroded over the course of the eighteenth century. As van Aswegen argues, 'during the period 1795 to 1806 the position of the Khoikhoi at the Cape changed' and those living, 'within the colonial boundaries – about 2000 by 1805 – were increasingly placed under the colonial laws and white control and their freedom was curtailed more and more' (1990: 164). In a heart-breaking example, we read of '[t]he female Hottentot, Sara, aged approximately 32 years' who is accused of 'murdering' her children after having been released with them from servitude and subsequently ordered to return to her 'employer's' farm (Court of Justice Records 1793a). Sara was horrifically 'condemned to be taken to the place of execution, there to be bound to a stake and strangled to death'.

As Watson indicates, an allied category of 'Bastard Hottentot' was employed to denote the supposed 'offspring of white or Khoisan and slave parents' (Watson 2012: 214, n25). With the decline of the slave trade, these categories of person ('Hottentots' and 'Bastard Hottentots') were increasingly held in service by 'burghers' and supposedly placed in contractual labour relations. However, significant tensions around exploitative labour practices and ill-treatment were common, and this prompted colonial governors to demand that 'Hottentot' persons register with the *landdrosts* of various districts. Later, this category of persons could be indentured by 'Europeans' as servants for periods of 10 years in return for food and lodgings. In such cases, they were treated as near-slaves and, just as the Court was always sure to record whether people of bondage were 'runaways', those classed as 'Hottentot' who left service before their contracted time were said to have 'deserted' (Giliomee and Mbenga 2007). For instance, we read of 'Dancer and Jan Valentyn both Hottentots, prisoners' who are accused of the theft of a sheep (Court of Justice Records 1806a). The Court makes special note that Dancer 'did go into the Service of farmer Dreyer of Ribecks Kasteel and after a Stay of Six months deserted the same' (Court of Justice Records 1806: 44). Both categories of person, 'slave' and 'indentured Hottentot', were thus uniquely opened to the potential of being criminalized and punished if they 'escaped' or 'deserted'. These categories were treated as akin to sentenced 'prisoners', who might also be punished for 'escaping' their confinement (Court of Justice Records 1809b).

Early forms of what today marks a severe and insulting slur, the word 'Caffer', defined another category of persons in Cape law at this time. Reserved for an 'echelon of the slave hierarchy', this term was used originally to refer to men of bondage from Asia who served a policing function relative to other slaves. In the nineteenth century under British occupation, the term was extended to encompass eastern-frontier Africans who 'acted as the executive arm of the Fiscal' (Giliomee and Mbenga 2007: 54). They formed a unique sort of constabulary who were given uniforms, armed, and allowed to walk Cape streets; without having to follow the curfews imposed on other people of bondage; and charged with carrying out some of the Court's sentences. The function fulfilled by these officers is illustrated by the case of January van Baly a 'slave' who, having 'deserted' his 'master', 'was discovered and laid hold of in the Town House Square by two of the Caffers of the Court of Justice' (Court of Justice Records 1806b). The relatively higher social standing of these officers, in the eyes of the Court, and their role as authorized enforcers of the Cape's social hierarchy, were taken into account whenever this category of person was the victim of a crime. When January van Baly 'made resistance with a Knife and a Stick', the members of the Court find him guilty of 'wandering about as a vagabond armed with a knife [and] having made a violent resistance as well against the officers of Justice' (ibid.: 125–127). The Court's ruling stresses that these 'are Crimes leading to bad and dangerous consequences' (ibid.: 129), perhaps referring to the possibility of sedition and revolt against the established order of the colony.

Finally, the most abject category within Cape social hierarchies was that of 'slave' persons, and even within that category there was yet another hierarchy (see Shell 1994: xxxi ff). As Giliomee and Mbenga point out, 'Bereft of freedom and status, slaves defined the liberties and status of others' (2007: 53). They formed the 'labour force of the colony' (ibid.). People of bondage were either 'owned' by the VOC, its officials, 'burghers' or rather more rarely by 'free blacks' (ibid.). The so-called owners gave those designated as slaves only first names; these names were often appropriated from months of the calendar, biblical characters and classical myths. In addition,

> Officials and burghers perceived each group of slaves differently, attributing skills and character to the country of origin and engaging in crude racial and geographical stereotypes. Slaves from Bengal or the coast of Coromandel, Surat and Macassar, had a reputation as skilful needlewomen and were used in this capacity. Slaves from Mozambique were deemed to be mild and patient but Malays were viewed as treacherous and inclined to run amuk.
>
> (ibid.)

In general, as can be detected from the case of February noted above, and as indicated by Worden and Groenewald (2005), this category was the most commonly targeted for crime-focused law. Of the 150 cases of the period we examined, 123 identified, charged and punished 'slaves'. In general terms, those designated as slaves were harshly punished. For instance, 'Asia of the Cape', a 'slave' said to have murdered 'his mistress', is sentenced to the following:

> [H]is right hand to be chopped off & thereupon to be hanged by the neck till he is dead, afterwards his head to be struck off, his dead body to be transported to the Plaggeberg, & then to be hung by the legs to a Gibbet in the public road, & the head & the hand to be stuck on a spike thus to remain till consumed by the fowls of the air . . .
>
> (Court of Justice Records 1810: 458)

The various categories of person authored through legal lexicons were subjected to the force of law not merely based on the perceived severity of a particular act defined as criminal, but on where the said person was placed in a social hierarchy. The relation between various categories of person, their criminalization and punishment served to perpetuate the appearance of social hierarchies – the 'naturalness' of the order – and at the same time helped to support a version of sovereignty politics at the Cape. Given that criminal proceedings were framed in the name of a sovereign, and given the centrality of distinctions of personhood to calculations of 'justice', the role of law and personhood was to be deeply entrenched in an emerging colonial sovereignty politics. This chapter now turns to further examine the role of the distinction of persons in determining calculations of punishment.

Calculations of persons, crimes and punishment

The Cape Court of Justice members' response to questions from the commander of the 1795 occupation, General Craig, regarding the use of torture on slaves reveals much about the way crime-focused law calculated the relative 'atrocity' of crimes, and the most suitable punishments. On this front, the Court members acknowledged that distinctions 'do exist between Europeans or free Persons and Slaves in this Colony', but they argued that they applied the law impartially while taking account of different degrees of personhood among Cape inhabitants (Theal 1897,

vol. 1: 304). They argued further that the distinctions upon which they based their calculations of crime and punishment 'almost amount to a Rule of conduct for the Courts of Judicature over all Europe' (ibid.). To clarify their scheme of reference, they proceeded to outline six basic criteria by which this jurisprudence calculated the 'atrocity' of crime and a corresponding punishment, 'in proportion to its magnitude' (ibid., see also Pavlich 2012a). The first of these criteria focuses on: 'The Person who commits the crime, and also the Person upon whom it is committed; as when a Subject murders his Sovereign or a Slave his Master' (Theal 1897, vol. 1: 302–303). Based on this criterion, they argued that in the case of slaves, the equality of punishment 'ceases when they committed offences against Europeans or free persons, particularly their Masters', as confirmed in February's case above (ibid.).

Given their previously noted, highly prejudicial, view of slaves, they presumed that, 'mitigating the severity of capital punishments may be productive of any increase of Murders, which during the short time that this Colony as being in the possession of His Britannick [*sic*] Majesty, have been very frequent' (ibid.: 306). The members added further, that these 'inconveniences' will not likely be 'removed untill [*sic*] Slavery, of which they are the natural or at least the inseparable consequences, be abolished', adding that this would be problematic for many inhabitants, the 'greatest part of the property' of whom consisted of slaves (ibid.).

Based on this set of assumptions, the categorizations of persons became foundational to the Court's calculations of crime and punishment. Determining the 'atrocity' of crime may have had to account for the quality of an act, where it was committed, the circumstances surrounding the event, and so on (Pavlich 2012a). However, the Cape judges insisted too that the kinds of person that committed a crime, and the victims thereof, were directly material to the calculation of justice. If justice was to preserve a slave-based social order and its hierarchy, the law had to take account of the category of person who had committed the crime, and the category of person against whom the crime was committed. Only then, so they argued, could law serve in the name of the sovereign who had commanded the protection of social order. From this vantage, a criminal act against a person was *ipso facto* an attack upon the body of the sovereign as protector of a social hierarchy and its orders of persons.

Hence, the Court's calculations of the severity of crimes claimed to defend a social order directly in the name of the sovereign. For instance we find that each case ruling produced during British control of the Cape concludes with an explicit claim to do justice in the name of His Brittanic Majesty. For example, in the case of February discussed above, we read that 'The worshipfull court of Justice . . . Doing Justice in the name of His Brittanick majesty, condemned the Prisoner' (ibid.: 228–229).

In defining accused criminals as prisoners, crime-focused law commenced processes of relative depersonalization, in which the accused subject's erstwhile personhood was reframed into categorizations of 'criminal', 'prisoner', etc. Such identities then opened onto public, spectacular punishments that were purportedly framed on the basis of previous calculations of specific crimes and their atrocity.

A number of cases illustrate such calculations, where the severity of punishment corresponded not only to specific crimes, but to the categories of assigned personhood for the actors involved. People thus attracted different punishments based on constructs of associated personhood. Within this regime of crime and punishment, we note that the severity of punishment operated through at least three registers. First, the bodily intensity of the punishment was driven by the judges' view that some categories of person were unable – through lack of 'education' and 'cultivation' – to 'measure the degree of punishment by their internal feelings rather than by bodily pain' (Theal 1897, vol. 1: 304). Here categories of personhood were differentially tied to corporeality; lesser persons were deemed closer to 'uncultivated' nature and conceived of as dangerous bodies.

Second, the possibility for 'corrective' punishment was ascribed to 'cultivated' categories of persons. Third, special legal measures were created for those who were acquitted of crime and were to have a degree of personhood reinstated.

Alongside the case of February discussed above, one might consider the case of 'Carel Hendrik Lewald, a Native of Prussia aged 47 years' tried at the Cape on September 24 1801 (Court of Justice Records 1801b). Lewald was employed as an overseer at the 'country place' of 'the Sworn Clerk of the Orphan Chamber G.A. Watermeyer'.[3] According to the confession recorded by the court, Lewald beat the 'slave' Laban to death 'because he had stolen some bread'. A person of bondage named Hannibal went to town and reported the death of Laban to his 'master', and the circumstances of the beating inflicted on Laban were described to the Court by two other slaves 'who were present at the Time at the place' (Court of Justice Records 1801b: 767, 769–770).

Incidentally, the role of Hannibal and the other people of bondage in Lewald's trial indicate what Esposito calls the paradoxical status of those categorized as 'slave' as one who is caught 'in the passage, between person and thing, and thus definable both as a living thing and a reified person' (2012b: 9). Thus the strange fact that 'slaves were assimilated to other property, or to animals owned by the master' but 'could still be subject to legal punishment, on condition that it be particularly cruel and ignominious, or could even testify before a judge' (ibid.: 77).

The court found Lewald guilty of 'bad usages' of a slave and claimed that this constituted an action which 'cannot be tolerated in a country where justice is duly administered but should on the contrary be punished most rigorously in order to correct the Criminal and deter the publick [sic] from the like proceedings' (Court of Justice Records 1801b: 771). The language here is telling. For the Court, it was not criminal that Lewald beat Laban; corporal punishment was part of the normal management of slaves. The 'bad use' consists in Lewald's having beaten Laban so severely as to have caused his death. In all likelihood, the prosecution and punishment of this 'bad usage' had as much to do with Lewald's destruction of the property of Watermeyer, a person of much higher status, as with the violence suffered by Laban. As punishment, Lewald was to 'be fixed to the whipping post and having received a Severe flogging in the presence of the Committee [of Justice] to be transported for Ten Ensuing years' (ibid.: 771–772).

One may note the disparity between the punishment of February who was publicly hanged, and left hanging, after wounding his Master, compared with Lewald who was flogged and sentenced to ten years transportation for killing a 'slave'. Together the two cases illustrate distinct conceptions of the categories 'Slave' and 'European'; the former, as a near-thing to be used (well or badly) and the latter as a person to be 'corrected'. Given this revealing distinction between bodily slave and European legal person we may understand why February was deprived of his bodily life, which from the perspective of the Court was all he was, while Lewald could instead be transported and so deprived of his legal personality within the colony. Lewald is seemingly understood as among that 'cultivated' class of persons, who could 'measure the degree of punishment by their internal feelings' (Theal 1897, vol. 1: 304). By contrast, February's execution appears to have been understood as necessary to the maintenance of a slave society.

Although banishment might have served in place of execution for Lewald, it could not do so for February. Banishment appears to be a punishment peculiarly associated with Europeans. Among non-Europeans who appear in our records, only the 'free black' Adam and the 'slave' La Fleur were punished with banishment (in both cases, for theft) (Court of Justice Records 1799a; 1799b). In 22 other recorded cases of banishment the prisoner to be banished was a European. Indeed, for any non-European category other than 'free black', banishment might simply have meant liberation from slavery or servitude. La Fleur's sentence 'to be transported

out of this Colony', was exceptional and undertaken on the grounds of his 'being supposed to have much inclination to live among the Convicts' (1799b: 73).

Another punishment, labour and/or imprisonment, was rare for Europeans (three cases), and yet common for 'slaves' and 'Hottentots'. Both of the latter groups were frequently confined to 'labour at the public works', often 'at Robben Island'. Notably, women were not sentenced to the public works. Instead, in several cases, 'Hottentot' women were sentenced to 'the slave lodge', which was, in essence, domestic enslavement to the Government, either for a period of years, or for life (e.g. Court of Justice Records 1799c; 1801c). This indicates a relative depersonalization of women in the hierarchical scheme of the day through a process of enslavement to the benefit of elite categories.

An iteration of dividing practices around personhood was a means by which law calculated who was to count as enough of a person to be 'corrected', and who ought to be depersonalized to the point of non-person to be destroyed through a public execution. In this regard, one might point to cases where criminal youth were punished less severely because of a belief that they could possibly be rehabilitated to the standing of law-abiding person. For example, in 1798, 12-year-old Martinus of the Cape is sentenced 'in consideration of his Youth, to be chastised within Doors, with rods on the bare buttocks' while his fellow prisoner, 30-year-old Claas, is sentenced 'to be tied to a stake & severely whipt on the bare back' (Court of Justice Records 1798b).

Note how Martinus, given his young age, was sentenced to a less severe punishment that exhibits a potentially corrective mode of justice. This lighter sentence seemingly recognized the possibility of correcting one on the road to depersonalization to a certain degree of personhood within the existing social hierarchy (Court of Justice Records 1798b).

Personhood was also accorded or re-established in the acquitting of crime. For example, in 1800, in the case of the 'Hottentot' Hermanus Windvogel, the Court gives specific instructions relative to the restoration of one Pieter Jacobson's status, who was accused of murder alongside Windvogel but found to be innocent. These instructions read:

> the Court having heard the declaration of the Fiscall [*sic*], he declareth and does hereby declare, that the said Pieter Jacobson is quite innocent of the above crime of Hermanus Windvogel. And for this reason every person is hereby most seriously cautioned against ever upbraiding with or accusing the said Jacobson with a crime in which he had no share, and from which he has been honorably acquitted, having on the 30th been dismissed from his detention.
>
> (Court of Justice Records 1798c: 287–288)

In this case, Jacobson was acquitted by the declaration of the Fiscal, whose specific role in the colony was to represent the sovereign. In this sense, while Jacobson's status as a law-abiding person was called into question by his accusation and detention – he was re-personalized in the name of His Britannic Majesty. This is an instance where the sovereign figured not only as a power that intervenes to strip personhood from those who were deemed to have challenged the prevailing social order, but as a power also capable of constituting personhood.

In parenthesis, we may also note that for the category of 'Europeans' there existed means of legal defence not available to others. Several cases involving Europeans mention that the Court of Justice considered a document called a 'memorial of Suggestion for the Defence of the Prisoners' before passing sentence (Court of Justice Records 1810c: 475; see also Court of Justice Records 1809c: 231; 1809d: 809). This indicates that Europeans were sometimes able to draft a document which would contest the prosecutor's 'criminal claim and conclusion'.

In a legal system where oral testimony had carefully to be recorded as text before it could appear as evidence, and in which the Court's role was to affirm or modify the written charges ('criminal claim') and recommend a punishment ('conclusion') presented by the prosecutor, the existence of a document on the side of the defence may have proven significant to the outcome of trials.

Appeals against the sentence of the Court were also possible, as indicated by the cases of Laurence Halloran, Johan Fleischakker, and Joseph Jansen Thomassen (Court of Justice Records 1810; 1811; 1803). The case of Thomassen (which spans the years 1799 to 1803) demonstrates the diverse means of appeal available to an apparently well-connected 'European'. Thomassen had shot and killed a subject designated as a 'bastard Hottentot', allegedly in self-defence. Exceptionally, the Fiscal (who ordinarily served as a public prosecutor) provided Thomassen with a defence. The prosecution was in turn delegated to the Secretary of the Court. When Thomassen was nonetheless found guilty and imprisoned, he sent letters of appeal to various officials including the Attorney General (under British rule), and then later to the Governor and the Commissioner General (under Batavian rule). Both of the latter intervened on his behalf and he was eventually able to instigate a rehearing of his case and an end to his imprisonment. We may infer that Thomassen was of relatively high standing based on his success in capturing the attention of the Court, the Governor, and the Commissioner General. As a European with connections he was able to appeal to the representatives of the sovereign in order to contest his depersonalization. Thomassen had been initially sentenced 'to be struck over the head with a sword and to be banished for life' (Court of Justice Records 1803a: 699). Once the case was reconsidered by the Court, the record indicates that Thomassen was spared the blow with the sword and, now eager to leave prison, banished from the colony (ibid.: 699).

Legal idioms, calculations and the appearance of a colonial sovereign

When passing sentences and inflicting punishment, nearly all cases involve the Court claiming explicitly to be 'Doing Justice' in the name of one or another sovereign, be it 'The Lords States General of the United Netherlands' (e.g. Court of Justice Records 1793b). 'His Brittanick Majesty' (e.g. Court of Justice Records 1797) or the 'Batavian Government' (e.g. Court of Justice Records 1803b). The lexicons of law presented a colonial sovereign as the guarantor and protector of a hierarchically ordered society. At the same time, as noted, the law's categorizations of persons in that hierarchy formed the basis for calculating the severity of particular crimes, and often unleashed spectacular public punishments that demonstrated the sovereign's power over bodies accused of transgressing the order which the sovereign was said to protect (Pavlich 2012a: 3).

Yet, as gleaned from our discussion of Foucault and Derrida, the very appearance of sovereignty is contoured from below and is performatively constituted through the Court's rituals, theatrical presentations and idiomatic expressions. In practice, the identification and punishment of 'criminals' held to be in violation of a social order helped to ensconce the notion that a sovereign power is required to provide a 'country where justice is duly administered' for subjects who obey the laws enforced in the name of a sovereign.

Significantly, the Court continued to portray the colonial sovereign in much the same way regardless of which colonial power controlled the Cape. Moreover, as demonstrated by the members' disagreement with General Craig, the Court resisted British functionaries' efforts to alter the way the Court applied the distinction of persons and calculated punishments. The image of the colonial sovereign fashioned at the Cape was the result of local contestation and not top-down imposition.

Through formulaic deferrals to a 'Majestic' sovereign, and through repeatedly claiming to protect its social order in the name of Justice, crime-focused law at the Cape helped to constitute sovereignty as a pivotal and seemingly necessary entity. Through juridical procedures the sovereign's strength was deferred to and underpinned by inquisitors and judges who claimed to act on the sovereign's behalf. As Pavlich elsewhere notes, the 'inquisitor, as the sovereign's representative, solicited "the truth" through codified and regulated procedures' (2012a: 6). Moreover, law's reliance on different categories of personhood within a contextual hierarchy, and its calculations of crime and punishment in relation thereto, helped to reinforce a close connection between law, persons and the sovereign. Through its criminalizing, corrective, and punishment practices, Cape crime-focused law both created and manipulated identifications of personhood and images of sovereignty which could depersonalize people to the point of a violent, public, death. Through such processes, interpreting Esposito (2012b: 84–87), one might recognize that law's capacity to shape personhood on behalf of the sovereign had the crucial effect of authoring and authorizing images of that very sovereign.

Personhood and contemporary crime-focused law

The chapter thus far opens up ways of thinking about the person as a legal concept, criminal law as performing iterations of personhood, and sovereignty as shaped through criminal law proceedings. Far from a sovereign command simply dictating various types of personhood through criminal idioms of law at the Cape, law and its concepts of personhood helped to shape the colonial sovereign. These conceptions of personhood, as well as the very ways that categorizations of personhood operated to constitute particular conceptions of sovereignty politics, are directly relevant to contemporary accounts of crime-focused law. In this regard, one might note the reverberations with current criminal law and how it divides out images of persons based on such factors as, say, mental state, gender, and age. As we indicated by way of example in our analysis of the Cape, such categorizations of person are not natural, nor granted by a top-down sovereign authority; rather, they are mediated legal constructs which shape sovereign authority, and this holds potentially significant implications for the manner in which we understand the expansion and tenacity of contemporary crime-focused industries.

Nicola Lacey's (2001; 2007; 2011) work on the differences in how distinct legal regimes treat and conceptualize various types of subjects is especially useful in this context. Lacey describes a historical shift within English criminal law from what she depicts as 'character-based' logics of responsibility attribution to 'capacity-based' logics. In character-based logics, criminal trials consider various characteristics of the person who commits the crime. For instance, such characteristics might include the person's status, reputation, background, and associates, which are considered evidence of a 'good' or 'bad' character (2001: 251, 267; 2011: 157). Subjects are held responsible for their characters – which is indicated by a particular criminal act – and it is on the basis of this character that the subject is punished. By contrast, the introduction of capacity-based systems began to consider whether an individual was responsible for a specific crime, which was grounded in two things: first, whether the individual committed the act and, equally importantly, whether the individual possessed the cognitive and volitional capacities to be found culpable. In Lacey's terms, '"character". . . evaluation attaches to persons and relates to identity' while 'capacity' evaluation involves 'concern with agency, choice, and personal autonomy' (2011: 155).

There are complex reasons behind the historical shift from character-based evaluations to capacity-based evaluations of criminal responsibility. Among these, Lacey notes that urbanization, together with increased mobility and anonymity, undermined character-based criminal judgments

insofar as they 'deprived the criminal justice system of reliable sources of local knowledge' (ibid.: 155). At the same time, Enlightenment conceptions of individuals as decisive or rational choice makers, together with psychological interest in motivation, undermined the legitimacy of punishing individuals based on their characters or social positions rather than for their actions (ibid.: 159–161).

It is useful to consider how changing ideas of responsibility affect the categorization and prosecution of persons. Lacey notes, for example, a historical decline in prosecutions of women as capacity-based notions of responsibility came to prominence within nineteenth-century England. Female offenders were increasingly categorized as lacking the volitional and cognitive capacities to be held 'responsible' and were subsequently diverted to psychiatric institutions (2001: 273). In this example, decisions on what type of subject an individual is do not merely influence sentence but also determine whether a woman appears before a criminal court at all. That is, calculations of the type of person a subject is enter into pre-trial decisions on whom to prosecute (Lacey 2007: 33–36).

It is worth noting too, in this context, that although diversion from the criminal justice system may circumvent criminalization, it may also redefine – or indeed depersonalize – an individual by presenting them as lacking responsibility and volition. Such a categorization, when extended to the sphere of psychiatry, may cast the individual as one who is unable to make decisions for herself and so unable to contest or refuse 'treatment'. Criminologists, therefore, should be concerned with such depersonalization, and attend to mechanisms by which police officers, prosecutors, and judges may divert individuals away from standard criminal justice measures and toward distinct regimes of control. One might consider, for example, the possible depersonalizing effects of youth criminal justice programs which divert individuals from trial or modify the form of the trial on account of the accused person's minority identity and any claims about supposedly inferior capacities for decisive action and rational thinking (Lacey 2011: 174).

Perhaps most significant, at the contemporary historical moment, is the preventive detention of individuals associated with terrorism 'on both sides of the Atlantic' and the proliferation of exceptional measures for dealing with such individuals without invoking the 'normal' criminal law (Lacey 2007: 34). Judith Butler (2004) writes compellingly on how the depersonalization of detainees at Guantánamo was an integral means of justifying their detention without trial. She notes that the detainees were compared to dangerous animals: they were said to be 'not like other humans who enter into war, not "punishable" by law, but deserving of immediate and sustained forcible detention' under the assumption that, unlike moral persons, they could not control themselves and so had to be restrained (2004: 73). In this example, we can recognize a certain degree of similarity between the category of dangerous terrorist as a type of being distinct from the responsible person, and the Court of Justice's distinction between dangerous bodies who were punished without efforts at rehabilitations and those 'correctable' persons whose 'internal feelings' led them to forego or renounce crime. Indeed, the ways ethnicity, nationality, and citizenship are currently employed as indices to potential terrorism (Butler 2004: 57; Lacey 2007: 304) make the parallel with the Court of Justice's worries about 'wild and rude nations' (Theal 1897, vol. 1: 304) especially pronounced. Nor can one fail to note that the enforcement of counter-terrorism measures produces conceptions of the nation-state as the sovereign power which is 'to exercise judgments regarding who is dangerous' and what legal treatment they are to receive in the name of citizens' security (Butler 2004: 57–76).

Indeed, one particular parallel may be drawn between the way the Court of Justice at the Cape separated 'uncultivated' bodies from cultivated persons and contemporary distinctions between dangerous and the correctable individual within contemporary law. As we have

previously noted, the Court of Justice had distinguished 'rude and uncultivated' nations said to understand only bodily pain and to be 'difficult to correct & to deter from doing evil' from those persons who 'from better education measure the degree of punishment by their internal feelings' (Theal 1897, vol. 1: 304). Arguably, the latter type of subject, able to feel shame and acknowledge their crime, maps neatly onto contemporary understandings of the type of moral subject amenable to rehabilitation, while the dangerous body of the 'uncultivated' maps onto contemporary notions of the dangerous offender who is to be isolated from society.

This division of subjects is examined by Foucault (2005), who analyzes the emergence of the concept of the 'dangerous individual' through the work of European criminal anthropology and psychiatry. He writes:

> in the nineteenth and twentieth centuries, penal practice and then penal theory will tend to make of the dangerous individual the principal target of punitive interventions. Increasingly, nineteenth-century psychiatry will also tend to seek out pathological stigmata that may mark dangerous individuals.
>
> (2005: 219)

Foucault notes how the construction of the 'dangerous individual' represents a departure from notions of capacity-based criminal responsibility that were being developed during this time period. He examines how, to the extent the 'fundamental question' about an individual became the question of 'the level of danger he [*sic*] represents for society', criminal sentences could be reconceived as 'a mechanism for the defense of society' (2005: 222). This might be understood as a strategy of governance that is justified on the grounds that the sovereign state secures the continuance of order and security for valued subjects.

At the same time, conceptualizations of dangerousness provide a strong counterforce to the logic of rehabilitation. According to a logic that presents criminal sentences as a means of defending society, the difference relevant to criminal sentencing is the 'difference . . . between absolutely and definitively dangerous subjects and those who can cease to be dangerous provided they receive certain treatment' (2005: 222). This also has certain resonance with the Court of Justice's distinction between dangerous 'uncultivated' bodies and those whose 'inner feelings' might be considered in sentencing.

One might build on Foucault's insight to indicate how logics of danger and rehabilitation divide along rather different conceptions of subjects. As Lucia Zedner (2010) reminds us, just as there are hierarchies of persons, not all subjects are equal within contemporary societies. For Zedner, there are a plethora of subjects whose full personhood is considered suspect or probationary, including 'anti-social youth, persistent offenders, sexual offenders, and suspected terrorists: all of whom occupy liminal spaces at the margins of civil society' (Zedner 2010: 389, cited in Lacey 2011: 168). Lacey suggests that after long-standing character-based methods of diverting individuals from the criminal justice system, we may now be encountering a resurgence of character-based measures within criminal law itself (Lacey 2007; 2011); measures that are 'preventive in temper; disproportionate in reaction; [and] indifferent to normal procedural protections'. These police powers rest upon a decision to cast certain subjects as, 'dangers to be managed, as distinct from citizen[s] invested with rights' (2011: 168).

In this context, Lacey directs our attention to dangerous offender policies, sex offender registries,

> civil preventive orders such as anti-social behaviour injunctions; pre-trial orders such as remands in custody; licence conditions on release from a sentence of imprisonment; or

criminal court orders aimed at preventing harm or risk of harm, such as disqualification from driving or from being a company director.

(2007: 33–35; 2011: 168)

Each of these measures is concerned not with specific acts that an individual has committed, but with an individual's supposed propensity to commit harmful acts. Such measures therefore display a 'character essentialism', which assumes that human propensities are immutable or at least firmly fixed, such that certain subjects must be controlled rather than, or in addition to, being rehabilitated (Lacey 2011: 156).

Just as this chapter argues that the Court of Justice at the Cape created categories of person through crime-focused law, Lacey contends that each preventive criminal law measure produces a stigmatized category of person which is identified through its subjection to the measure (ibid.: 169). Examples include the anti-social individual, the sex offender, the dangerous offender, as well as less easily labelled categories such as 'the person who cannot be trusted to operate motor vehicles'.

Character-based measures, which create and target specific classes of persons, are problematic and contestable insofar as they rely upon an erroneous 'us' versus 'them' dichotomy. As Lacey writes, an understanding of the role of criminal law in producing categories of person promotes the idea that 'there is a finite number of "bad people"' which can simply be detained or neutralized in order to make 'the world . . . a safer place for those of "good character," who alone deserve the full protections of the rule of law' (ibid.: 165).

Finally, we may consider the role of contemporary law directed to crime, not only in terms of how it produces categories of persons, but also how it contributes to a contemporary sovereignty politics that presents the state as a power directing criminal law for the sake of protecting valued subjects. Lacey attributes the prevalence of security-oriented sovereignty politics in the post-9/11 world largely to insecure 'publics', experiencing 'economic restructuring and cultural disembedding', which project their anxieties upon a supposed 'criminal threat' (ibid.: 170, 173). The research presented here suggests that increased attention must be given to the role of legal decision-makers such as police, prosecutors, and judges in constructing specific images of sovereignty and the narrative of the anxious public which appeals to sovereign protection.

Conclusion

We have shown that regardless of their assigned category in the social order, the Cape's crime-focused law treated subjects as one or another category of persons. All subjects were at once thereby regarded as potential legal persons, and subject to possible depersonalization through criminalization and punishments ranging from horrific execution through to banishment and imprisonment. Crime-focused law served as one way these categories were instilled and reified. Through this process, persons were brought in contact with legal process and conceptions of sovereignty politics, simultaneously casting them as persons under law, and then either allowing them to maintain their personal status or depersonalizing them to a status as lesser persons or even non-persons. In doing so, the law permitted iterations of personhood and sovereignty to be performed in every instance of criminal law proceedings. This means that, far from a sovereign command dictating various types of personhood at the Cape, law and its concepts of personhood emerged to help shape the colonial sovereign.

In this instance, Foucault's (2003) insight that the supposedly all-powerful and transcendent sovereign is constituted 'from below' dovetails with our analysis of the way the distinction of

persons was enforced in the name of the very sovereign, which the categorization of persons in fact helped to constitute. In addition, far from persons being constructed by the sovereign, the relational process of becoming a subject of law and thereby personalized or depersonalized cannot be fully understood in terms of sovereign decisions. Personhood is not 'stripped' from subjects by an all-powerful sovereign in the sense that Agamben (1998) might posit. Instead, our account shows the nuanced ways in which a colonial sovereign and a hierarchical social order are defined by crime-focused law. Legal formulations of personhood are intertwined with historical versions of law, crime, punishment, and sovereignty. Different categorizations of personhood underscore calculations of justice through judgments and punishments that constitute hierarchical ordered classes of person by acting upon these classes differentially. Images of a sovereign are constituted relative to this hierarchy of persons as the sovereign is retro-actively presented as the guarantor of a hierarchical social order.

In contemporary times, criminal law continues to produce various forms of personalization and depersonalization according to categories such as race, gender and citizenship as well as through preventive character-based criminal measures which constitute groups such as 'dangerous offenders' and 'suspected terrorists'. At the same time, as Lacey (2011) demonstrates, a sovereignty politics in which the state is understood to protect 'good people', 'citizens', or otherwise valued categories from those whom the criminal law constitutes as 'bad people', 'potential terrorists', and so forth, is produced precisely through crime-focused law oriented to people's alleged character.

Such examples show how the generation of personhood is reliant on sovereignty, and vice versa; personhood is brought into existence as a legal category that both frames and generates sovereignty politics. Personhood and sovereignty are 'performances' that often present as 'natural' and 'inevitable' but are in fact contingent historical productions (Derrida 2009). Starting with an example of the classification of persons at the Cape, during a time when certain characteristics were constructed as 'naturally just' means for ordering society, allowed us to illustrate this operational logic. Although we may consider contemporary society as being 'beyond' colonial images of sovereignty politics, given the abolition of slavery and 'post-racial' rhetoric, contemporary accounts are indicative of how personhood continues to be inscribed in crime-focused law today. We might note how character-based measures, implicated in an 'us' versus 'them' sovereignty politics, produces vulnerable categories of people within liberal polities, rendering the poor, youth, non-citizens and racial minorities particularly exposed. This chapter seeks to challenge the taken-for-granted idea that states exist to protect law-abiding subjects from others, and to scrutinize how crime-focused law produces categories of persons *and* the sovereign state in whose name these categories are inscribed.

Discussion questions

1   What role do hierarchies of personhood play in generating social inequalities? How can an understanding of the operational logic of sovereignty challenge this?
2   Is personhood always a problematic mechanism of social control or could it ever shape a benevolent sovereignty politics?
3   What types of personhood emerge within contemporary modes of governance?

Websites

http://plato.stanford.edu/entries/personalism/.
http://www.sahistory.org.za/south-africa-1652-1806/history-slavery-and-early-colonisation-sa.
http://www.southafrica.info/about/history/521102.htm#.UJFno7RLrw.

Notes

1   All summaries of cases were located from the Western Province Archives and Records Service, CJ Series. We wish to thank staff for their assistance in providing access to this archival material. We also acknowledge a Social Sciences and Humanities Research Council of Canada Standard Research Grant for the generous support of the wider research program to which this chapter contributes (George Pavlich, Principal Investigator).

2   The similar case of Floris of Ceylon (1798), Western Province Archives and Records Service CJ 794 [357ff] involves a slave who stabs his Master after being reprimanded by him. Like February, Floris is hung and his corpse exposed.

3   The Orphan Chamber was a powerful colonial institution, which managed large sums of money due to its role in disbursing property left by those who died intestate or with underage heirs. TANAP Research Group, Cape of Good Hope Documents. Inventories of the Orphan Chamber of the Cape of Good Hope. Functions and Duties of the Orphan Chamber, available at: http://www.tanap.net/content/activities/documents/Orphan_Chamber-Cape_of_Good_Hope/introduction/25.htm.

References

Agamben, G. (1998) *Homo Sacer: Sovereign Power and Bare Life*, Stanford, CA: Stanford University Press.

Butler, J. (2004) *Precarious Life: The Powers of Mourning and Violence*, London: Verso.

Court of Justice Records (1793a) The Case of Sara. Western Province Archives and Records Service, CJ 797, [19ff].

Court of Justice Records (1793b) The Case of Claas Zwart. CI 796 [285ff].

Court of Justice Records (1797) The Case of February of Bengal. Western Province Archives and Records Service, CJ 797, [225ff].

Court of Justice Records (1798a) The Case of Stamat of Padang, Amsterdam of Batavia, Pedro of Mozambique, Damon of Mozambique and Fredrick Medicus. Western Province Archives and Records Service, CJ 798, [9ff].

Court of Justice Records (1798b) The Case of Claas and Martinus, Western Province Archives, CJ 797 [p329ff].

Court of Justice Records (1798c) The Case of Hermanus Windvogel, Western Province Archives, CJ 797 [239ff].

Court of Justice Records (1799a) The Case of Adam. Western Province Archives, CJ 798 [p111ff].

Court of Justice Records (1799b) The Case of Telemachus, Spadille, La Fleur, Said, Boegies and Boelang. Western Province Archives and Records Service, CJ 798 [p67ff].

Court of Justice Records (1799c) The Case of Sarah, Mitje, Kaatje and Sarah. Western Province Archives, CJ 798 [p41ff].

Court of Justice Records (1801a) The Case of Gerrit Bezuidenhout. Western Province Archives and Records Service, CJ 797, [218ff].

Court of Justice Records (1801b) The Case of Carel Hendrik Lewald. Western Province Archives and Records Service, CJ 799 [767ff].

Court of Justice Records (1801c) The Case of Appollus, Africa, Jan Piet, Lys, Magdalena, Lena, Launa, and Hanna. Western Province Archives, CJ 799 [p368ff].

Court of Justice Records (1803a) The Case of J. J. Thomassen, Western Province Archives, CJ 496 [669, 671ff, 679, 691].

Court of Justice Records (1803b) The Case of Adonis of the Cape, Western Province Archives, CJ 800 [144ff].

Court of Justice Records (1806a) The Case of Dancer and Jan Valentin. Western Province Archives and Records Service, CJ 801, [44ff].

Court of Justice Records (1806b) The Case of January Van Baly. Western Province Archives and Records Service, CJ 801, [124ff].

Court of Justice Records (1808a) The Case of Africa alias America. Western Province Archives and Records Service, CJ 802, [284ff].

Court of Justice Records (1808b) The Case of John Wilson of Kent. Western Province Archives and Records Service, CJ 802, [300ff].

Court of Justice Records (1808c) The Case of Jaapie. Western Province Archives and Records Service, CJ 802, [603ff].

Court of Justice Records (1809a) The Case of Tobias of the Cape. Western Province Archives and Records Service, CJ 803, [327ff].

Court of Justice Records (1809b) The Case of Pedro of the Cape, February from Mosambique, Pluto from Mosambique, Adam of the Cape and David of the Cape. Western Province Archives and Records Service, CJ 803, [66ff].

Court of Justice Records (1809c) The Case of Jacobus Kluysman. Western Province Archives, CJ 803 [225ff].

Court of Justice Records (1809d) 51 Accused. Western Province Archives, CJ 802 [725ff].

Court of Justice Records (1810a) The Case of Asia of the Cape. Western Province Archives and Records Service, CJ 803, [445ff].

Court of Justice Records (1810b) The Case of Johannes Fleischakker, Western Province Archives, CJ 803 [545ff].

Court of Justice Records (1810c) The Case of Jean Baptiste le Baron, François Herboliue and Felix La Pert. Western Province Archives, CJ 803 [469ff].

Court of Justice Records (1811) The Case of Laurance Halloran, Western Province Archives, CJ 803 [553ff].

Court of Justice Records (1812) The Case of Lena Willemse. Western Province Archives and Records Service, CJ 908, [439ff].

Derrida, J. (2009) *The Beast and the Sovereign*, vol. 1, Chicago: The University of Chicago Press.

Du Toit, A., and Giliomee, H.B. (1983) *Afrikaner Political Thought: Analysis and Documents*, Berkeley, CA: University of California Press.

Esposito, R. (2012a) 'The Dispositif of the Person', *Law, Culture and the Humanities*, 8(1): 17–30.

Esposito, R. (2012b) *Third Person: Politics of Life and Philosophy of the Impersonal*, Cambridge: Polity Press.

Fine, H. (1991) 'The Administration of Criminal Justice at the Cape of Good Hope 1795–1828', PhD, Cape Town: University of Cape Town.

Foucault, M. (1990) *The History of Sexuality*, vol. 1: *An Introduction*, New York: Random House.

Foucault, M. (2003) *Society Must Be Defended: Lectures at the Collège de France, 1975–76*, New York: Picador.

Foucault, M. (2005) 'About the Concept of the "Dangerous Individual" in Nineteenth-Century Legal Psychiatry', in P. Rabinow and N. Rose (eds) *The Essential Foucault*, New York: New Press.

Foucault, M. (2007) *Security, Territory, Population: Lectures at the Collège de France, 1977–78*, trans. G. Burchell, New York: Palgrave Macmillan.

Foucault, M. (2008) *The Birth of Biopolitics: Lectures at the Collège de France, 1978–79*, trans. G. Burchell, New York: Palgrave Macmillan.

Giliomee, H. and Mbenga, B. (2007) *New History of South Africa*, Cape Town: Tafelberg.

Groenewald, G. (2010) 'Slaves and Free Blacks in VOC Cape Town, 1652–1795', *History Compass*, 8(9): 964–983.

Lacey, N. (2001) 'Responsibility and Modernity in Criminal Law', *The Journal of Political Philosophy*, 9(3): 249–279.

Lacey, N. (2007) 'Character, Capacity, Outcome: Toward a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English law', in M. Dubber and L. Farmer (eds) *Modern Histories of Crime and Punishment*, Stanford, CA: Stanford University Press, pp. 4–41.

Lacey N. (2011) 'The Resurgence of Character: Responsibility in the Context of Criminalization', in R. Duff and S. Green (eds) *Philosophical Foundations of Criminal Law*, Oxford: Oxford University Press, pp. 151–178.

Pavlich, G. (2010) 'Legal Judgment and Cape Colonial Law,' *Law, Culture and the Humanities*, 7(2): 1–12.

Pavlich, G. (2011) 'Sustaining Sovereignty through Law at the Cape Colony, 1795–1803', *Journal of Forensic Psychology Practice*, 11(2–3): 184–203.

Pavlich, G. (2012a) 'Cape Legal Idioms and the Colonial Sovereign', International Journal of the Semiotics of Law, 56: 1–16.

Pavlich, G. (2012b) 'Sovereignty by Acquisition at the Cape: Foucault, Hobbes and de Mist, George Pavlich', in B. Goulder (ed.) *Re-Reading Foucault: On Law, Power and Rights*, New York: Routledge-Cavendish.

Ross, R. (1979) 'The Changing Legal Position of the Khoisan in the Cape Colony, 1625–1795', *African Perspectives*, 2: 67–88.

Ross, R. (1980) 'The Rule of Law at the Cape of Good Hope in the eighteenth century', *Journal of Imperial and Commonwealth History*, 9(1): 5–15.

Ross, R. (1999) *Status and Respectability in the Cape Colony, 1750–1870: A Tragedy of Manners*, Cambridge: Cambridge University Press.

Ross, R. (2008) *A Concise History of South Africa*, New York: Cambridge University Press.

Shell, R. (1994) *Children of Bondage: A Social History of the Slave Society at the Cape of Good Hope, 1652–1838*, Boston: University Press of New England.

van Aswegen, W. (1990) *History of South Africa to 1854*, Pretoria: van Schaik Publishers.

Watson, R. L. (2012) *Slave Emancipation and Racial Attitudes in Nineteenth-Century South Africa*, Cambridge: Cambridge University Press.

Wessels, J. W. (2005) *History of the Roman Dutch Law*, New Jersey: The Lawbook Exchange.

Worden, N. and Groenewald, G. (eds) (2005) *Trials of Slavery*, Cape Town: Van Riebeck Society.

Theal, G. M. (1897) *Records of the Cape Colony, February 1793–December, 1796*, vol. 1, Cape Town: Government of the Cape Colony.

Zedner, L. (2010) 'Security, the State and the Citizen: The Changing Architecture of Crime Control', *New Criminal Law Review*, 13(2): 379–403.

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