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Crime, Justice and Social Democracy

International Perspectives

Edited by Kerry Carrington, Matthew Ball, Erin O'Brien and Juan Tauri

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Crime, Justice and Social Democracy

International Perspectives

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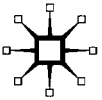

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Foreword

The contributors to the book you are about to read address themselves, in their various ways, to a large and important question: *how to think about crime and justice in relation to social democracy?*

Already, in posing this question, these authors make a valuable move. They put aside the discipline's negative (and somewhat obsessive) focus on 'neoliberalism' and pose, instead, a series of more positive inquiries about social democracy, its ideas and institutions, and the possibilities it contains for social and criminal justice.

This is an ambitious kind of criminology. It is a criminology that addresses questions of crime, crime control, and criminal justice in the context of large-scale social organisation. It is a criminology that takes as its conceptual horizon the broad structures of political economy rather than the narrow confines of criminal justice policy. It is a criminology that concerns itself as much with the rights and responsibilities of citizenship as with the causes and consequences of crime. And the authors in this volume show just how productive such a criminology can be.

But such ambition brings its own challenges. As several contributors point out, the conceptual terms of this broader criminology cannot be taken for granted. The very phrase 'social democracy' brings with it a number of possibilities and therefore, a number of misunderstandings. Is social democracy to be understood as a distinctive conception of economic and social justice? Or as a leftist politics, working towards socialism by democratic, parliamentary means? A synonym of democratic socialism? Or a reformist, 'Third Way' centrism that views the welfare state as the *summum bonum*? Is it, indeed, a political movement? Or the proper name for a type of society – the type that seeks to restrain and regulate its market economy in the interests of social security, social solidarity, and a measure of social justice? Which is to say, the type of society in which most readers of this book actually live.

We might apply the same caution to the term 'neoliberalism', which may be the most overused term of the early twenty-first century. It is no doubt true that neoliberal rationalities and techniques have dominated government policy in recent decades, especially in the nations under discussion here – above all, Australia, New Zealand, Canada, the US, and the UK. But, as you will read in these pages, we should take care not to think of 'neoliberalism' in essentialist ways, or to assume that societies in which free market policies find favour become, as a consequence, fully formed, 'neoliberal' totalities.

Nor should we assume that 'neoliberalism' and 'social democracy' are unitary, mutually exclusive, and mutually antagonistic political formations.

The pre-eminence of neoliberal actors and ideologies since the 1970s has transformed much in our economic and social lives, often with devastating consequences for the poor and for working people. But these policies have not fully transformed the basic structures of Western societies, which continue to exhibit the institutional forms of welfare capitalism. None of the Anglophone nations under discussion has become thoroughgoing free market societies. None of them has altogether abolished the social protections or the social democratic principles inherent in their welfare states. What has happened, instead, is that the balance of political forces *within* modern welfare capitalism has shifted from the social democratic ascendancy of the post-war decades, to the free market emphasis of recent decades.

In each of these nations, neoliberalism and social democracy – together with other more progressive, or more conservative, or more politically indeterminate political movements and policy initiatives – compete for dominance on an institutional terrain that continues to combine capitalist economies with mass democracy. Rather than thinking in terms of mutually exclusive, mutually antagonistic pure types – social democracy versus neoliberalism, government versus market – we need to come to terms with the hybrid, compromise formations that are the stuff of real policy and real institutions, whether in the socioeconomic domain or in the world of criminal justice. Doing so will better enable us to describe and explain the specific characteristics of crime control and penal practices – few of which are well-captured by the terms 'neoliberal' or 'social democratic'. And it may assist us in developing crime control initiatives and criminal justice interventions that have no necessary affiliations, either to neoliberalism or to social democracy, but which are open in their political meaning and indeterminate in their potential constituencies of support.

A criminology that aims to understand the facts of crime and justice in relation to the structures of political and economic power has to move from the particular to the general in ways that respect the intermediating processes and mechanisms involved. If it aims to paint the big picture it has to combine broad, impressionistic brushstrokes but with *pointillist* factual detail and faithful attention to proportion, perspective and composition. And, as always in the portrayal of social life, it must seek to capture the play of irony and contradiction, and avoid the tendency to gloss these over in pursuit of a too-neat simplicity or order.

In this regard, the care with which this book's authors turn to historical and comparative data has much to commend it. So, too, does the attention they pay to the complex (and much misunderstood) relation between crime, perceptions of crime, and penal responses. We know, for example, that penal policies tend to be harsher in societies that are closer to the neoliberal end of the continuum than to the social democratic end. But we cannot proceed from this to assume a direct, unmediated link between political

economy, crime and justice. After all, rates of crime and violence increased in all western nations from the 1960s to the mid-1970s – a period during which social democratic politics were in the ascendant, welfare states were, everywhere, expanding, and economic inequalities were being reduced. Conversely, in at least some societies – most notably the USA in the 1990s, but elsewhere too – the rise to dominance of neoliberal politics and policies has coincided in time with marked reductions in crime and homicide rates.

There is an object lesson here for progressives and supporters of social democracy: do not presume that more welfare and equality will necessarily result in less crime, at least in the short term. And do not assume the converse. Trends in political economy and trends in crime and punishment don't always run parallel. Politicians and policymakers can stamp their 'welfarist' or 'neoliberal' imprints on criminal justice policy and institutions. But they exert much less control over the complex social processes that produce crime and violence. And patterns of crime and violence will tend, over time, to influence the popular demand for punishment and public evaluations of criminal justice.

Future research will, one hopes, unravel these puzzling correlations and identify the actual causal processes involved. But in the meantime, they are a useful reminder of the challenges faced by a politically ambitious criminology, of the interactive relation of crime and punishment, and of the complex links that connect these to the larger structures of neoliberalism, social democracy, and the welfare state in capitalist society. If you wish to learn more, read on...

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Preface

On a warm winter Brisbane evening, three Queensland Supreme Court Judges sat in the front row of a public lecture about to be delivered at Queensland University of Technology (QUT) by David Brown. The lecture was on rescuing the democratic narrative in criminal justice, and this book sprang from the unexpectedly enthusiastic reception to the seemingly novel idea at the lecture's heart – that of linking democratic ideals of justice to criminal justice. Just over one year later, in September 2011, an international conference on Crime, Justice and Social Democracy, with keynote speakers from the UK, US, Australia, Canada and New Zealand, was hosted by the School of Justice at QUT. The selection, which produced much engaging dialogue, spontaneity and creativity, comprises the substance of this edited book. The participants, a quarter of whom were from outside Australia, regarded it as one of the most intellectually stimulating events they had attended. We are delighted that the product of so much of that stimulation has been captured in this edited compendium. Of course, many outstanding papers presented at the conference are not included here, simply because it would otherwise have been a tome, though these papers can be found in refereed conference proceedings.[1]

So what was it that sparked such lively discussion and intellectual stimulation? It is the promise that social democratic ideals hold as perhaps the most cogent set of principles and values to which we might turn in order to address the ongoing social and criminal injustices produced in neoliberal societies. As wide-ranging ideals about the values we ought to strive towards in the arrangement and government of our societies, social democratic values force us to ask broader questions about government, ethics, and the exercise of power in criminal justice institutions, and constantly reflect on their achievement. Each of the chapters here directly engages with how this might occur, in one way or another.

While there were many ways of linking the topics that comprise this volume, the 23 chapters are organised into seven sub-themes. The intellectual breadth, diversity and complexity of these contributions posed a welcome challenge for us as editors in tying them together and introducing them to readers. We have chosen to do this, though, by focusing on three of the recurring themes that appear in the book.

The social democratic critique of neoliberal regimes

The first theme that underpins the contributions of a number of authors here is the ongoing task of critiquing neoliberal regimes of government and

crime control using social democratic thought. Contributions of this kind point to the forms of exclusion, inequality and injustice created by neoliberal regimes, and thus strengthen the moral claim of social democratic ideals as a necessary approach to addressing these problems. Taking inspiration from David Garland's (2005) profound analysis of the distinctive modes of crime control in the twenty-first century, these contributions also point out how progressive reforms can still be reversed, and that addressing injustice is an ongoing struggle.

The book opens with Elliott Currie's wide-ranging analysis of the social and ecological disaster of unfettered free-market capitalism that has come to dominate the global economy '...exacerbating inequality, perpetuating needless deprivation, threatening the global environment and, not least, fostering widespread violence and other social harms' (Currie: 3–15). Currie contemplates alternative visions to predatory capitalism and imagines 'what kind of social democracy should we be striving toward?' while suggesting some crucial elements of what he coins the 'sustaining society'.

Democracies are built upon the notion of difference. Susanne Karstedt's chapter analyses how increasing ethnic diversity poses challenges to the inclusionary mechanisms of contemporary democracies in general, and to its criminal justice systems in particular. Based on a cross-cultural comparison of indicators, Karstedt explores the role of the values and institutions of inclusion in an environment of ethnic diversity and fractionalisation. Judith Bessant's chapter also interrogates the values, ethics and modes of governance that underpin social inclusion policies, describing the kinds of taxation, social and criminal justice policies necessary for operation of a minimally just society.

The chapters by Kerry Carrington and Reece Walters illustrate just how much the crimes of the rich and powerful, shielded by neoliberal imperatives of privatisation and ideologies of free markets and anti-regulation, are rarely subject to the penal gaze of criminal justice systems. Carrington argues that post-industrial mining regimes often mask and privatise the harms associated with precarious work practices, such as alcohol related male on male assaults arising from the housing of thousands of non-resident resource sector workers in camps. Her chapter illustrates how the political economy of knowledge at work in approving multi-billion dollar mining projects for development has spawned the extensive privatisation of knowledge, resulting in the capture of university social research by the industry and the loss of a critical voice. Reece Walter's chapter focuses on the harmful consequences of expanding networks of global trade that produce byproducts, create new illegal markets in the disposal and distribution of waste. In its various toxic and non-toxic forms, the refuse of contemporary societies not only poses widespread environmental and waste management concerns but also simultaneously creates substantial commercial prosperity for legal and illegal business entities. This chapter draws on original research involving

Italy's 'eco-mafia', and critiques discourses in 'waste crime' within emerging landscapes of environmental justice.

Questions about social justice, governance and ethical practice are inextricably linked to crime control and criminal justice practice, and these links are considered by many of the authors here as well (such as Weber, Phoenix, Bessant, Ball, O'Brien, DeKeseredy, Dragiewicz, and Hearfield and Scott). The necessity for examining this link is readily apparent in the ongoing over-representation of Indigenous peoples in the criminal justice system. The racialisation of crime and deviance and the policing of visible ethnic minorities and first nations peoples has been a major issue in the big four neocolonial jurisdictions of Canada, Australia, New Zealand and the US. There are several chapters in this volume that directly address this theme (those by Tauri, Stubbs, and Cowlishaw). Julie Stubbs' chapter draws our attention to the specific and ongoing criminalisation of Indigenous women, an overlooked issue in the field of criminology and criminal justice policy. Gillian Cowlishaw's contribution reflects on the everyday taken-for-granted assumptions about crime, deviance and Aboriginal communities, challenging social constructions of those officially designated as 'offenders' as somehow inherently deviant. In the communities where she undertook anthropological field research, these outsider (officially constructed) stigmatisations of 'deviance' have little or no purchase. In a similar vein, Juan Tauri's chapter offers a critique of what he sees as a control freak discipline – that of criminology. His chapter powerfully deconstructs how the criminological gaze, including its theoretical and empirical tools, constructs the Indigenous Other, and excludes Indigenous ways of knowing to elevate a colonialist construction of crime and deviance as the only legitimate forms of criminological inquiry.

Another illustration of the links between social justice and crime control is presented by John Pratt and Anna Eriksson who remind us that, as social inequalities in Anglophone countries have widened, so have their rates of punitiveness and imprisonment. But their chapter tells a different, less well-known story of the Nordic social democratic states (Finland, Norway and Sweden), where it has remained possible to think about punishment and penal policy in fundamentally different ways, of which the response to Anders Breivik's mass killing of 77 persons in Oslo in July 2011 is exemplary. Instead of calling for retribution, the return of the death penalty and the spruiking of intolerance and vigilantism, the popular response was characterised by 'solidarity, democracy and unity', in a march that celebrated Norway's citizenship and its 'unwavering commitment to social democratic values' (Pratt: [51–69]).

Confidence in the integrity, independence and professionalism of criminal justice and investigative agencies is an essential feature of the modern social democratic state. With the rising threat of terrorism and despotism, the decline of social democracy in parts of the world, and the elevation of national security concerns, the contemporary climate of policymaking

has been plagued by growing tensions between the protection of human rights and democratic freedoms on the one hand, and national security on the other. Again, a number of chapters explicitly address this theme (such as those by Lee and McGovern, Poynting, Weber, and Grewcock). Scott Poynting argues that the contemporary 'wave of Islamophobic moral panic' has led to scapegoating of others for the failures of the disintegrating and dismantled welfare state. He points out that exaggerated threats, 'such as of global terrorism, can be manipulated by states in pursuit of elusive resolutions of the global contradictions of empire' (Poynting: [133–44]). In his assessment, social democracy can be 'just as complicit in the politics of populist xenophobia and the atrocities of empire in the era of neoliberalism, as is its conservative alternative' (Poynting: [133–44]).

Paramount among these are concerns about criminalising the border crossings of asylum seekers and migrants seeking to escape the lottery of life. The chapters by Erin O'Brien, Leanne Weber and Michael Grewcock confront the protectionist policies of social democratic nation states, highlighting the stratification of groups of people that occurs as a result of the often conflicting aims of addressing humanitarian concerns while maintaining border security. Erin O'Brien's chapter, inspired by Nils Christie, deconstructs the ideal trafficking victim represented in anti-human trafficking awareness campaigns as essentially a young, vulnerable, powerless woman forced into sexual servitude. The selective imagery and focus on these women as the only 'legitimate' victims, she argues, obscures the key causes of trafficking and excludes others from accessing victim support.

Both Michael Grewcock's and Leanne Weber's chapters analyse how the criminalising role of border policing has a powerful exclusionary effect on assigning citizens between those who belong and those who don't. There are serious consequences for those who enter countries unlawfully – such as forced removal and mass imprisonment through mandatory detention and off-shore processing, including the on-going detention of children in far-flung and less-than-humane processing centres, such as on Christmas Island. Grewcock argues the anti-smuggling policing operations have largely failed by concentrating on policing the crews of such boats (mostly young poor fishermen from the Asia Pacific rim) who play no role in the actual organisation of people smuggling, and some of whom, he reminds us, are motivated by humanitarian concerns to save the stateless from years of exile in camps. The externalisation of border control, anti-smuggling transnational policing, mandatory detention and offshore processing are bi-partisan policies. Grewcock argues that these are strategies of denial used by nation states to neutralise their human rights obligations to protect refugees. He too envisages a more just and inclusive policy approach 'structured around the human rights of refugees and the normality of mobility' (Grewcock: [327–43]). Instead of stressing deterrence, detention and punishment, he suggests that state resources could be deployed to respond in an orderly

and rational fashion to facilitate entry and resettlement of stateless people and refugees of civil war, conflict and persecution – primarily because the most vulnerable of asylum seekers are also the most likely to undertake risky border crossings by boat. Leanne Weber's chapter also takes aim at the social exclusionary effects of crimmigration – of criminalising transborder crossings. Her argument is not so much against social democracy, as against forms of social exclusion and boundary maintenance upon which nation states are inherently constituted. She argues for extending social justice beyond territorially bounded social democratic forms of governance to a genuine reconceptualisation of transnational citizenship and governance, which extends human rights beyond the boundaries of nation states.

The unintended exclusion produced by inclusive policies

The second theme that underpins the contributions of a number of other authors is one that tries to warn us of the dangers that can be produced in attempts to increase social justice, inclusion, and bring about greater equality. While neoliberal regimes often intentionally, or unapologetically, entrench inequalities, one of the unintended consequences of our attempts to be inclusive or reform practices so as to achieve greater social justice can also be the perpetuation of injustice and exclusion (contributions that consider this theme include chapters by Ball, Carlen, O'Brien, Bessant, Phoenix, and Hearfield and Scott). The chapter by Colin Hearfield and John Scott is a case in point. It illustrates the failings of restorative justice in rural spaces, especially among Indigenous youth, which depend on modes of self-governance and materiality (that is, access to support, jobs and futures) and access to cultural and social capital simply unattainable to many.

By way of another example, Pat Carlen's chapter takes issue with the rehabilitation industry and its discriminatory focus on offenders from the poor and disadvantaged, who ironically have nowhere to be taken back to for rehabilitation. The idea of rehabilitation is to return the offender to civil society with desistance, or an enhanced capacity to be law abiding. The fundamental problem with the rehabilitative zeal, as Carlen stresses, is that its subject tends to be reserved for property offenders and others involved with crimes of powerlessness and survivalism – street crimes as opposed to suit crimes. Corporate criminals – white collar offenders – are outside constructions of rehabilitation, being a normative feature of capitalist social relations. If criminalised at all, after being fined or barred from holding Director positions, Carlen highlights how corporate criminals are simply returned to civil society without the need to be reformed, 'unlike their poorer sisters and brothers in crime' (Carlen: [89–104]). This leads Carlen to imagine reparation as a more just and socially inclusive form of punishment in 'grossly unequal societies' (Carlen: [89–104]). While Carlen argues that it may be easier to imagine 'flying pigs' than citizen reparations, it is a concept 'that chooses to

imagine an inclusive social justice giving primacy to the values of citizenship, democracy and inequality reduction' (Carlen: [89–104]).

Some of these unintended exclusions can be produced by criminology itself (as Juan Tauri's chapter shows). Similarly, Walter DeKeseredy's and Molly Dragiewicz's chapters also deconstruct how the criminological canon privileges certain gendered constructions of crime and deviance through the uncritical use of statistical tools and conventions, which have the effect of erasing fundamental gendered social inequalities, especially the power differentials between battered women and their perpetrators.

Further, Matthew Ball's chapter engages with the politics of the heteronormative constructions of intimate partner violence that have silenced the issue of same sex violence for decades. His chapter asks how do we best understand and represent the experience of violence in these communities? What are the costs and benefits of inclusion? Is it better to expand the tools used to understand heterosexual intimate partner violence to include 'Queer' communities? Or does inclusivity at times have the unintended consequence of perpetuating forms of heteronormativity and homonormativity? In addition, Jo Phoenix's chapter explores some of the unintended consequences of contemporary criminological and sociological knowledge about prostitution and prostitution policies. Her chapter traces the discourses of sex, of prostitution, and of consumerism that, in their kaleidoscopic interplay, paradoxically create the conditions in which policy and practice diverge and where welfare and justice agencies find it increasingly difficult to address the lived realities of prostitution and routine experiences of abuse, violence and exploitation.

Murray Lee and Alyce McGovern's chapter draws on original research to argue that the boundaries between policing and popular culture have become so entangled that 'simulated policing' is emerging as new plank in the crime control armoury. Their chapter raises the interesting questions about how these new technologies emerging in the virtual parallel world are also breaking down distinctions between the public and the police. For instance, is this creating a more democratic model of policing in the contemporary world? Or does simulated policing extend the penal reach of policing into the realms of private life and popular culture?

Visions for a socially just criminal justice politic

The chapters by Carlen, Pratt and Eriksson, Karstedt, Hogg, and Brown remind us that criminal justice policies in Anglophone countries have been captured by penal populism over the last 30 years, leading to the burgeoning imprisonment rates, 'extraordinary absurdities' (Carlen: [89–104]), and soaring costs of crime control. These are the countries that have gone farthest in developing neoliberal forms of government and winding back social welfare. Many of these have increased their punitiveness based on

penal populism. But not all that is popular is bad (as Hogg's and Pratt and Eriksson's chapters remind us), and we must ensure that our critique of neoliberalism in favour of social democracy does not produce problematic closures, boundaries and dualisms.

By way of example, Russell Hogg's chapter seeks to rescue populism from its critics by decoupling populism from penalism. The demonising of populism, Hogg argues, prevents its comprehension in the wider body politic as a political rationality that can be positive. Populism takes many forms, and erects 'the people' in the centre of calls for justice and freedom. Historically, populism and penality have been a linked pair of twin evils, associated with the law and order auctions of governments, the neoliberal punitiveness of Thatcherism, and the intolerance of the Tea Party in the US and One Nation in Australia. Yet Hogg reminds us that the recovery of populism is a vital ingredient to ways of reimagining a social democratic mode of crime control. Justice reinvestment and restorative justice policies, of the kind outlined by David Brown's chapter, are examples that cut across the punitiveness of popular politics. Just as the larrikin (Bellanta, 2012) and figures like Ned Kelly provide a 'reservoir of anti-institutional, anti-status-quo sentiment', populism elevates the 'conviction that the democratic idea that moral, political and scientific truths are within the grasp of ordinary people' (Hogg: [105–19]). The 2011 uprisings of the 'Arab spring' and the riots across Greece, Spain and Britain are emblematic of the power of populism and its irreducibility to a singular politics.

What these chapters illustrate is that the capture of the Anglophone world by a neoliberal culture of late modernity (Garland, 2001) is not as monolithic, or as universal, or as ossified as many commentators and theorists of crime control have thought. This accounts in some part for why those three supreme court judges at Dave Brown's public lecture were so receptive to what sceptics and pessimists consider unthinkable – the linking of social justice and criminal justice.

The contributions to this volume, while critical and hard hitting, also envision more socially just and inclusive possibilities. Sharon Roach Anleu and Kathy Mack's piece, for example, investigates the impact that the changing gendered profile and composition of magistrates and the judiciary has had and can have on the everyday workings and normative cultures of judicial decision-making. This innovative sociolegal research pays attention to how the dimensions of judicial work are influenced by changing social, political and cultural contexts. Carlen's imagining of a more socially just concept of citizen reparation; Weber's vision for a 'denationalisation of ideologies of social justice and their replacement with a broader conception of universal human security' (Weber: [344–57]); Brown's urging for seriously reconsidering the links between economic, social and penal policies; Hogg's optimism that populism and penality can be decoupled in socially just crime control policies; Grewcock's vision for a border protection regime focused

on human rights, rationality and ordered intervention during times of civil strife to assist the stateless and persecuted; and Bessant's vision for a minimally just society that would allow for *all* people to pursue a dignified and flourishing life: these are all examples of imagining more socially sustaining societies of the kind urged by Elliot Currie in the opening chapter.

Our brief introduction can provide only a taste of the extraordinary coherence of this volume of highly original, provocative and thoughtful essays and reflections on new international perspectives on the state of social democracy and its inextricable links to crime and justice. We hope you enjoy reading on.

Note

1. See www.crimejusticeconference.com

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Abbreviations

AAM	Association of Australian Magistrates
AAP	Australian Associated Press
ABC	Australian Broadcasting Corporation
ABS	Australian Bureau of Statistics
ACON	Aids Council of NSW
ACOSS	Australian Council of Social Services
ADCQ	Anti Discrimination Commission Queensland
AES	Active Employment Strategy
AHRC	Australian Human Rights Commission
AIJA	Australasian Institute of Judicial Administration
AJAC	Aboriginal Justice Advisory Council
ALP	Australian Labor Party
ALRC	Australian Law Reform Commission
APH	Australian Parliament
ARC	Australian Research Council
ARPEC	Asian Regional Partners Forum on Combating Environmental Crime
ASIB	Australian Social Inclusion Advisory Board
ASIC	Australian Securities and Investment Commission
ASIC	Australian Securities and Investment Commission
ATEST	Alliance to End Slavery and Trafficking
ATM	automatic teller machine
ATSIC	Aboriginal and Torres Strait Islander Commission
BASE	Barnardo's Against Sexual Exploitation
CAEFS	Canadian Association of Elizabeth Fry Societies
CHRC	Canadian Human Rights Commission
CIA	Central Intelligence Agency
CITES	Convention on International Trade in Endangered Species
COAG	Council of Australian Governments
CPTED	Crime Prevention Through Environmental Design
CROC	Convention of the Rights of the Child
CSGJC	Council of State Governments Justice Center
CSRM	Centre for Social Responsibility in Mining
DAD	dependency, availability, deterrence
DIDO	drive-in, drive-out
DMPWA	Department of Mines and Petroleum of Western Australian
EBP	evidence based policy
ECHR	European Convention on Human Rights

EIA	Environmental Investigation Agency
EIS	environmental impact statement
ESI	Endangered Species International
EU	European Union
FIFO	fly-in, fly-out
FReMO	Framework for Reducing *Maori* Offending
GDP	gross domestic product
GL	Gigalitres
GLBTIQ	gay, lesbian, bisexual, transgender, intersex, queer
GSS	General Social Surveys
GST	general sales tax
HIV	human immunodeficiency virus
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
IFAW	International Fund for Animal Welfare
IJA	Indigenous Justice Agreements
ISI	Pakistani security forces
JR	Justice Reinvestment
LAC	Local Area Command
LAPC	local area police command
MCA	Minerals Council of Australia
MERIT	Magistrates Early Referral into Treatment
MI5	Britain's Domestic Security Service
MI6	Britain's Foreign Secret Intelligence Service
MP	Member of Parliament
MRRT	Mineral Resources Rent Tax
MST	multi systemic therapy
NATO	North Atlantic Treaty Organization
NGO	non-government organisation
NPACSG	National Partnership Agreement for the Regulation of Coal Seam Gas
NRWs	non-resident workers
NSPCC	National Society for the Prevention of Cruelty to Children
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
NT	Northern Territory
OECD	Organization for Economic Cooperation and Development
OESR	Office of Economic and Statistical Research
PETA	People for the Ethical Treatment of Animals
PR	public relations
Qld	Queensland
QRC	Queensland Resources Council
RCADIC	Royal Commission into Aboriginal Deaths in Custody
RoBM	Reoffending by Maori

SA	South Australia
SCRGSP	Steering Committee for the Review of Government Service Provision
SCYPSE	Safeguarding Children and Young People from Sexual Exploitation
SECOS	Sexual Exploitation of Children On the Streets
SIEV	suspected illegal entry vessel
SIMP	social impact management plan
SJC	Social Justice Commissioner
SLCALC	Senate Legal and Constitutional Affairs Legislation Committee
SMI	Sustainable Minerals Institute
SOAAR	Speak Out About Abuse in Relationships
SRP	safe relationships project
SSDVI	Same-Sex Domestic Violence Interagency
SWC	Status of Women Canada
TAFE	Technical and Further Education
UK	United Kingdom
UN	United Nations
UNEP	United Nations Environmental Programme
UNHRC	United Nations Human Rights Council
UNICRI	United Nations Interregional Crime and Justice Institute
UNODC	United Nations Office on Drugs and Crime
UQ	University of Queensland
US/USA	United States of America
USDJ	Unite States Department of Justice
VAWA	Violence Against Women Act
VAWS	Violence Against Women Survey
WA	Western Australia
WADCS	WA Department of Corrective Services
WVS	World Values Survey
WWF	World Wildlife Fund

Part I

Social Justice, Governance and Ethics

1
The Sustaining Society

Elliott Currie

Introduction

I have a lot of friends who have told me lately that they no longer read newspapers. This isn't because they get their news on the internet now, but because they can't stand to read news at all because the news is so grim. I haven't gone that far, but I am sympathetic. It's undeniable that reading the paper today is a fairly gruelling experience, because the news seems to be full of almost nothing but accounts of the various crises that afflict much of the planet. In particular, the global economic order most of us live under – so-called 'free-market' capitalism – seems to lurch from crisis to crisis and indeed often seems to be in a state of perpetual emergency.

Yet there is also a sense that there is not much anybody can *do* about it – which is part of why my friends don't read the paper. There is a widespread sense that the *alternatives* to an out-of-control capitalism have also failed or are simply irrelevant in this new global age. The result is a kind of deep resignation – a profound pessimism, even among many progressive people, about the possibilities for a better society.

The theme of this volume is, of course, crime, justice and social democracy, and social democracy has long been the most prominent progressive alternative to unfettered capitalism. So the sense that we are stuck with the kind of world we now have – and that it is indeed likely to get worse – is in part a feeling that social democracy no longer offers a viable alternative – if in fact it ever did – and we are not sure anything else does either. It's often said that social democratic politics as practiced by most official socialist or social democratic parties isn't really an alternative at all – just business as usual, a slightly softened version of neoliberalism but one that is increasingly hard to distinguish from it. It's said that social democracy has made little enduring difference in the character of modern industrial societies; and that it has shown itself to be politically unsustainable, economically unworkable, or both.

I want to offer a more positive and more hopeful assessment. But to do that I need to make a fundamental distinction between what I take to be some of the core *principles* or elements of the social democratic (or democratic socialist) vision, versus what social democratic or socialist *parties* in various countries actually do. Put another way, it's crucially important to distinguish between social democracy with small letters 's' and 'd' versus Social Democracy with capital letters. A huge amount of confusion has been sown by conflating these two very different things: and that confusion fuels the pervasive pessimism about the possibilities of building a good society.

There are many different variants of Social Democracy with *capital* letters – and it's very true that not all of them have much to inspire us. But I think the core principles of small-letter social democracy *do* have much to inspire us – that they continue to offer a social vision that is both possible and well worth striving for. That is not to say that those principles are all we should strive for, or that it will be easy to achieve them. But it is to say that they remain a crucial platform on which to build.

Those core principles include, most centrally, a fundamental commitment to social and economic equality, and to making the best use of existing technological and human resources to advance human well-being – not just for some people, but for all people; and not just as a vaguely hoped-for byproduct of the pursuit of private economic gain, but as the first order of business for a truly civilised society. Small-letter social democracy allows plenty of room for market forces, but with the crucial proviso that markets should be the servants of larger social and human purposes, not the masters. That means that important realms of social life should operate largely if not entirely outside of the logic of private profit. People's health and security should not be contingent on how they fare in the market economy. They are fundamental, universal rights – rights we possess by virtue of being members of the human community, not prizes we win or lose in the marketplace.

All of this is obviously very different from simply saying that we will let the logic of private profit drive the fortunes and shape the lives of most people and then, if we have any resources left over, we may use some of them to blunt the roughest edges of the struggle for existence – to pick up the pieces after the market has done its destructive work. Some versions of Social Democracy, of course, have historically adopted just that approach, and plenty of formally Social Democratic parties are doing so as we speak. But that's not the kind of social democracy that embodies the principles that have been small-d social democracy's chief contribution to the world. And I think the verdict is in on the results of this kind of approach historically. Because this approach holds the principles of social support and solidarity hostage to the fortunes of the private-profit economy, it is precisely when the 'market' becomes least able to provide reliably for people's needs that the countervailing system of public supports is also stripped of its capacity to step in – creating a kind of vicious cycle in which market-subservient social

democratic regimes are routinely ensnared. We can see that conundrum unfolding all around us in the current global recession, when social democratic governments have been forced willy-nilly into being the enforcers of a strategy of austerity for the many driven by the profits of the few.

Small-letter social democracy, by contrast, is based on a deeply rooted commitment to the values of human dignity, contribution and inclusion. It is not simply about salvaging people from the ongoing train wreck that is unfettered capitalism. It is about making the most of the human possibilities opened up by the technology and resources available to us at this point in human history. One part of this commitment involves ensuring a floor of material well-being below which no one, no matter where they started out, is allowed to fall, but that is far from being the whole story. The social democratic vision of the good society is not just about minimum requirements that we have to meet in order to keep people from truly desperate straits. As the great British democratic socialist R.H. Tawney put it 60 years ago, it is about ensuring that 'within the limits set by nature, knowledge and resources', we enable everyone to 'grow to their full stature' (Tawney, 1952: 235).

That kind of vision moves beyond the idea of maximising equality in some abstract or quantitative sense. It is a vision of society committed to nurturing and liberating human potential. Nature, knowledge, and resources do set limits. But those limits are not set in stone. What makes a society successful, in this vision, is its commitment to both pushing those limits ever outward and seeing to it that the resources and knowledge we have now are made to benefit everyone.

These principles haven't been confined to formal social democratic or socialist parties or movements. Historically they have sometimes been put forward, and fought for, by others, including religious parties. But whatever their historical roots, it is when these principles have been most consistently put into practice that we have come closest to building what I call the 'sustaining society' – a society that really does provide, within the limits of nature and resources, the most nurturing context for human development and well-being. And I would argue that some actually existing societies have done a fairly impressive job on that score – especially given that they have tried to do it in the teeth of unrelenting hostility from those segments of society that oppose those principles, and in the context of a global economic order that those opponents have largely built and mostly run – and which they will go to almost any length to defend and expand.

No society has gone far *enough* toward that vision of the sustaining society. No society has completely vanquished the problems foisted on it by global inequality and insecurity or definitively overcome longstanding legacies of racism and sexism. I can't say that any society has found a magic formula or a 'plug and play' model that the rest of us can apply in cookie-cutter fashion to our own societies. But I *will* say that, contrary to naysayers at all points

on the political spectrum, those small-s social democratic principles *matter*: they have significantly and sometimes dramatically improved human well-being where they have been the most thoroughly implemented. The closer they come to being fully practiced, the closer we come to creating liveable, honourable and sustaining societies that 'work' in human terms.

We often talk about 'what works' when it comes to specific social programmes, like the rehabilitation of prisoners. But we can also speak of whole *societies* as 'working' or not working. And societies built on these core principles 'work' – at least in the sense that they are the closest thing to 'successful' societies, in human terms, in modern history. Most importantly, they beat the alternatives hands down: and the rumours of their death or growing irrelevance are greatly exaggerated. Lest I be accused of being a fuzzy-headed optimist, let me also say that I can't guarantee that these principles will survive. But I *can* guarantee that if we don't fight hard to preserve and extend them, as militantly and creatively as we can, they *won't* survive. That's why I think it is so important to talk about what small-letter social democracy has accomplished, and to challenge some myths about its failure or its obsolescence.

Let's look first at the human impact of those principles. It is remarkable, by the way, how rarely we do this. Much of the vast literature on social democracy is all about the political history of Social Democratic parties, and sometimes about the narrowly *economic* impact of their policies. That is certainly important, but the deeper and more crucial question is whether and how much those principles have contributed to enhancing the well-being of real people in the real world. And we actually have a massive natural experiment to help us answer that question because some advanced industrial societies have gone pretty far down the road towards small-s social democracy, while others have fiercely resisted it, and still others are somewhere in the middle. The evidence from that experiment is hotly contested and there are all kinds of formidable issues of measurement and empirical interpretation that have to be grappled with and acknowledged. But I think the results of the experiment are basically in. 'Small s-d' societies, whatever the specifics of their political histories or policy regimes, 'win' on virtually every measure of social well-being – win by powerful margins when it comes to Tawney's criterion of enabling people to rise to their 'full stature'.

Some very basic and very striking numbers tell part of the story. Consider Denmark as an illustration. Denmark has been happily in the news recently because the Left has returned to power and they have elected the country's first female prime minister. But long before this, of course, Denmark was one of the most prominent examples of a social democratic welfare state – a situation which a decade of conservative rule didn't do all that much to change (see Obinger *et al.*, 2010: chapter 2). What difference does that make for real people's lives? Well, American children live in poverty at a rate almost eight times that of Danish children. If the United States had

the Danish overall poverty rate, about 30 million fewer Americans would be poor – that is to say, about two thirds of the current total. If the United States had the Danish infant mortality rate – which is kept admirably low in part by universal and high-quality health care and in part by the reduction of poverty and social exclusion generally – one third of all the babies who die each year in America would live (if the United States had the Swedish infant death rate, *two-thirds* of those babies would live) (OECD, 2011).

How about violent crime? In 2011, the entire nation of Denmark, with a population of about five and a half million, chalked up 47 homicides, which is roughly half as many as the city of Oakland, California, near where I live, with 375,000 people, or one-fifteenth Denmark's population (Statistics Denmark, 2012). If the United States as a whole enjoyed the Danish homicide rate, we would save something in the neighbourhood of 12,000 American lives a year, which is roughly twice as many Americans as have died during the current wars in Iraq and Afghanistan since we invaded Iraq in 2003 (Federal Bureau of Investigation, 2011).

I could go on and on with statistics like these and not just of course from Denmark – which I hasten to add is hardly without its own share of social problems. But there is a quicker way to learn the same lessons: buy a plane ticket. Go and walk around the worst neighbourhood you can find in Copenhagen (or Stockholm). See how people live. Then get back on the plane. Fly to Chicago or Baltimore or Detroit and walk around the worst neighbourhood *there*. Then if you in fact get out alive, take some time to reflect on what you think about the impact of social democratic policies – or the *lack* of them. In fact, I'll make you an offer you can't refuse. Come to the United States and I will *personally* give you a tour of the dark side of rampaging unfettered capitalism that I guarantee will make your hair stand on end. The quick lesson, in short, is that if you believe that those social democratic principles are irrelevant, try living in a country that doesn't have them.

Are *all* of these differences between the United States and less unequal, less volatile countries due to the effects of 'small-s' social democratic policies in restraining the raw impact of the market? No. There are other, historically specific factors that play a role – in the United States, most notably our long and tortured history of racial subordination (Currie, 2008: part II, Peterson, Krivo and Hagan, 2006). But the evidence suggests that a big proportion of the difference *is* about the taming of market society. It is about the reduction of extreme inequality and concentrated poverty; it is about the provision of crucial supports for families and children; it is about the consequent reduction of the bitter alienation and profound sense of antagonism that comes from systematic social exclusion.

This is, in fact, one of the biggest 'stories' of modern times, though one of the least reported. There is much talk of 'convergence' among advanced industrial societies when it comes to social policies and social conditions.

It's said that, under global economic and technological pressures, we are all coming to look very much alike. The figures, however, tell a very different story. The hard reality is that the absence of something like a social democratic vision has often resulted in what can only be called a social disaster, a human catastrophe that at its worst can attain massive proportions. Again, it is not that the relatively 'sustaining' social democratic societies have eliminated deprivation and suffering. But in the United States, the least social democratic of advanced societies, we kill hundreds of thousands of people over the course of a decade as a result of needless social disadvantage. We kill them through remediable poverty and social exclusion; we kill them through the minimalist and residual provision of social supports, and an expensive but highly privatised and widely inaccessible healthcare system. We kill them through the violence, preventable illness, and endemic stress that those deficits engender. And we do so through 'good' economic times as well as bad. The late American socialist writer and activist Michael Harrington once coined the phrase 'slow apocalypse' to describe where an increasingly anti-social capitalism might be heading (1989: 284). In some places around the world – including places just a few miles from my house – that slow apocalypse is already here.

In a sense, that slow apocalypse tends to fall beneath our field of vision because we lack a comprehensive way of describing it and accounting for it. We routinely add up the numbers of people who die of homicide, or preventable diseases, or who succumb to infant death, or are disabled by violence or needless accidents. But we don't often put those numbers together: we lack a 'metric' that can adequately capture the holistic character of the deep and largely preventable disaster that a social order fundamentally shaped by the weakly regulated drive for private profit predictably brings. One recent American study makes an attempt to quantify the proportion of deaths that result from essentially preventable social causes: for the year 2000, the toll includes 133,000 deaths from the effects of poverty, 161,000 from low levels of social support, and 119,000 from the impact of income inequality (Galea *et al.*, 2011).

The paradox of a pervasive and, in many ways, deepening human disaster amidst enormous human and technological potential is one of the defining characteristics of our time. The great insight and central argument of small-letter social democracy from the beginning has been that avoiding that fate is both morally imperative and also *possible*. To an important extent, in other words, the social ills we face are 'needless' ills: they persist for reasons that are essentially political, not technological. Today that sense of conviction and possibility has been sorely tested, and is under siege from both the Right and sometimes the Left. It is argued not only that social democracy has made little difference so far but that it is on its way out: that sober and level-headed people must acknowledge that even what little social democracy did accomplish cannot survive the new realities, economic and

political, of contemporary global capitalism; and that it is time for even the most die-hard idealists to grow up, lower their expectations, and get with the global programme.

Confronting these arguments is critical because if the critics are right – if we are really doomed to witnessing (or even colluding in) a roll-back of the progress toward the good society we have accomplished, with enormous struggle, so far and if what we might call the 'Americanisation' of the advanced industrial world is our only future – then we might as well confine our efforts, at most, to tinkering at the margins of a social order we must reluctantly embrace. But I think both critiques are wrong – the Right's wholly wrong, the Left's less so but still both simplistic and unduly pessimistic.

The Right's main indictment has always been that social democratic principles are incompatible with economic performance – with successful 'competition.' 'We' are the people who create wealth (or jobs) and if you cut into our profits in order to 'redistribute' resources to the less successful, you kill the goose that lays the golden egg. At the same time you instil the wrong values and motivations in the recipients of this unearned generosity – when you give them 'entitlements' they stop striving, become fat and lazy, and come to expect a level of comfort and leisure that the real-world economy cannot realistically support. Again, that is a very old argument but it is now sharpened by the growth of global competition. The refrain is familiar: in a world where competition is ever more intense, we've got to get lean and mean. You can't carry the baggage of high wages, generous social benefits, or costly 'entitlements' when you go head to head with the Chinese or the Brazilians, or with the well-educated but inexpensive high-tech workers in Bangalore.

It hardly needs saying that this argument has been remarkably successful ideologically and politically. It has convinced a lot of people and it has sometimes stimulated a race to the bottom in which the gains won over decades of social struggle have eroded, often very quickly. But the argument is also wrong – a fact that receives considerably less public attention, though it would no longer seem very controversial to people who seriously study these issues. The evidence is complicated and certainly contested but, as I read it, the bottom line is that many of the societies that have gone farthest in implementing core social democratic principles have also been among the world's most competitive economies, even measured – and this is very important – by the perverse, stacked-deck logic of free-market economics (Pontusson, 2011, Obinger *et al.*, 2010).

So, for example, the World Economic Forum, which is a thoroughly pro-business organisation, puts out a list every year of ranking the competitiveness of the world's economies. Among the top ten in 2011's ranking are three Nordic social democracies: Sweden is third on the list, Finland is fourth, and Denmark is number eight. First place this year is taken by

Switzerland, a society which is not exactly Social Democratic in capital letters, but in many ways has long been social democratic in small letters – including having one of the more egalitarian income distributions in the world. The United States is on that list too, but it has fallen to number five, and the United Kingdom to number ten – against the orthodox wisdom that predicts that these heartlands of neoliberalism should be burning up the global economy and leaving the sluggish welfare states in their dust (Saltmarsh, 2011). And there is now a wealth of more technical evidence that supports the same point.

What explains the success of these societies even in the context of a Darwinian global economic competition? Some of it has to do with the fact that these are highly advanced, increasingly high-tech economies that continue to produce high-quality goods that people around the world want to buy – which is often *not* true of more freewheeling market societies, which in their tendency to focus on short-term profits have begun to produce less and less that is tangible or useful, and to engage more and more in the unproductive manipulation of financial instruments. But it is also because these strong social democratic countries have done a remarkably good job of creating a skilled, capable and healthy workforce.

And it is crucially important to realise that this is what social democratic economies can do *even when they are forced to play by the 'rules' laid down by the dominant global capitalist order.* What if they weren't? The current performance of, say, the Swedish or Danish economy is only a partial and limited indicator of what an economy powered by social democratic principles could accomplish if it was unshackled from the distortions and constraints of a global economy antithetical to those principles. The best-performing social democratic countries have managed to achieve this fusion of global competitiveness and the highest level of social well-being in human history despite the fact that there really are enormous pressures in the external global economy that push against the maintenance of those generous policies, like storm waves pounding against a fragile shore. Imagine, then, what might be possible in a global economy, most or all of which was in the hands of other social democratic governments pursuing similar social ends?

So the Right's self-serving claims are unsupportable empirically – even on its own blinkered and narrow terms. What about the more sorrowful pessimism of parts of the Left?

Here the arguments are much more serious and much more honest (see Cronin, Ross and Shoch (2010) for some examples). But I don't find them convincing. Some of them are based on simplistic assumptions that don't hold up when you look hard at them and often seem oddly out of date – as if they are talking about a different world than the one we actually now live in. In particular, these arguments often rest on an overestimation of the performance and prospects of deregulated capitalism that is hard to justify in the face of the realities of the modern world. The Left-pessimists' belief

that small-letter social democracy can't work in the modern world typically rests on an assumption – rarely clearly articulated – that the twenty-first century version of capitalism *can*.

Sometimes the Left critique simply buys into arguments that have long been staples of the Right, notably the idea that increasing globalisation makes it impossible to maintain the levels of social spending that undergird sustaining and egalitarian social policies. But again there's abundant evidence that in this simplistic form, this idea is wrong because there are many things about supportive and egalitarian social policies – especially those that seriously invest in people – that make small-s social democratic economies *more* competitive, rather than less.

The more credible Left-pessimist argument is about politics. It comes in many variants but basically it says that several social and cultural forces have weakened the traditional social base for strong egalitarian policies. Technology and globalisation (again), the shift from manufacturing to services, and other forces have diminished the role of the traditional blue-collar working class and put nothing as cohesive or easily organised in its place. There is certainly some truth to that, but there is also another side to the story – actually, several other sides.

First of all, it is important to remember that some of the most important victories for the social democratic vision historically were never won just by the industrial working class alone, but by an alliance of broader constituencies – in Sweden, for example, first through the alliance between industrial workers and farmers, then between blue-collar workers and the white-collar middle class. In fact I can't think of a time when small-s social democracy was really successful without that kind of broader coalition behind it. And that will surely be even more true in the future. Successful movements to maintain or expand more generous and inclusive social institutions will only work if they mobilise a broad set of post-industrial constituencies. And there is good reason to believe the time is now ripe for precisely that kind of broad mobilisation.

One of my less optimistic but undeniably progressive friends said to me, not long ago, that this seemed like a completely Utopian idea. I don't think so. I think this kind of left pessimism overstates global capitalism's ability to deliver the goods to broad segments of the population in modern post-industrial societies. What we increasingly see when we look around the world is that predatory capitalism is creating something much more destructive and socially corrosive than either its promoters or some of its critics imagine. Back in capitalism's 'golden age' after World War II, you could make a more convincing argument that it had great strength ideologically and politically because it *did* 'deliver' – it did, although unevenly and for what turned out to be a short time, 'lift all boats'. But today capitalism is a different animal – meaner, more volatile, more authoritarian, more destructive – including being more destructive of the very planet on which

it and everything else depends. And its benefits, meanwhile, are now going to a much smaller slice of the population than they used to. That is true in countries around the world and *most* true in the societies where neoliberal policies have most thoroughly taken root.

In the United States, for example, in the 27 years from 1983 to 2009, 82 per cent of the increase in wealth in the entire country went to the richest 5 per cent of the population. What's left of the gains – all of the other 18 per cent – went to the rest of those in the top 40 per cent. The entire lower 60 per cent of the population has suffered *declining* wealth since the early 1980s (Mishel, 2011). And of course this stunning increase in the concentration of wealth among a handful of people at the top is only one facet of the deepening pathology of market society in the twenty-first century. There is also, for example, the equally stunning waste of human resources and potential as a result of 'free-market' capitalism's inability to reliably put people into useful work at living wages that can support a life of dignity and meaning – especially with regard to the young. In Spain, the youth unemployment rate – the *official* one – passed 50 per cent in early 2012 (Youth Unemployment Crisis Sparks Davos Leaders into Action, 28 January 2012, online). Some social democratic societies have done better than others on this front and it has made a difference, such as in Denmark, Holland, Austria and sometimes Sweden. In other countries – France, the UK, the United States – there are huge swaths of the urban landscape where a majority of the young have nothing meaningful or sustaining to do, at least not legally, and it is hard to envision how this can improve in the future, barring fundamental changes in the way these societies distribute opportunities for work.

I could offer many more examples but the general point is that the irrationality and destructiveness of predatory capitalism means that vast numbers of people have been put into essentially the same boat – and the boat is foundering. All of those people, even if they mostly don't (yet) know it, would have their lives transformed by a society that made the market the servant rather than the master of social purposes – a society that tamed the rampant instability, deprivation and waste of human potential that so distorts modern societies, and focused our vast human and technological capacities on fulfilling real needs. That's the real contradiction of modern capitalism: as it comes more and more to dominate the planet, it reliably meets the needs, hopes and aspirations of fewer and fewer people. That makes it morally indefensible. It also makes it politically vulnerable.

But without an all-out effort to educate and mobilise that potentially vast constituency, things could obviously go a different way, and very badly – with the various groups in that potential constituency turning against each other, pointing fingers of blame at immigrants, single mothers, sick people, old people, young people, black people – with the cheerful encouragement of the rich and the global corporations. And of course that's not an abstract speculation: plenty of that is going on right now, with immigrants probably

taking the brunt of the finger-pointing around much of the globe today. But I think it is possible to turn that around – to catalyse that larger constituency of the deprived, the insecure, the thwarted, the just plain outraged (it's not for nothing that the Spanish protesters who took to the streets by the tens of thousands in the spring of 2011 described themselves as 'los indignados'). There is a moral dimension to this appeal that is often overlooked. There is a widespread sense that much of the vast global suffering we see today when we pick up the newspaper or look at the television screen is *needless* in what is actually a very rich world: that the wealthy and the big corporations increasingly act outrageously and with impunity; that no one is taking responsibility for dealing with the seemingly endless crises of modern society; that the lives, talents and potential of whole generations are being shamefully wasted; that the people who carry the real freight in global society aren't getting a fair share; and that conventional politicians – including some of the established parties of the left – are at best compromised and irrelevant, at worst hopelessly corrupt and in cahoots with the most predatory people on the planet. Those feelings are a potent well of discontent and they need to be mobilised.

I first wrote these lines before the Occupy movement burst on the political scene in the United States, with its compelling and highly effective highlighting of the chasm between the '1 per cent' at the top and the rest of us – the other 99 per cent. This is a movement that neither the Right nor much of the Left expected. But with the advantage of hindsight, its emergence now is not surprising at all. And the notion that 99 per cent of the population has much in common – while perhaps a little hyperbolic – does reflect something very important about the new shape of social and economic relations in our time.

For those of us who are committed to small-letter social democratic principles, this is, accordingly, a time of real crisis but also unprecedented opportunity. The destruction, disappointment and sense of betrayal that pervade many advanced societies today provide an opening for us to offer a moral and social vision that transcends the politics of the present and is bold enough to talk seriously about the kind of future that we believe is possible and deserve. But this is the opposite approach to the one that many people, even some on the left, now urge us to take, which is to settle for a supposedly 'realistic' centrist position that doesn't rock the boat, and that doesn't challenge the current drift of global society. But I think that view is backwards. It fundamentally misreads the recent political history of many countries, including my own. The lesson from that recent history is that it is the *centrist* strategy that is scrambling to maintain its footing, and ultimately unsustainable.

A 'Social Democratic' strategy of simply trotting along in the wake of a rampaging and out-of-control global capitalism and hoping (at best) to patch things up after the damage is done cannot thrive either economically

or politically over the long run, because it cannot solve any of the problems that global capitalism increasingly creates – not endemic joblessness, not the disruptive movement of populations, not the potentially game-ending assaults on the natural environment. That kind of Social Democracy is a marvellous example of what C. Wright Mills (1958, chapter 13) famously called 'crackpot realism', and it ends up being neither fish nor fowl. It will never be Right-wing enough to satisfy the corporations or most of the rich, or the paranoid (and vocal) middle class Right; and at the same time it will fail to inspire its political base among those who are most predictably and savagely hurt by capitalism's perpetual crisis.

A revived, committed and unapologetic movement based on small-letter social democratic principles does have the potential to inspire, and to mobilise broad constituencies behind real solutions to the endemic problems of predatory capitalism. That is not to say that it can simply redeploy the tools it has relied on in the past. An effective movement will need to push the traditional social democratic envelope, to tackle problems that have often stymied it. As just one example, I think it will be crucial to redefine the way we think about work: to liberate work from its captivity to market logic and think creatively about how to provide enough, but not too much, work for all. This has been a weak point for social democracy, even at its best: and we urgently need bold thinking now and in the future about how to strengthen it. We need to think about making meaningful and sustaining work a human right, much as health care is in most of the advanced societies. But that is a discussion for another day.

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2
Democracy and the Project of Liberal Inclusion

Susanne Karstedt

Democracy and immigration: a strain for liberal inclusion?

Democracy is a multi-dimensional concept, ranging from definitions based exclusively on institutional frameworks (for example, Held, 2005, Przeworski, Alvarez, Cheibub and Limongi, 2000) to complex and integrated measures that include political and civil rights, democratic practices, values and, finally, a diverse set of institutional arrangements in society, including welfare, education, industrial relations and the legal system (Inglehart and Welzel, 2005, Jaggers and Gurr, 1995, O'Donnell, Cullel and Iazetta, 2004). This reflects the range of and distinction between merely formal electoral democracy and genuinely 'effective liberal democracy' (Inglehart and Welzel, 2005: 149), where democracy is firmly embedded not only in its institutions but in the values of its citizenry. Evidence from cross-national research confirms that formal democratic institutions, different dimensions of effective democracy, and democratic values are indeed strongly linked (Inglehart and Welzel, 2005: 154, Jaggers and Gurr, 1995: 446). Democracy is more than just a set of institutions, rules and mechanisms: it is a set of core values engrained in the 'lived experience' of its citizens. Core values of democracies are individual autonomy and egalitarianism, tolerance of diversity, and freedom from oppression for both individuals and institutions. Democracies restrain their governments by the rule of law and grant its citizens equal access to and equal treatment by legal institutions. Among these institutions, criminal justice and the treatment of those who violated rules and regulations represent sensitive seismographs for the quality of effective democracies, and the ways how democracies realise their core values.

It is these core values of individual autonomy, egalitarianism, tolerance and rule of law that make liberal democracy a *project of inclusion* of a plurality of people, classes, values and practices. Democracies need to achieve a certain degree of universal inclusion of their citizens. Notwithstanding the fact that democracies widely differ in terms of gender equality, economic

and social inequality, or in discriminatory practices against minorities, their basic institutional design as well as the core values that these institutions represent have to ensure universal and equal rights, and universal and 'open access' for its citizens within the democratic project. However, the project of liberal inclusion is equally defined by its boundaries. These are the boundaries of the nation state which gave rise to liberal democracies since the nineteenth century. For most contemporary Western democracies, ethnic minorities and immigration put pressures and tensions on the project of liberal inclusion.

These are pressures and tensions that sharpen and increase those that are innate to the project of liberal inclusion and that democratic societies had to deal with since their beginnings. These tensions arise from inclusionary values and practices on the one hand and, on the other hand, from recognition of plural interests, values, and differences of class and ethnicity. The democratic project of liberal inclusion is, therefore, inherently fragile and, consequently, in particular democratising states, are often close to state failure (Esty, Goldstone, Gurr, Harff, Levy, Dabelko, Surko and Unger, 1998). The tensions between inclusionary mechanisms and procedures and the autonomy and rights which they granted to individuals, as well as the tolerance that necessarily had to come with it, were first observed and analysed by Alexis de Tocqueville (2000 [1835, 1840]). In his analyses of the first democracy of modern times (the United States), he pointed to the paradox and inconsistencies that arise out of these innate tension between inclusion and individual autonomy. Democracy simultaneously gives rise to individual independence and high levels of conformity: the rights of individuals are counterbalanced by strong forces towards conformity. Majority rules imply dominance and authority, and rely on submission at the same time that they provoke resistance. Tolerance and individual rights carry with them the simultaneous possibilities of strong belief and profound rejection of belief, of norm compliance and violation of norms. Tocqueville observed that egalitarian values co-exist with envy, status differences and social inequality.

Among contemporary authors, Michael Mann (2005) has drawn attention to these inbuilt tensions which become particularly obvious when democracies have to accommodate ethnic minorities or wide-ranging social and economic inequality. He argues that precisely because of their mechanisms of liberal inclusion, democracies are less capable than autocracies to integrate ethnic minorities. These mechanisms prove to be rather weak when compared with 'divide-and-rule' tactics employed by autocratic regimes and mechanisms of 'repressive inclusion' (see Karstedt, 2006). Democracies thrive on 'weak ties' (Granovetter, 1973) and incorporate varying degrees of social solidarity, ranging from high levels as in Scandinavian welfare states to comparatively low ones as in the United States. Citizens engage with each other in 'benevolent disinterest' (Hirschmann, 1988: 139), and cohesion in

democracies is based on comparatively low levels of consensus and 'pragmatic dissent' (Mann, 1970).

The project of 'liberal inclusion' is based on the *core values* of individual autonomy, egalitarianism and tolerance of diversity. It gives rise to essential and vital *practices*; these are generalised trust between citizens, civic participation and open access, and pragmatic dissent. It is finally realised in *institutions* as the rule of law, meritocratic mobility, and welfare regimes for its citizens. 'The other' – whether a 'criminal other', a migrant or member of an ethnic minority – challenges these values, practices and institutions by prompting the question: To what extent does the universalising capacity of liberal democracies actually include these 'others'? In any case, these 'others' will enhance and bring to the fore the innate tensions of democracies and, as such, they represent 'acid tests' for democratic values, practices and institutions. To the extent that prisons have been and are seen as indicators of (democratic) civilisation, immigration and the treatment of immigrants and ethnic minorities testify to the strength and resilience of democratic liberal inclusion. While migration is criminalised in various ways and to different degrees in contemporary western democracies and while (illegal) migrants are held in specific types of detention and citizen rights are withheld, the boundaries between the criminal and the migrant other are blurred, a process that has been aptly described as 'crimmigration' (Aas, 2007: chapter 4, Aas, 2012). It is presently estimated that about 60 million migrants from developing countries are living in (mostly) democratic developed countries, and that this is equalled by the flow from developing to other developing countries. Migration exchange between developed countries amounts to at about 50 million persons.

This paper explores the tensions and pressures that immigration and ethnic conflicts put on democratic values and practices. It uses the link between the criminal and the migrant 'other' in analysing criminal justice as an indicator of these tensions and conflicts. Accordingly, the study relates indicators of criminal justice – the imprisonment rate and prison conditions – to democratic values and practices, exploring both inclusionary as well as exclusionary practices. This does not imply any causal relationship between, for example, immigration and prison populations or prison conditions, or between immigration and the treatment of ethnic minorities in prisons. Reliable comparative data do not exist for such an exercise, not even for national jurisdictions. Rather these explorations use criminal justice indicators as 'diagnostic tools' (Van Dijk, 2008) for stressors on democratic values and practices that are linked to migration. Although this exploration naturally takes the form of a cross-national and cross-cultural comparison, it also focuses on a more homogenous group of 'mature democracies' according to the Polity Index 2007 (Marshall and Jaggers, 2005; see Appendix 2.1 for list of countries). The study will in particular look at egalitarian values, practices of social and economic

inclusion/exclusion of migrants, and the extent to which universalising mechanisms of integration are supported.

Sample and data

The following analyses are based on a cross-national sample of 51 countries comprising European, Latin and Anglo-American, Asian and Pacific as well as African countries, for which data on immigration, penal regimes, value patterns and structural indicators were collected. The sample is comprised of only mature democracies, as identified by the Polity Index (Marshall and Jaggers, 2005). The Polity Index ranks countries on a scale from –10 to +10, where negative values indicate autocracies and dictatorships. Countries with values between +8 and +10 are usually classified as mature democracies; these were included in this study.

The study uses two indicators of penal regimes: the rate of imprisonment per 100,000 population (Walmsley, 1999–2009) and 'prison conditions', which are included in the Country Reports regularly issued by the US Department of State (US Department of State, 1999–2005; the United States has not self-reported). This qualitative assessment is based on a number of indicators of conditions of life in the country's prisons. Neapolitano (2001) has turned these into a scale with three general categories: first, prison conditions fulfil minimum international standards; second, they are 'harsh' and do not fulfil these standards; and third, they are harsh bordering on being 'life threatening'.[1] This scale was used as the basis for a new scale with five categories because the first and the last of Neapolitano's categories did not seem to differentiate sufficiently between countries, and only roughly represented the qualitative categories. The new scale comprises five categories: (1) 'fulfils minimum standards'; (2) 'fulfils standards with some deficits'; (3) 'does not fulfil minimum standards'; (4) 'harsh but not life threatening'; and (5) 'life threatening'.[2] Both indicators are overall not correlated and prison conditions are only related to the mean length of prison sentences. For both indicators, mean values for the period between 1999 and 2007 were calculated in order to adjust for inconsistencies in the data and reports.

Pressures from immigration were measured in two ways. The level of immigration was recorded as the proportion of the population who reported that they were foreign-born in the World Value Surveys (WVS) between 1995 and 2005 (*European Values Study Group and World Values Survey Association (1981–2005)*). The index of ethnic fractionalisation by Alesina and his colleagues (Alesina, Devleeschauwer, Easterly, Kurlat and Wacziarg, 2003), which includes linguistic, religious and ethnic differentiation, measures the extent to which a country is divided into different ethnicities, with higher values indicating a higher level of fractionalisation and division.

The core democratic value of egalitarianism is based on a study by Hofstede (see Hofstede and Hofstede, 2005) which has been extended since the 1970s to

more than 60 countries. Hofstede collected these value patterns as cultural and social practices and, as such, they represent 'lived values' (see Karstedt, 2006). The data are collected on the individual level and aggregated, with values for each country ranging from 0 to 100. Egalitarianism measures the extent to which power, domination and subordination define relationships between different status groups in society or are replaced by more egalitarian orientations, with high values representing more egalitarian value patters in this study. Western industrialised countries – with the exception of Latin European countries (France and Italy) – are distinctly egalitarian, while Latin American and Asian countries are characterised by a comparably low level of egalitarian values, and are dominated by more hierarchical values and practices.

The other democratic values and practices were retrieved from the World Value Surveys 1995–2005 and were measured as the proportion in a country that supported the respective statements. The level of inclusionary or, alternatively, exclusionary practices was identified through the proportion of those who supported the exclusion of migrants from their neighbourhoods ('do not want as neighbours'). Support for economic discrimination and abandonment of universalising mechanisms in the economy was measured through support for economic exclusion of migrants ('When jobs are scarce, employers should give priority to [NATION] people over immigrants'). Generalised trust was used as an indicator of universal and integrative mechanisms, which according to Putnam (2007) is under pressure when immigration levels are high ('Most people can be trusted'). Finally, the support for rule of law as a requirement for citizenship was defined as an indicator of universal versus more particularistic integrative mechanisms ('How important should the following be as requirements for somebody seeking citizenship of your country? Abiding by my country's laws').

Analyses start with establishing a 'baseline' for democracies in terms of imprisonment rates and prison conditions. Next, trajectories of imprisonment rates for countries with low and high levels of immigration are compared. In a third step, penal regimes are compared for levels of immigration and ethnic fractionalisation, as well as for support for inclusionary versus exclusionary practices. For both steps, groups of countries were categorised as above and below the median of the distribution, and t-tests were used; the hypotheses allowed for one-sided tests. Finally, interactions between democratic values and practices and levels of migration and ethnic fractionalisation were analysed (ANOVA).

Testing the project of liberal inclusion: immigration and criminal justice

Generally the core values of democracy – individual autonomy and egalitarianism – do not impact on the prison population itself; however, they shape and influence conditions in prisons. Even for the more homogenous group of

mature democracies, we find that democratic values do not define how many we punish by imprisonment, but how we punish, and the extent of respect for the human rights of prisoners. In particular, democracies with strong meritocratic orientations have worse prison conditions. However, structural conditions of inequality (measured as income inequality) have a massive and significant impact on both imprisonment rates and prison conditions in mature democracies but for ethnic fractionalisation no impact on imprisonment rates and only a weak one on prison conditions is found (see Karstedt, 2011). From this baseline we are now exploring how democratic values and practices 'react' under the pressure from immigration and ethnic fractionalisation.

Trajectories of imprisonment in mature democracies with low and high levels (below and above the median) of foreign-born population are contrasted in Figures 2.1 and 2.2. Among countries with low levels of immigration, Norway has a low and hardly changing prison population over time, Portugal's decreases, while two Latin American countries show slightly increasing trajectories. Among the mature democracies with high levels of immigration, three have a decisively upward trend across the period (the Netherlands, Sweden, Australia), while Germany has a more levelled trajectory after 1997 following a massive take-in of refugees from former Yugoslavia in the previous years. This rather inconclusive result is further corroborated by contrasting countries with high and low ethnic fractionalisation (Figures 2.3 and 2.4). Three countries with low ethnic fractionalisation have an upward trajectory of imprisonment, while countries with high

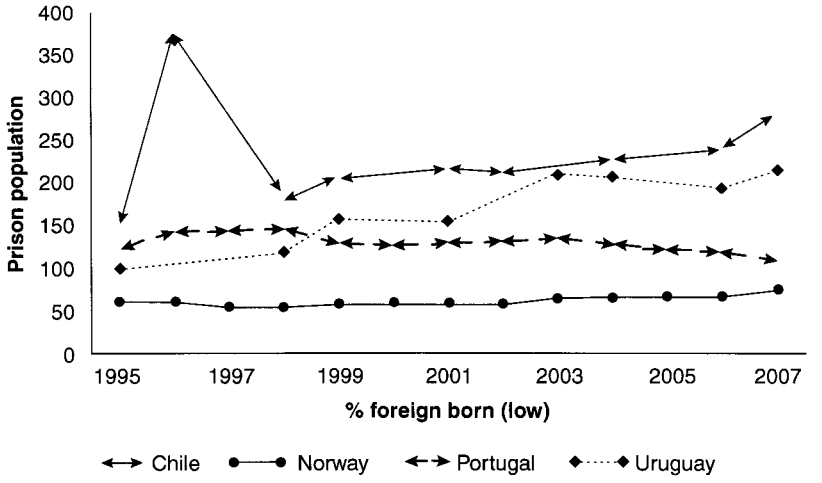

Figure 2.1 Democracies with low immigration: prison population 1995–2007 (per 100,000 persons)

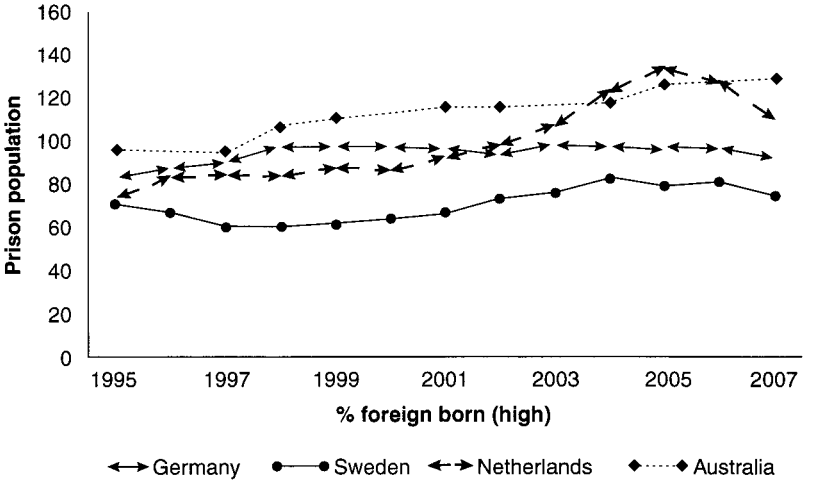

Figure 2.2 Democracies with high immigration: prison population 1995–2007 (per 100,000 persons)

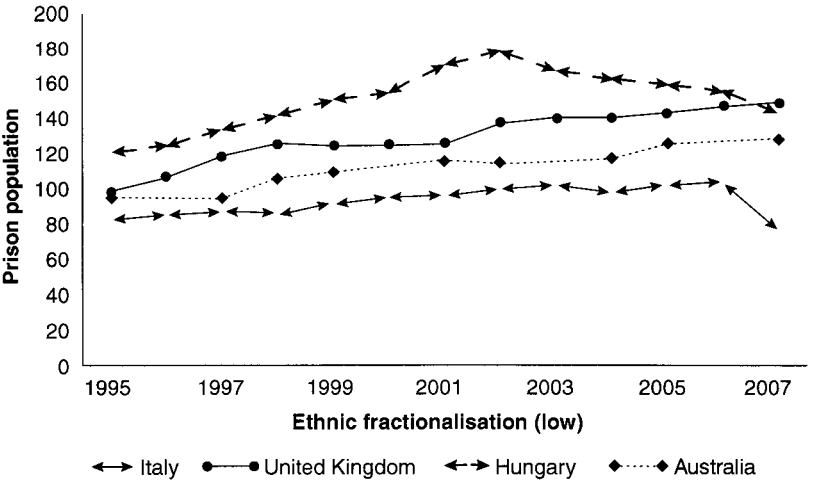

Figure 2.3 Democracies with low ethnic fractionalisation: prison population 1995–2007 (per 100,000 persons)

ethnic fractionalisation have partially steady or declining trajectories, with the notable exception of Israel after 2002. In sum, *trajectories of imprisonment* and the number of prisoners do not seem to be driven either by immigration or by ethnic fractionalisation.

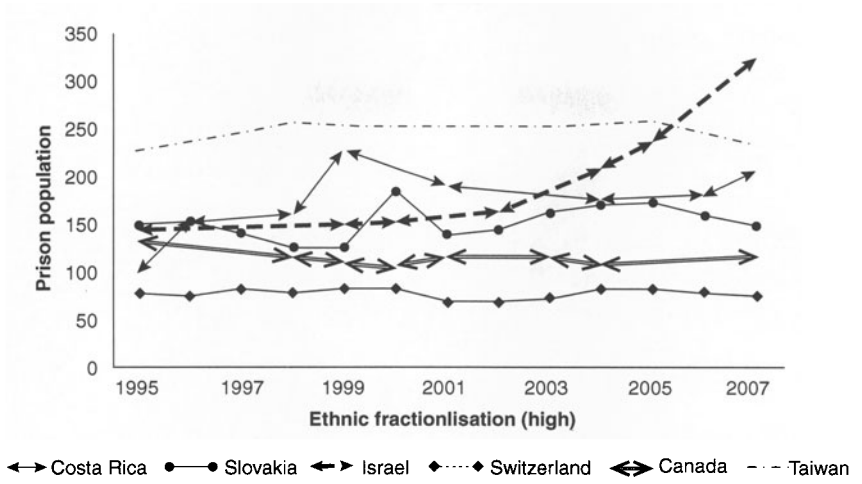

Figure 2.4 Democracies with high ethnic fractionalisation: prison population 1995–2007 (per 100,000 persons)

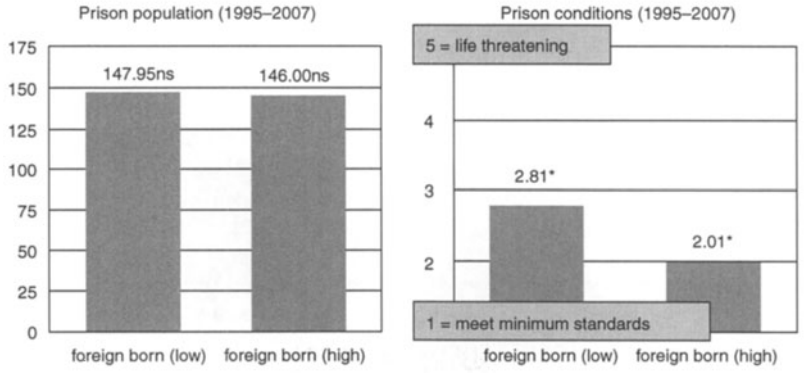

Figure 2.5 Level of immigration (foreign born % (WVS)): prison population and prison conditions 1995–2007

Note: t-test: * p < .05 **p < .01 *** p <.001.

A slightly different picture emerges when *levels of imprisonment and prison conditions* in countries with high and low immigration and ethnic fractionalisation are compared. While no impact of immigration is found on levels of imprisonment, mature democracies with higher levels of ethnic fractionalisation have higher imprisonment rates (Figures 2.5 and 2.6, left panel). Even if the number of migrants does not have an impact on

Figure 2.6 Ethnic fractionalization: prison population and prison conditions 1995–2007

Note: t-test: * p < .05 **p < .01 *** p <.001.

imprisonment, the ensuing divisions within democracies coincide with more imprisonment. Additionally, these divisions and lack of integration coincide with worse prison conditions: prisoners are treated more harshly and with less respect for their rights in societies which are divided along ethnic, linguistic and religious lines, and where 'others' are generally more subjected to exclusion (Figure 2.6, right panel). Interestingly, in countries with high proportions of foreign-born citizens, prison conditions are significantly better (Figure 2.5, right panel). This might indicate an effect of self-selecting processes among migrants, who actually prefer well-established democracies with a record of rule of law and human rights, which seemingly extends to regimes in prisons.

The relationship between support for inclusionary practices and universalising mechanisms and the penal regime are explored by contrasting countries with high and low support for such practices. High support for economic exclusion and discrimination of migrants has a considerable impact on prison conditions; where support for such exclusion – driven by competition with migrants – is high, prison conditions are significantly worse (Figure 2.7, right panel). As advantages for the majority group are secured against (and often in negation of) universal values and integrative ideals of democracy, such values and integrative ideals are neither extended to the migrant nor generally to the criminal 'other'. The missing link here seems to be the predominant status politics in a democracy: as Whitman (2003) points out for the United States and its harsh penal regime in contrast to two European countries (France and Germany), the US prison regime mirrors the treatment of the most recent immigrant group with the lowest

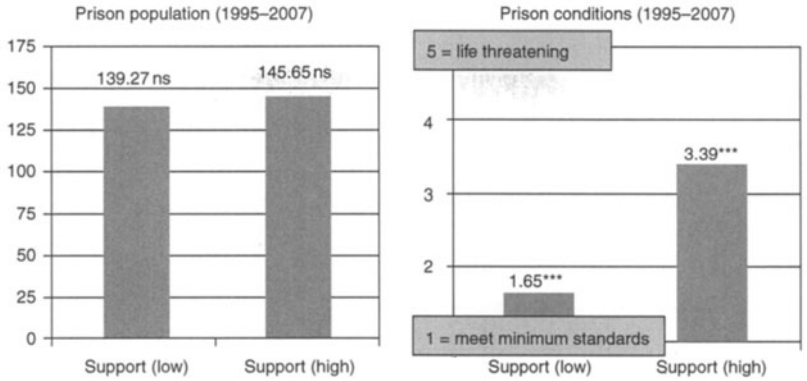

Figure 2.7 Support for economic exclusion of migrants (employers should prefer [nation] people % (WVS)): prison population and prison conditions 1995–2007

Note: t-test: * p < .05 **p < .01 *** p <.001.

status. Even if the US data are not included in the analysis of prison conditions, this relationship between the treatment of prisoners and migrant groups is corroborated for this sample of 51 stable and mature democracies, and seems to apply to democracies in general. In contrast exclusion of migrants from the neighbourhood is not related to prison conditions; attitudes in the more private sphere seem to be less informed by democratic values and practices than in the more public sphere of the workplace, and they follow different rules and rationales (not shown). Both exclusionary practices are not related to levels of imprisonment.

Support for a 'minimalist' approach to integration of immigrants that is based on the rule of law and its universalising mechanisms coincides with significantly better prison conditions (Figure 2.8). Such an attitude towards migrants seems to extend to the punishment of criminals, seeing them rather as subject to the same laws as everybody else than as individuals who should be suffering particularly harsh conditions in prison. This interpretation is corroborated by the fact that, in democracies where prisoners have the right to vote, prison conditions are significantly better than where prisoners are denied the vote (not shown). Extending universalising mechanisms and institutions to 'others' – whether migrants or criminals – is closely related to citizens' sense of justice and fair treatment in penal regimes.

The following Figures (2.9–2.11) present the results of interactive effects between democratic values and immigration in order to explore how democratic values and practices 'react' when tensions are generated and enhanced by immigration. In only one case – egalitarianism under pressure from ethnic fractionalisation – we can observe an impact

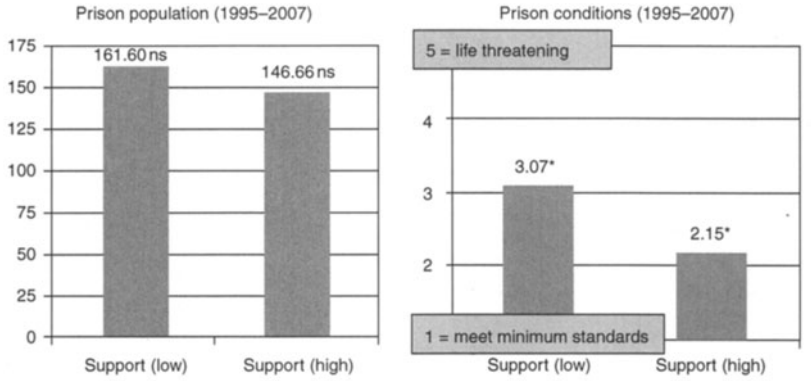

Figure 2.8 Support for rule-of-law integration (law compliance as requisite for citizenship % (WVS)): prison population and prison conditions 1995–2007

Note: t-test: * $p < .05$ ** $p < .01$ *** $p < .001$.

of ethnic fractionalisation in high-egalitarian democracies, but not in low-egalitarian countries (Figure 2.9). Other pressures on values and practices do not materialise in higher/respectively lower imprisonment rates. In contrast such pressures seem to be related to prison conditions although in unexpected ways.

Democracies with high egalitarianism *and* high levels of immigration have the best prison conditions, a result that is supported by significantly worse prison conditions in countries with low levels of egalitarianism *and* low levels of migration; this reiterates the findings shown in Figure 2.5 where presumably self-selective processes of migration to countries with good records of human rights and rule-of-law credentials are reflected in better prison conditions. When analysing pressures not from numbers of migrants but from ethnic fractionalisation, the most distinct difference in terms of prison conditions is found between high-egalitarian democracies with low levels of ethnic fractionalisation (best) and low-egalitarian democracies with high levels of ethnic fractionalisation (worst). Because democracies with high egalitarianism and high levels of ethnic fractionalisation have similar prison conditions, egalitarian values seem to be the main factor in shaping prison conditions, rather than ethnic divisions (Figure 2.9).

A comparable pattern emerges when trust levels in democracies and potential pressures from migration and ethnic fractionalisation are explored. The best prison conditions are found where trust levels and migration are high, and the worst under opposite conditions (not shown). In a similar vein, Figure 2.10 demonstrates that countries with high levels of trust and little ethnic division have the best prison conditions, and those with low trust and high ethnic fractionalisation have the worst. Again, it seems to

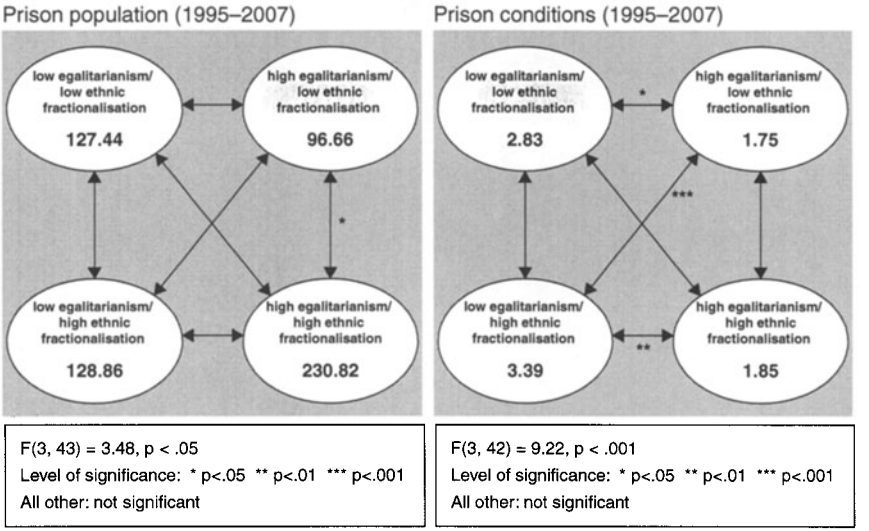

Figure 2.9 Egalitarianism and ethnic fractionalization: prison population and prison conditions 1995–2007

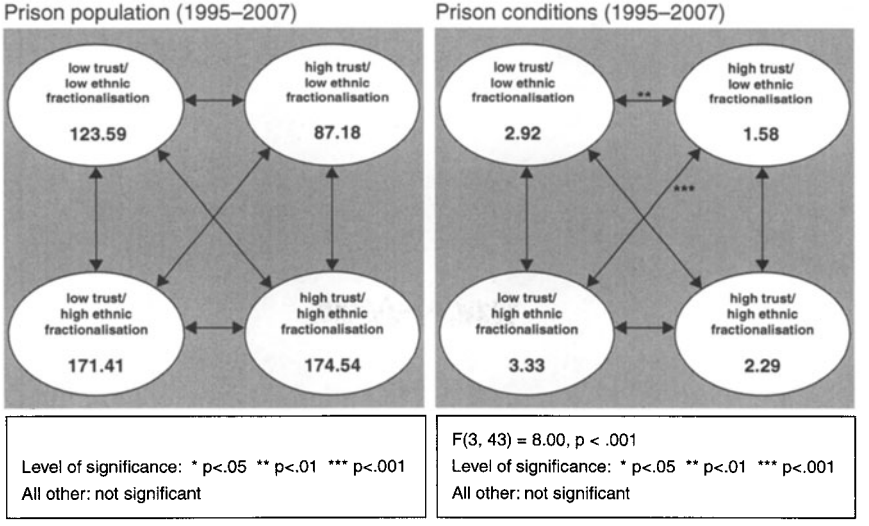

Figure 2.10 Generalised trust and ethnic fractionalization (most people can be trusted % (WVS)): prison population and prison conditions 1995–2007

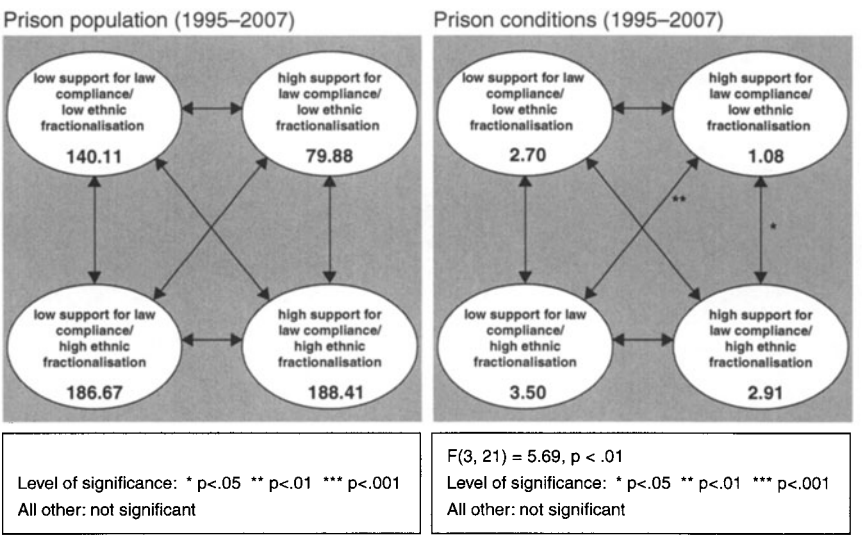

Figure 2.11 Support for rule-of-law integration and ethnic fractionalization (law compliance as requisite for citizenship % (WVS)): prison population and prison conditions 1995–2007

be general trust that makes the difference in terms of prison conditions, rather than any exacerbating pressure from migration and ethnic divides. However, depletion of trust levels by high ethnic fractionalisation cannot be excluded in the long run, thus having an indirect rather than interactive effect on prison regimes.

These results are further supported by the analysis of 'rule-of-law' demands from foreign immigrants and ethnic minorities. The distinct differences between democracies with the best and worst prison conditions show again that high immigration does not have a detrimental impact on prison conditions, but to the contrary; the decisive difference is the support for a minimalist and rule-of-law approach to the integration of migrants and ethnic minorities, rather than pressures to adopt national cultures (not shown). As has been shown above (Figure 2.8), such a minimalist approach has a distinct potential for the inclusion of others, be these migrants or prisoners. Figure 2.11 corroborates these results for ethnic fractionalisation: Prison conditions are worst, where the minimalist approach to social inclusion finds little support and ethnic fractionalisation is high. However, even if support for a rule-of-law approach to integration is high, prison conditions considerably deteriorate if ethnic fractionalisation is high, indicating that ethnic fractionalisation in itself is a decisive factor in shaping prison conditions.

Conclusion: the resilience of democratic values and practices?

Democracies differ widely as does the way they resolve the innate tensions of the project of liberal inclusion; these differences impact on criminal justice regimes as well as on violence (see for example Karstedt, 2006, 2011, 2012). Immigration – in particular where it generates ethnic fractionalisation – puts pressure on the project of liberal inclusion, and one indicator of heightened tensions is the penal regime and criminal justice in democracies. Both the treatment of criminals and migrants are 'acid tests' for the project of liberal inclusion and put democracies under stress. This study shows that the project – notwithstanding its inbuilt tensions and paradoxes – is remarkably resilient and obviously copes with these pressures. The study demonstrates that self-selecting processes direct migrants towards countries with a record in democratic values, practices and institutions, and that they settle in countries where citizens support these values and extend democratic inclusionary practices to 'others', including the treatment of criminals. While ethnic fractionalisation increases imprisonment rates, migration itself does not impact on prison populations. However, imprisonment rates are equally mostly independent of democratic values, practices and institutions.

What cannot be seen and explored from this comparative perspective is the increasing number of ethnic minority members in the prisons of Western democracies, often from the second generation. These are groups that are not integrated on the other side of the prison gates and are also abandoned inside prison, often by their own groups. This puts mounting pressures on the prison system itself and prison conditions generally. More fine-tuned measures than the ones used here might be better at exploring these problems. However, as this study demonstrates, the project of liberal inclusion, democratic values and practices, and rule-of-law institutions seems to be rather well equipped to address these problems – and enhance effective democracy.

Democracies differ widely with regard to their penal regimes and imprisonment rates, integration of migrants and immigration policies. Any form of solidarity with the 'other' – criminals and migrants – is not a 'natural' correlate or pre-requisite of democracies; to the contrary, democracies thrive on their weak ties and generalised rather than confined trust and collaboration, which allows for tolerance of diversity. This study demonstrates that such universalising, even if minimal mechanisms, provide a seedbed for solidarity with the 'other' in which such sentiments can grow, and integration is realised. In the course of history, democracies have been capable of such integration, although often in long and painful processes. Importantly, it could be shown that where such formal universalising mechanisms are negated under pressure from economic competition, dissociation from the 'other' is also evident in the penal regime and prison conditions. As such,

Appendix 2.1 Sample of mature democracies, prison population and prison conditions (mean 1995–2007)

Country	Prison Population (a)	Prison Conditions (b)
Albania	71.00	3.08
Argentina	118.88	3.77
Australia	112.22	1.00
Austria	94.77	1.15
Belgium	84.92	1.92
Brazil	149.88	4.54
Bulgaria	134.62	4.00
Canada	114.43	1.00
Chile	232.00	3.00
Costa Rica	175.00	2.23
Croatia	73.38	2.00
Czech Republic	192.85	1.77
Denmark	66.31	1.08
Dominican Republic	162.67	3.92
Finland	61.31	1.00
France	88.62	1.62
Germany	93.77	1.08
Ghana	51.56	4.46
Greece	74.62	3.69
Guatemala	62.10	4.08
Hungary	150.54	1.92
India	30.60	3.77
Indonesia	32.40	4.00
Ireland	74.09	2.54
Israel	176.33	1.50
Italy	92.75	2.38
Jamaica	169.40	3.00
Japan	50.09	2.77
Latvia	347.75	3.00
Mexico	154.33	3.25
Moldova	245.23	4.33
Netherlands	99.00	1.15
New Zealand	156.50	1.31
Norway	61.92	1.00
Panama	319.56	4.31
Peru	111.71	3.92
Philippines	85.00	4.08
Poland	188.77	3.00
Portugal	129.62	3.38
Romania	199.69	3.92
Slovakia	152.69	1.42
Slovenia	51.23	1.27
South Africa	369.00	2.92
South Korea	127.89	2.15
Spain	125.62	1.54

Continued

Appendix 2.1 Continued

Country	Prison Population (a)	Prison Conditions (b)
Sweden	70.15	1.31
Switzerland	77.92	1.77
Taiwan	246.67	1.92
United Kingdom	129.08	1.92
Uruguay	169.25	3.31
United States of America	695.33	Not available

Source: (a) Walmsley, 1999–2009; (b) US Department of State, 1999–2005; the United States has not self-reported.

solidarity with the other is 'a goal to be achieved' for democracies (Rorty, 1989: xvi), and whilst representing 'extreme' institutions, the penal system and immigration need to be part of these efforts. Democracies are, however, based on values, practices and institutions that provide the vision and help to achieve the goal.

Notes

I am grateful to Michael Koch, University of Bielefeld, Germany, and Stephanie Moldenhauer, University of Osnabrueck, Germany, for research, documentation, and the graphic design of figures and tables. Parts of this article are based on previous research (Karstedt 2006, 2011).

1. The categories were coded: (1) compliance with and fulfilment of minimum standards; (2) some deficits, in particular resulting from overcrowding; (3) prison conditions below minimum standards, in particular deficiencies of buildings and sanitary provisions due to the age of buildings; (4) harsh prison conditions, violence between inmates and violence by prison officers; and (5) reports explicitly note threats to the lives of inmates. This results in slightly different prison conditions for Germany and Sweden, as the reports note overcrowding for Swedish prisons but not for Germany at the start of the century. As the sample includes a number of countries, where prison conditions are rated as 'life threatening', and rates of imprisonment are comparatively low (like for example in Nigeria), prison conditions are not related to imprisonment rates in the total sample, whilst they are for a sub-sample of European countries. Other indicators of the severity of sanctions like the rate of prisoners with life sentences, or the mean length of prison sentences was only available for a small number of countries and were not used (see Van Kesteren (2009) for a more differentiated indicator).
2. European Values Study Group and World Values Survey Association (1981–2004) European and World Values Surveys four-wave integrated data file, 1981–2004, *v.* 20060423, 2006. Surveys designed and executed by the European Values Study Group and World Values Survey Association. File Producers: ASEP/JDS, Madrid, Spain and Tilburg University, Tilburg, the Netherlands. File Distributors: ASEP/JDS and GESIS, Cologne, Germany. Available at, www.worldvaluessurvey.org, date accessed 15 May 2012.

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3
Justice and Social Inclusion Policies

Judith Bessant

Introduction

Since 2008 the social policy of Australia's Labor government (in office since 2007) has been framed by a commitment to 'social inclusion'. In this respect Australia belatedly aligned itself with policy imaginaries already widely, if variably, adopted in Europe (Atkinson and Davoudi, 2000, Levitas *et al.*, 2007, Buckmaster and Thomas, 2009).[1] This framework has been self-consciously identified as what Labor governments are equipped to do. Framed by the post-2007 global financial crisis and agreeing with claims that 'excessive greed' and irresponsibility on the part of financial markets sponsored that calamity, the Labor government vigorously promoted its 'social democratic' credentials. Former Prime Minister Rudd has explained this meant that Australia would no longer adopt a neoliberal orientation promoting unrestrained capitalism (Rudd, 2009).

Social inclusion became one way of staking a claim to being social democratic. Then Deputy Prime Minister Gillard (2007, online) claimed that, 'including everyone in the economic, wealth creating life of the nation is today the best way for Labor to meet its twin goals of raising national prosperity and creating a fair and decent society'. Social inclusion was the antidote to 'social exclusion' understood as:

> A shorthand label for what can happen when individuals or areas suffer from a combination of linked problems such as unemployment, poor skills, low incomes, poor housing, high crime environments, bad health and family breakdown. (Department for Social Security, 1999: 23)

As Hayes, Gray and Edwards (2008: 4) have argued, 'social inclusion' and 'social exclusion' are integrally related, and it is difficult to discuss social inclusion without discussing social exclusion. The government's education and employment policies have been identified as the mainstay to a social inclusion framework because more schooling and access to jobs are deemed

to be the best ways to tackle 'social exclusion' (Gillard and Wong, 2007: 1, ASIB, 2010). Social inclusion policies are also designed to address what Hays, Gray and Edwards (2008) identified as 'at risk' communities characterised by low levels of 'social capital', reduced 'resilience' and the erosion of 'trust'. Here the solution appears to be by ensuring that people living in such communities have access to well-managed, accessible and efficient government services.

While some writers (Buckmaster and Thomas, 2009: 1) have noticed the 'concept of social inclusion lacks a clear definition or a coherent theoretical core', most mainstream policy writers (such as Griffiths, 2005, Hays, Gray and Edwards, 2008) have been reluctant to critically assess the social inclusion framework. According to Spicker (2007) and Ryan and Sartbayeva (2009), the term 'social inclusion' was used to substitute the term 'poverty' because the United Kingdom Government in the 1970s didn't want to use the word poverty. In turn, this led the European Union to use 'social exclusion' in its place. All this suggests some plain speaking is warranted. The time is ripe for such an assessment and especially one making explicit reference to a conception of justice. Policy evaluations typically involve the use of techniques for assessing efficiency by way of cost-benefit analysis or an evaluation of the degree of alignment between the stated aims and achievements of the policy. In this way the typically silent effect of relying on a utilitarian ethical framework can be seen. Less usual is an evaluation carried out explicitly in terms of some conception of justice. As some writers have pointed out, whether implicit or explicit, theories of justice inform policies that governments make as well as our assessment of those policies (Thompson, 2003a, 2003b).

In this chapter I assess the social inclusion policy using the 'capabilities approach' or the 'human development approach' (Sen, 2009, Nussbaum, 2006, 2011, Stiglitz, Sen, and Fitoussi, 2009). It is an approach concerned with addressing social injustice and inequality and enables comparative assessments of justice located in a broad liberal tradition. Using this approach to justice is warranted because its proponents have made important practical contributions to theorising justice. It also promotes an egalitarian conception of justice that is missing from most contemporary policymaking communities. Secondly it is warranted, given that Rudd himself used Sen's work to develop his own neoliberal political imaginary (2009: 7). More importantly, it is warranted because writers like Sen and Nussbaum are committed to making a normative vocabulary explicit, so that their work can be used to evaluate policy frames like Australia's social inclusion framework.

I begin by outlining Australia's 'social inclusion' policy focusing on education and employment as its mainstays. Using the capability approach to assess those policies, I argue that rather than ameliorating problems of exclusion and injustice, Australia's 'social inclusion' framework does the opposite. It has the effect of stigmatising and marginalising disadvantaged groups

and does nothing to address the problem of justice and inequality. Finally I identify some key actions needed to achieve a minimally just society.

Social inclusion

Having won office in 2007, the Rudd Labor Government introduced a social inclusion agenda. It involved establishing structural arrangements that included a Social Inclusion Board and a Social Inclusion Unit in the Department of Prime Minister and Cabinet (Australian Government, 2009). The Government also identified a number of priorities for social inclusion in employment participation, mental health, homelessness, child poverty, support for local communities and overcoming Indigenous disadvantage. It released a compendium of social inclusion indicators to assist the Social Inclusion Board develop measures of social inclusion and to discuss social inclusion related issues. It also indicated that, by the end of 2009, it would develop a national statement on social inclusion designed to chart a long-term strategy towards making 'Australia a stronger, fairer society' (Gillard and Macklin, 2009, online).

Operationally it focused on participation in education-training as preparation for employment and work. This was justified on the grounds that it would enable more people to work, get an income and engage socially. It was directed towards addressing the problem of weak or non-resilient communities recognisable by their low rates of 'social capital' and 'social trust', and the fact that they did not have access to services or, when they did, those services were poorly co-ordinated and managed (ASIB, 2010). In this way, the social inclusion policy acknowledged what was defined as the problem of 'excessive reliance' on governments (which were 'overly bureaucratic' and 'inefficient') where communities, especially Indigenous and long-term welfare beneficiaries, had little experience of the motivational, disciplinary and regulatory effects which market activities and relationships are said to provide (Sheehy, 2010). If these motifs seem familiar, it is because they are.

While the Rudd-Gillard government promoted social inclusion as a major innovation, the rubric of social inclusion is the latest in a sequence of neoliberal welfare models going back to the mid-1980s. In the early to mid-1980s, the Hawke-Keating Labor government demonstrated the versatility of neoliberalism by creating early versions of 'Third Way' politics which used Labor 'values' to spin neoliberal agendas exemplified in the OECD's 'Active Society' model or the IMF's advocacy for floating exchange rates. That involved a major renovation of 'social security' policy undertaken by the Cass Review of social security which changed the fundamentals of 'welfare' policy in the late 1980s and early 1990s. The primary objective was to integrate 'welfare', employment and education by deregulating the labour market, identifying and disciplining 'dole bludgers' and 'encouraging' young people to stay at school (Cass, 1988).

Informing this policy was the assumption that recipients of social security payments were 'inactive' and 'dependent' and that a new ethos and style of conduct needed to be inculcated compulsorily. This led to the *Active Employment Strategy* (AES) incorporating a restructured income test designed to 'encourage' labour force attachment. This was an early instance of the neoliberal model of governance of the self that was added to and extended over the following decades. It replaced the older Laborist model (as opposed to the insurance model) of unemployment benefits established in 1944, which linked a guarantee of full-employment to the idea of a safety net of unemployment income (Daniels, 2006, Dean, 1991). *Newstart* relied on measures like breaching those who infringed social security rules, and made payment conditional on the unemployed demonstrating that they 'actively' sought work or training.

In the 1990s, Australian governments developed a keen interest in 'social capital' theory (Putnam, 1995), talked-up building 'strong communities', an 'active society', 'mutual obligation' and watched as various European governments generated a 'new' discourse about 'social exclusion'. 'Mutual obligation' and a 'socially inclusive' society were identified as solutions to problems of 'welfare dependency', which rested on the idea that income support without work, training or job search activities rewarded bad behaviour and would create a weak-willed, lazy and dependent citizenry (Saunders, 2004). Such 'dependency' was said to lead to social pathologies like high crime rates, social isolation and homelessness (ASIB, 2010). At the turn of the twenty-first century, the conservative Howard government appointed the McClure Committee (1999–2001) to review welfare policy. Like previous Labor governments, the Howard government framed policy problems in terms of 'passive recipients' and excessive reliance on 'welfare', which reduced participation and increased social problems. These assumptions were reaffirmed under the rubric of social inclusion.

Back to the future

For decades, policymakers of all persuasions engaged in agenda setting that explained unemployment, high crime rates, social isolation and homelessness in terms of laziness, poor skills and so on. The new answer – namely 'social inclusion' – involved an 'education revolution' and enhanced education participation (Senate Standing Committee, 2007, Australian Government (Bradley), 2008).

The 'education revolution' was flagged by Julia Gillard (when Deputy Prime Minister, Minister for Education and Minister for Employment and Workplace Relations) as a core element of social inclusion policy (Gillard, 2010); 'new' goals were set and priority was given to 'vocational outcomes', greater productivity and efficiency. As part of a macro-policy framework, education was constituted as human capital formation and a subordinate

aspect of macro-economic policy. In this way, the value attributed to social inclusion was established in terms of individual income benefits or economic progress understood as growth in GDP.

Under the 'new social inclusion' framework, participation is defined as economic participation. The goal is to 'break welfare dependency' by getting more people working and in education or training as preparation for work. It 'won't be a memorial to good intentions, it will be about action and hard-headed economics' (Gillard, 2007, online). This 'investment' will help the underprivileged by bringing them and their communities into 'the mainstream market economy' (Gillard, 2007, online). Safer and more equitable communities are achievable through enhanced 'vocational or educational outcomes' and by paying attention to 'the disadvantaged', sub-criminal groups seen as criminogenic who make-up 'the underclass'. To address the problem of social exclusion and make communities safer, the Labor government set a target of ensuring that 40 per cent of people aged 25–45 would have bachelor level qualifications or above by the year 2040 (Gillard, 2010). Of particular relevance is the plan for young people from lower socioeconomic backgrounds to constitute 20 per cent of university enrolments by 2020 (Australian Government (Bradley), 2008).

Following on from the Howard government's extension of 'welfare conditionality' into Indigenous communities, the Rudd-Gillard government moved to expand the conditionality principle. It did this on a number of fronts. For example, the family tax benefits, worth $726.35 per child, became conditional on parents complying with new regulations mandating a pre-school health check. This was designed to target children from lower socioeconomic communities because they were 'developmentally vulnerable' and likely to be future welfare dependents, school drop-outs, unemployed and criminally inclined (Gillard, n.d.).

'Teen mothers' were similarly targeted. Their income ($625 per fortnight) would be docked if they did not agree to improve themselves by developing specified skills as parents and 'future workers'. They are now required to attend the mandatory Centrelink school preparation meetings then enrol in school and complete Year 12 once their child is 12 months old (Gillard cited in Dunkerley, 2011).

The 'Earn and Learn' policy was also introduced and justified using the language of prevention. It would 'prevent' youth unemployment by keeping people in their early to mid-20s in study or training. It required people under 17 to be working, training or being schooled, and those between 17 and 20 who were unemployed to be in study or training. Moreover, anyone under 20 that had not completed schooling to Year 12 was required to be in study or training to qualify for Youth Allowance. The net game plan was to increase the national Year 12 or equivalent rate to 90 per cent by 2020 (COAG, 2009).

Extending education was rationalised using the utilitarian language of 'individual investment in human capital' and 'skilling-up'. As this policy was rolled-out, expenditure on post-secondary education as a proportion of GDP compared with other OECD countries stayed close to the bottom. The proportion of private funding contributed by Australian students is also high, with the average annual fee being the third highest after the US and Japan.

Worse still, the gross economic inequalities that characterise Australia are also evidence that the social inclusion policy is not working. It is not delivering living conditions that promote a life that is commensurate with a person's dignity or with a conception of a just society. As OECD (2011) research reveals, most western societies are becoming more unequal. In Australia there is evidence of a dramatic increase in all relevant measures of social and economic inequality (Quiggin, 2011). One study of the USA, Australia, Germany and Britain which used three-year average incomes concluded that they are the most unequal countries in terms of standard measures of inequality and are the most unequal in terms of permanent income inequality (Leigh, 2009: 17). This is exacerbated by increases in the cost of living (housing affordability) and increased financial stress and levels of household debt (Keen, 2007, 2009).

Ongoing tax reforms continue to increase indirect consumption taxes like the GST, while also enhancing income inequality by providing disproportionate tax relief to the highest income earners. This helps explains the persistent trends towards income inequality over the past three decades. Income taxation has become less progressive since the mid-1990s. Between 1996 and 2009, the overall level of tax paid by a taxpayer on 250 per cent of the average wage (around $150,000) fell by 22 per cent, compared to 14 per cent for one on half average wages, and just 9 per cent for an average wage earner (ACOSS, 2009: 15). High income earners ended-up paying a fifth less than they had been paying, while the less well-off got 9 per cent tax relief which facilitates increases in income for the wealthy. Equally, the taxation system pays investors who invest in property and shares by allowing tax write-offs for negative gearing, another arrangement that compounds the unequal distribution of wealth.

In addition, labour market factors continue promoting social inequality. Australia now has the highest proportion of its workforce engaged in part-time and precarious employment of any OECD nation: this helps explain the persisting problem of the 'working poor'. ABS data show how the proportion of part-time employees increased from 19 per cent of the labour force to 29 per cent between 1987 and 2011, with nearly 46 per cent of women working in part-time positions in 2011 (ABS, 2011). Using a more complex measure of 'social exclusion', Kostenko, Wilkins and Scutella (2009) estimate that '20 to 30 per cent of the Australian population aged 15 years and over [is] experiencing "marginal exclusion" at any given point in time' (2009: 2). Those in

work are also working longer hours. In doing so, they forgo things that are constitutive of a worthwhile life like leisure and a 'balanced work-home life'. In addition, parents are less able to spend time with their children. This is significant given the connections between financial stress, 'family breakdowns', 'neglect' and child protection reports.

The move to increase education enrolments until one's early to mid-20s is a paternalistic *functioning oriented policy* that infantilises people who are not children. It does not honour choice nor focus on capacities, and leaves little if any room for human agency. In this way, this policy, in conjunction with other policies and social conditions, constrain young people from choosing to 'be adult' (for example, by choosing to leave the parental home, rent or buy a home, and form their own family). As such, they are different from other 'classes' of citizens in ways that require government to make choices for them. In very young children this may be a defensible policy (for example, compulsory education to develop 'adult capabilities') but for young adults it is not. This is particularly so when it also entails mortgaging their future with large fee debts and no guarantee of employment in areas relevant to their study. As Nussbaum (2011) observed, there is a huge moral difference between policies that focuses on functioning and those which focus on capabilities.

It is also worth observing that the quality of education, which is expected to be the engine room of the social inclusion project, is grossly unequal (Teese and Lamb, 2007). What Connell, Ashenden and Dowsett (1982) argued decades ago has direct contemporary relevance. The capacity of educational institutions to remedy gross social inequality has always been constrained by broader patterns of basic inequalities. Furthermore, conceptions of student's abilities and the capabilities of those from lower socioeconomic backgrounds produced inequalities through labelling and stereotyping. Bourdieu, Passeron and Saint Martin (1994) have similarly pointed to the ways many students are disadvantaged once they enter education institutions because those institutions use pedagogical approaches and competencies and assume a very narrow set of lived experiences that are often irrelevant to the lives of many students who nonetheless need to perform well at them if they are to be considered successful.

As Australia has moved to increase education participation, there has been little if any acknowledgement of the competitive advantages conferred on children enrolled in elite private schools or to the quality of the educational experience students received in cash strapped institutions, especially students from lower socioeconomic backgrounds who tend to struggle in academic settings without additional support. The problem of increasing credentialism and the prospect of generations of debt ridden graduates, qualified but unable to get work in their field, was overlooked. The issue of increased debt due to loans to pay for their education was justified using individualisation arguments (the user pays principle) and by framing

it as 'investment' in 'human capital' that ostensibly reaps benefits down the track. Moreover, as Australia corralled more young people from lower socioeconomic backgrounds in school, decisions were taken in some jurisdictions to increase fees for TAFE, a move that had major financial implications for people from those backgrounds as well as the TAFE institutions themselves.

Although these issues have been overlooked, they raise basic issues of justice. As such they are critical for assessing the government's declared commitment to creating a just society courtesy of social inclusion.

Justice and the capability approach

Proponents of the capabilities approach reject the utilitarian frame that informs Australia's social inclusion framework and government policy generally. They say that, rather than measuring well-being using economic metrics like income or GDP, the essential question to ask in assessing how just communities are is to ask: what is each person in that community able to do and be? The capabilities approach is neo-Aristotelian in that it sees each person as an end (as opposed to the utilitarianism that depicts people as a means to an end). It is not focused on determining the average well-being but on freedom, on choice and opportunities available to citizens, and on their capacities to realise those opportunities. The goods a government should promote are opportunities, substantial freedoms which people may or may not choose to pursue. It is committed to respecting our capacity for self-determination in a social context and recognises a plurality of values (not single or a narrow band of prescribed values such as income, wealth). It's also concerned with social injustice and inequality.

Proponents of the capability model do not accept the idea that happiness (utility) ought to be used to assess the value of social practices or policies (such as work, education). This is because a calculation of benefits derived from such social practices (for example estimated income, material goods) cannot tell us whether a person is thriving or a community is just. Counting 'detached objects' (such as income or commodities) says little about individual well-being or the fairness of a community. They say there are multiple and incommensurable ways of determining what constitutes a good life and argue against the pursuit of economic growth and productivity only. Promoting *justice requires us to ensure there is freedom* and the *capability* available for people to choose and *pursue what they value*. 'Judgments about justice have to take on board the task of accommodating different kinds of reasons and evaluative concerns' (Sen, 2009: 395).

Central to the capabilities approach to social justice is the liberal claim that a society is just when citizens are enabled to choose what they value, to pursue those valued ends that define the good life. One repercussion of this is that citizens should not be coerced to develop capabilities to be and/or

do what they did not choose and may not value. This, however, is precisely what social inclusion policy requires of many disadvantaged groups (like those in receipt of social security 'benefits').

For Nussbaum, a decent political order ensures the core elements needed for a good life exist and that all citizens enjoy a threshold level of those capabilities (or social goods). Briefly, they include:

- Life: Being able to live a life of normal length and good health (for example through adequate nourishment, shelter);
- Bodily integrity: Being able to move freely, to be secure against assault;
- Sense imagination and thought: Being able to imagine, think and reason in ways informed by good education;
- Emotions: To have attachment to things and people, to love, grieve;
- Practical reason: Being able to form a conception of good and engage in critical reflection;
- Affiliation: To live with and towards others, to recognise and show concern for others, to engage in a variety of social interactions;
- Other species: Being able to live with concern for and in relation to animals, plants and nature;
- Control over one's environment, such as our political and material context (Nussbaum, 2011: 33).

Appropriate goals for government are to enhance these capabilities because that allows citizens to exercise agency or choice. There is a 'huge moral difference' between policies that promote 'participation' (for example, mandated functionings) and one that promotes internal and external capabilities to participate (the capacity to choose to learn what they value and the conditions needed to achieve that). Government should not use its power to make citizens 'participate' (Nussbaum, 2011).

Proponents of the 'capability approach' reject claims that progress and well-being can be measured in terms of GDP, the long standing way of gauging well-being and human progress (Tinbergen and Huerting, 1992). Increases in GDP make little if any difference to the quality of people's lives whose existence is marked by inequality and deprivation (Nussbaum, 2011: 1). Metrics of economic growth and increased wealth cannot solve the problems of those who are disadvantaged unless governments develop policies that make positive differences to those peoples' lives. 'The benefits of... increased wealth do not reach the poor, unless local elites are committed to policies that redistribute wealth' (Nussbaum, 2011: 13). Social inclusion policies are not designed to achieve these ends, nor designed to redistribute resources.

Capabilities refer to more than abilities a person has – the freedom to choose is also inherent in the notion of capability. We have freedoms and opportunities that are created by a mix of personal abilities as well as the

existence of family, social political and economic conditions. We also have internal capabilities that can be developed (such as through education). They are, however, of little good if we do not have opportunities to function in ways that are aligned to the capabilities we have. We can, for example, have the *capacity* to vote (an internal capability) but do not have the functioning if there is no legal entitlement to vote (an external capability). Similarly, a young person may have the *freedom to choose* to be educated to develop *capabilities* to be X, but if there are no jobs – *opportunities* that relate to their education/capability – then there is no opportunity to function as X.

A just society does not to engage in coerced functioning. The political goals are to raise all citizens above an agreed-on threshold of capabilities, to enable them to enjoy substantial freedom to choose to act and pursue what they value. In a just society, a plurality of values is recognised and respected. Has the social inclusion framework extended these capabilities to all citizens? Do all citizens have adequate knowledge, information, confidence, access to decent health services and housing to enable participation? Do all citizens have opportunity to develop their capacity to function and participate?

The pursuit of narrow or single principles or measures like income or wealth creation ignores the existence of a plurality of values. Sen (2009) explains:

> Various attainments in human functioning that we may value are diverse, varying from being well nourished... to taking part in the life of the community... The capability that we are concerned with is our ability to achieve various combinations of functionings that we can compare and judge against each other in terms of what we have reason to value. (Sen, 2009: 214)

In this way, the 'capability approach' is seen as better than policies informed by utilitarianism because they emphasise the important elements of peoples' lives which are plural and qualitatively distinct from each other. What is valued cannot be reduced to a single metric without distortion (Nussbaum, 2011: 18). Moreover, there are good reasons to treasure freedom, to have agency by determining the nature of our lives for ourselves and have opportunities to pursue objectives or goods we value.

This conception of freedom provides a basis for assessing aspects of a person's life, an institution, or community against the idea of justice as comprehensive freedom. Using Sen's work to establish whether a person is living a good life, or whether a society or institution is just, involves asking about the extent to which people are free to choose between viable alternatives and the extent to which they can achieve what they value. His interest is in the whole person's life, not just detached objects of convenience

(like incomes or commodities we possess, which are taken, especially in economic analysis, as the criteria of success) (Sen, 2009: 233)

Determining the capabilities a person has to exercise choice and access to the resources needed to pursue valued ends requires more than assessing the *means* we have to live: it requires assessing our *actual opportunities* (Sen, 2009: 253). Standard economic practice in assessing well-being relies on income and wealth and, as such, cannot provide information about those opportunities. Consider, for example, a person with a severe illness or serious disability. They cannot be judged to be better-off because they have a larger income or more wealth than the healthy able-bodied person because *poverty and disadvantage is more than deficient income.*

Social inclusion

If the capabilities approach is invoked, it suggests that social inclusion policy in Australia faces a number of problems. In spite of a rubric of social inclusion, the community is failing to provide material support and choice consistent with a minimally just society. What we have is a 'welfare system' that ostensibly exists because 'the market' has failed to provide the means for many people unable to earn an income. It is a regulatory system that is used to discipline people who ostensibly share certain characteristics and conditions that allegedly cause social problems such as poverty, crime and illicit substance abuse. Deficits (such as high numbers of child protection reports, incarceration in youth justice centres, parents in prison and mental health issues) are the kinds of pathologies identified to mark out and justify their regulation. It is claimed that regulation like the principle of conditionality will ameliorate the problems and threats they represent.

Asking what is being targeted is one way to get closer to the kind of thinking that generates these classifications (such as 'teen mother', 'unemployed', aged, youth), which are not impartial descriptors but based on beliefs that people who fit those categories are problems and require special treatment. Through administrative means they are divided off, separated out and in many instances disconnected from other classes of citizens who are not subject to that policy.

As a form of governmentality, social inclusion policy is not directed towards addressing the problem of injustice and does nothing to tackle the problem of social inequity and justice. Indeed, inequality has become worse and the political world-view that justifies it – namely economic liberalism – has become more entrenched and prevalent in the relevant policy communities. The appeal to individualisation, and use of a moral vocabulary (for example 'obligation') characterise the policy rhetoric while prevailing injustices are attributed to the 'choices' individuals make.

In keeping with the neoliberal world-view, people are successful because they possess personal attributes (such as a work ethic, intelligence, good

judgment), while the disadvantaged are 'in need' (unemployed, poor) because they made bad choices which are indicative of their faulty character and personal deficits. In this way, inequality is fair and good because it rewards those with positive attributes and who 'make the effort' and penalises those who do not. Not only does this provide a rationale for addressing inequality, it provides a misleading account of why inequalities exist and why the gap continues to grow. To explain gross inequalities we need to turn our attention toward certain cultural and institutional arrangements like the taxation system, or the schooling system, and how they replicate social inequities and a range of social prejudices, and away from individual deficits and bad or good choices.

Conclusion: a minimally just society

The social inclusion framework does not point to a government interested in creating a just society. The task of a government interested in justice is to ensure that *all* people can pursue a 'dignified and flourishing life'. Social inclusion policy worthy of the name is designed to ensure citizens are placed above the threshold of human capabilities. It may be that the threshold cannot be achieved immediately but it needs to be pushed for as a policy objective and political goal. Such political objectives will have an immediate impact on poverty which creates barriers to participation in various social activities.

In a political order where there is interest in creating a minimally just society, we would see people who need additional help receive the assistance needed to get them above a 'core capabilities threshold'. Rather than being breached, special interventions would be implemented to assist people who are disadvantaged. In this way, 'human dignity' determines policy choices, enabling human agency rather than implementing paternalistic policies that mandate functioning and not capabilities.

In a minimally just society, we might see initiatives like those made by the French President Sarkozy when he established *The Commission on the Measurement of Economic Performance and Social Progress*. One of its aims was to identify the limits of GDP as an indicator of social progress, an initiative that necessitates reflection on traditional economic frameworks and the values that inform it.

In a minimally just society, we would see interest in developing long-term approaches to evaluating well-being so as to establish which people/groups have access to capabilities and to publicise and disseminate those results. This would raise awareness of inequity and justice. There is also value in developing ideas and information about what constitutes a good quality of life and acceptable measures of social inequity. This can lead to the development of a metric for evaluating well-being that goes beyond the standards economics practices.

For a minimally just society, we would require changes to taxation systems and the establishment of an integrated revenue taxation scheme that provides a larger revenue pool derived from an equitable revenue raising system. A commitment to the principle of intergenerational equity based on the principle of intergenerational neutrality is also needed for a minimally just society. So too is a commitment to human rights law (Australia is the only modern liberal democracy without a bill of rights).

The introduction of an unconditional, universal system of income support via basic income paid to citizens to secure freedom and capability would take us closer to the idea of individuals as actors of their own development. Turning this into a policy and law involves asking what core capabilities or social goods are necessary for a good life. Finally, a minimally just society is one that reinvigorates the use of an explicit ethical vocabulary in public deliberation and entails a clearer articulation of the values and ethics that inform policy.

Note

1. The adoption of social inclusion as a framework for social policy analysis in Australia occurred in 1999. Since that time, South Australia, Tasmania, Victoria, and the Australian Capital Territory have adopted social inclusion frameworks to guide government policy and programme development. The Australian Government established the positions of Minister and Parliamentary Secretary for Social Inclusion in December 2007 and a supporting Unit in the Department of Prime Minister and Cabinet. In May 2008 the Australian Government established the Australian Social Inclusion Advisory Board (ASIB).

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Part II
Penal Policy and Punishment

4

Penal Policy and the Social Democratic Image of Society

John Pratt and Anna Eriksson

Introduction

For the last thirty years or so, many Western societies have been engaged in a programme of wide-ranging social and economic reconstruction. In this process, everything associated with the rise of the post-1945 welfare state has come to be discredited: the role of the state as the provider of welfare services has been undermined by privatisation; public expenditure has been cut; economies have been deregulated; and direct taxation has been lowered while indirect taxes have been raised. In such ways, modern societies have been reconstructed, as if the previous commitments to welfarism and the high levels of expenditure and taxation that were needed to pay for it had been some sort of ghastly aberration which, from the 1980s, political parties of both Right and Left – certainly in the Anglophone societies – have been keen to correct. By getting the state out of people's lives, it has been claimed, entrepreneurial energy and dynamism would be freed up, bringing about much greater wealth creation as individuals took on more responsibility for the course of their lives. In an article titled *Brick by Brick, We're Tearing Down the Big State,* British Prime Minister David Cameron has thus written that:

> State bureaucracy has proved too clumsy and inefficient, stifling the innovation we need at a time when value for money is so critical. I also have an instinctive belief that parents, patients and professionals are so much better equipped to make the choices that will drive improvements in our public services. Give the power to them, allow new providers to come forward with new ideas, and good things will happen. (*Daily Telegraph,* 29 March 2012: 9)

As this shift in governance has occurred, however, social inequalities have widened. While the wealthy have prospered and have had the means to purchase enhanced services from the private sector that the welfare state no longer provides, the poor are increasingly likely to be trapped in poverty.

At the same time, these divisions have weakened social bonds, attachments and interdependencies, loosening restraints on crime while at the same time increasing intolerance towards those who become involved in it. It should be no surprise that the United Kingdom, one of the leaders of this programme of restructuring with one of the largest divisions between rich and poor in the OECD, has witnessed periodic episodes of extensive rioting and property destruction from the 1980s. Furthermore, along with the other Anglophone societies where these trends have been sharpest – the UK, USA, New Zealand and some Australian states – prison populations have accelerated to their highest levels.

Versions of this well-known story have now been told many times over, most notably by Garland (2001). This chapter, however, tells a rather different, less well-known story and is based on a broader programme of research that explains why it has become possible to think about punishment and penal policy so differently in the Anglophone world (a sample consisting of England, New Zealand and Australia, represented for the purposes of this research by the state of New South Wales[1]) on the one hand; and the Nordic world (the sample being Finland, Norway and Sweden) on the other (Pratt and Eriksson, 2013). As a demonstration of these differences, Anglophone societies in the sample are positioned at the top end of Western imprisonment spectrum, while the Nordic societies are positioned at the bottom. In addition, the gulf between them has been widening in recent years, as Figure 4.1 shows.

At the same time, there are startling contrasts in the respective prison conditions of these societies. While the Anglophone prisons are known for

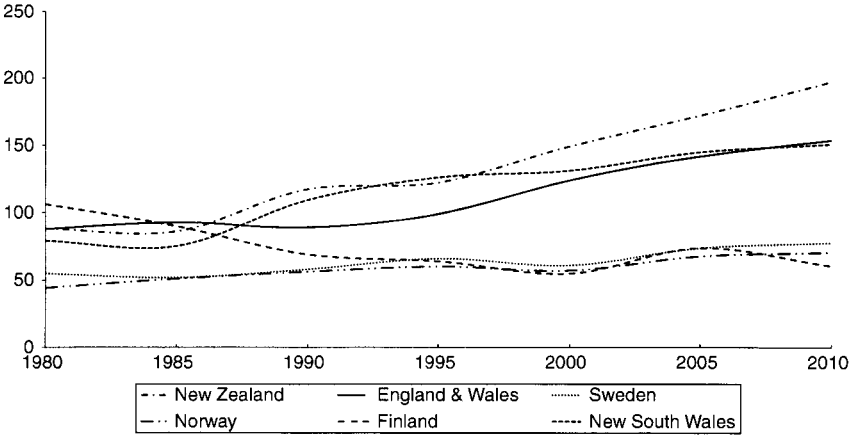

Figure 4.1 Prison population rate, 1980–2010

their debilitating consequences and high emphasis on security, the Nordic, by comparison, are humane and relaxed (Pratt, 2008).

How is it, then, that the Nordic societies have largely avoided much of the restructuring and the social and penal consequences that have come with this that we have become so familiar with in the Anglophone world?

The social democratic image of society

One of the main reasons for this has been the continuity of what Francis Castles (1978) referred to as the dominance of *the social democratic image of society* in the Nordic region. By this, he meant something more than the way in which the various Social Democrat and Labour parties present policies which regularly – certainly more regularly than their Anglophone counterparts – win them elections (for example, the Swedish Social Democrats were in government – sometimes alone, sometimes as coalition members – from 1932 to 1976). In addition, he was referring to the way in which these parties had been able to indelibly imprint *what they represented themselves as* (this phrase is used deliberately because the full story of the Nordic model of welfare and, indeed, the dynamics of the Nordic 'welfare sanction' is more complex than this chapter allows) – humane, egalitarian and inclusive – on the fabric of these societies. In effect, rather than these values merely being the property of Left-of-Centre parties that can be overturned every time the Right-of-Centre comes to power, they have become ingrained in the *weltanschauung* of this region. Indeed, so effectively have these social democrat values colonised the terms of political debate that the Swedish Conservative party had to change its name to that of the Moderate Party – *Moderatana* – in 1961 to detoxify it: the very term 'Conservative' had become so associated with ideological extremism that it was completely discredited. In effect, then, there might be movements and adjustments within the parameters of social democrat politics but there could be no departures from them without loss of political credibility. And, *very importantly*, while it is no longer the case that Social Democrat/Labour parties routinely win elections, the social democratic image of society still shines out in these societies; no longer as brightly perhaps, but still shining.

What were – what still are – these representations of humanitarianism, egalitarianism and social inclusion? These were reflected in, and advertised to, the world at large in the post-war period, particularly the 1960s and 1970s, by the welfare programmes of these societies. As Gősta Esping-Andersen (1990) has shown, *the social democratic model of welfare state* that had, by then, been developed in the Nordic region involved generous, largely universal provisions and services that were intended to *maintain* the living standards of their recipients rather than simply rescuing them from destitution (the much more limited function of the means-tested

Anglophone *liberal welfare state model*). Benefits were thus earnings related, up to 90 per cent replacement value in Sweden in the 1960s and 1970s. Education, health and child-care services were provided almost exclusively by the state, free of charge or heavily subsidised. The high levels of taxation that were necessary to pay for them also ensured that wage differentials were the lowest in Europe – this was something to celebrate rather than to be concerned about since this was in line with the egalitarian social democrat ethos. In keeping with the longstanding acceptance of a powerful central state authority in these societies, the state was almost the exclusive provider of welfare services – use of the private sector was actively discouraged. Furthermore, the delivery of extensive welfare services cemented-in high levels of trust between the citizens of these Nordic societies and their paternalistic and apparently benevolent state. Here, state power was something to be welcomed rather than feared. Tag Erlander, the Swedish Prime Minister in the 1960s, thus explained that 'the state is not a threat to or an enemy of the individual. On the contrary, many of their problems can only be solved through cooperation and solidarity, through the state and the municipality' (quoted by Fleisher, 1967: 68).

These representations of humanitarianism, egalitarianism and social inclusion were also reflected in the penal programmes of these societies. Visitors to Swedish prisons, in particular in the 1960s, reported in wonderment at prisoners being given holidays like any other group of workers, of relaxed security, and access to education with prisoners living alongside students in hostel accommodation in some instances:

> I asked what was done about escaping prisoners, since none of the guards had guns and the [prison] walls were not exactly formidable. [The prison manager] replied, 'it is better to let the man go than to put a hole in him ... we can always catch him later'. (Connery, 1966: 409–10)

> If the sentence is imprisonment, the prisoner has the comfort of knowing that Swedish prisons are world famous, the explicit aim being to reform, not to punish or take vengeance. (Jenkins, 1968: 65)

> If one should be sentenced to a work camp for driving under the influence of alcohol, it will not be in the newspaper even if one is well known; and one has some choice as to when he will serve his time, such as during vacations, so that even his employer need not know. (Tomasson, 1970: 276)

Under the headline *Almost the Best of Everything*, Tom Wicker (1975: 10) claimed: 'Sweden's prisons are models of decency and humanity', linking its prison conditions to the quality of life outside of them in this society. While there were high numbers of escapes, the reaction of the authorities

to this was that this was simply a natural reaction to the unnatural circumstances of the prison: security was then further relaxed rather than intensified.

What made 'the social democratic image of society' possible?

These, then, were some of the representations of the social democratic image of society. How, though, did it come to be established in this region? There are five main reasons.

(i) The route to electoral success of Nordic Labour and Social Democrat parties was facilitated by the relatively small scale nature of industrialisation – sufficient to create an industrial working class, but never an urban proletariat whose numbers would sweep it into government. The size of the natural constituency of these parties necessitated alliances, compromise and moderation if political power was to be won. Accordingly, aspirations to achieve 'ownership of the means of production' and to ensure 'dictatorship of the proletariat' became too polarising symbols of class warfare. They were thus dropped in the early twentieth century, leading to an exodus of leftist radicals who then formed their own socialist/communist parties. As a consequence, the Social Democratic and Labour parties posed no threat to the capitalist structure of these societies – they were not going to take over private firms (many industries, such as the railways, were anyway state owned, with none of the threat to private property that this concept raised in England), nor were they going to threaten the ownership of private property. On this basis, these parties were well placed to widen their support base amongst the middle classes (Ericsson, 2004). At the same time, the trade union core of these parties was not the electoral liability it became in the Anglophone countries. This was because, in the Nordic, the unions were seen as one more branch of the extensive intra-class social movement tradition of this region (others involved religious revivalists and the Temperance Movement). Indeed, employers' federations were also strong by the end of the nineteenth century – and they too had an accepted and central place in industrial relations (Therborn *et al.*, 1978: 42). In Finland, Norway and Sweden, agreements were made in the 1930s between unions, management and government that consensually set economic and social goals. In these ways, a tradition of political co-operation and consensus was established: each organisation would become more powerful if it worked with others rather than opposed them, while, through these process of incorporation, the possibilities for dissent were largely neutralised.

(ii) There was no patrician class able to dominate political life and thought in the Nordic countries. With the family farm as the basic unit of agricultural

organisation, the *bönder* (small farmers) were able to use their political power against urban elites to demand the eradication of inequalities and upper-class privileges. As such, the drive towards the democratisation of Nordic society, coming primarily from rural smallholders rather than a radicalised working class, made possible the emergence of strong Agrarian/Farmers' – eventually Centre – parties. These then provided Social Democratic and Labour parties with opportunities for coalition government. Furthermore, it seems likely that their subsequent electoral systems based on proportional representation, which in itself tends to favour left-leaning parties (Lacey, 2008), emerged out of this nexus between the particularities of industrial development in this region, population distribution and class structure.

(iii) In the 1930s, Social Democrat policies were hailed as outstanding successes. Nationally, the response of the Swedish Social Democrat/Agrarian party coalition government to the economic crisis and industrial disorder of the early 1930s had been to reverse the economic orthodoxy of the time: rather than cutting public expenditure and imposing further restrictions on welfare benefits, they embarked on a 'massive reflationary policy of government sponsored public works and deficit financing' (Castles, 1978: 25), while simultaneously raising income tax by 20 per cent. Unemployment fell from 136,000 in 1932 to 21,000 in 1936. Thereafter, strikes and industrial unrest sharply declined under the new arrangements for corporate government and the planning and development of economic and social policy. In a country where there were few inhibitions about the state's involvement in the economy, and where guarantees of *trygghet* – the nearest English translation of this term is *safety and security* – rather than the pursuit of wealth were more compelling, these achievements procured subsequent Social Democrat electoral successes. Their share of the vote increased from 43 to 48 per cent in the 1936 election, which it won with slogans such as 'welfare policy' and 'remember our poor and old people'. They had discovered the key to political power, as Gruchy (1966) later noted:

> to maintain its support... the Social Democratic Party has to keep the matter of what is of primary importance... in the forefront of economic policy considerations – *and of primary importance is the high level of employment* [emphasis added]. Any political party in Scandinavia that would not assign very high priority to full employment policy would have a dim political future. (Gruchy, 1966: 437)

This was vital for the economic wellbeing of individuals and, at the same time, for the subsequent development of the welfare state since their taxes would fund its expansion. These credentials further ensured that the Swedish Right-of-Centre parties were drawn into the social democratic framework. As this happened, political debate and strategy became marked

by high levels of consensus rather than division. Adler-Karlsson (1969) thus wrote that:

> All the parties of the economic process have realised that the most important task is to make the national cake grow bigger and bigger, because then everyone can satisfy his demanding stomach with a greater piece of that common cake. When instead, there is strong fighting between the classes in that society, we believe that the cake will often crumble or be destroyed in the fight, and everyone will be losers. (Adler-Karlsson, 1969: 18)

At the same time, the Swedish Social Democrats also received considerable international acclaim. For example, Marquis Childs (1936: 3) famously characterised their programme of governance as 'the middle way', bridging the gap between the 'concentration of economic power in the hands of a few men' in the United States and 'the trials and hardships in Russia'. An article in the United States business journal, *Fortune Magazine* (1938) similarly reported that:

> Sweden has gone in for a far reaching New Dealism without scaring, overtaxing, or otherwise discouraging private enterprise and investments... Sweden has created the greatest boom in her history, the greatest in any peaceful country today – industrial production is up 50 per cent on the 1929 peak... unemployment is reduced to a minimum... the government has emerged from five years of extensive agricultural subsidies and public works with a healthy budget and a startling method of handling depressions. (*Fortune Magazine* article, 1938: 65)

In such ways, the Social Democrats were able to present themselves as the natural party of government in this region, locking in a policy framework and structure that would be both politically and bureaucratically difficult to unravel (Lindbom and Rothstein, 2004). Thus, although since the 1980s Social Democrat electoral successes have been fewer, radical departures from the social democrat programme have been short lived. For example, the 1991–94 Centre/Right coalition government in Sweden cut taxes and public expenditure and privatised some welfare services. However, the Social Democrats were then returned to power in 1994, with an increased share of the vote (from 37.6 to 45.3 per cent). Learning from this, Centre/Right governments have since concentrated more on the mode of delivery of welfare services rather than questioning the validity of these services themselves, while the Moderates were forced to rebrand themselves again – this time as the 'New Moderates'. Both they and the Social Democrats then fought the 2010 election on the theme of 'Jobs First'. And while right wing populist parties have successfully conjured menacing images of immigration and crime, these

parties have been shunned and isolated in Finland, Norway and Sweden rather than given limelight in coalition arrangements. Furthermore, the Social Democrats feel no need for name changes or rebranding. Even if its light now shines rather less brightly, they still project the same image: 'our aim is clear: everyone shall be included' (*alla ska med*)... when we support each other, everybody wins' (Swedish Social Democrat Manifest, 2006: 10).

(iv) The very structure of the Nordic media also projected the dominance of the social democratic image. Scobie (1972: 199) commented as follows on the pattern of state broadcasting in the Nordic countries in the 1960s: 'the authorities have assiduously avoided any form of advertising on either radio or television, being anxious to escape what they consider to be the awful excesses of American commercial television'. Similarly Jenkins (1968: 259), on current affairs programmes: 'so harmonious and so unwilling to engage in controversy are the Swedes that these programs are invariably punctuated by long silences and often seem to be on the point of running down altogether'. As regards the widely read Nordic press – Sweden had the largest circulation of newspapers in the world in the 1960s (Tomasson, 1970) – 'there are certain boundaries of tolerance that the Norwegian press never crosses... a sensation press is unknown in Norway' (Grimley, 1937: 158); 'the Norwegian press reflects a culture with which the vast majority are identified. Yet this "common man's" culture is not based upon emotional sensationalism or a tendency to simplify human problems in terms understandable to the least common denominator of the Norwegian population' (Rodnick, 1955: 65); and 'even if the presentation [of the Norwegian press] was often pedestrian, it was inevitably free from sensationalism and mob appeal' (Derry, 1979: 436). The prevalent themes in all sections of the media were moderation and agreement, and the avoidance of unnecessary emotion, excess or glamour: key values of Nordic society, and values that the social democratic welfare state seemed to safeguard and protect.

Of course, since the 1970s, the Nordic countries have not been immune from the deregulation of broadcasting and the introduction of new media technologies that have extended the trends towards sensationalism and trivialisation in the Anglophone media. State broadcasters in these countries now have to shrug off some of their staid, educational role and compete with their private sector rivals. In all three of these Nordic countries, there are indicators of more tabloid-style reporting that then has an ability to undermine the social democratic frame of reference through which the world is understood: instead of seeing it in terms of cohesion, solidarity, and the need to redress the injustices experienced by society's victims, those same 'victims' – criminals, refugees, asylum seekers and so on – are now more likely to be seen in a revamped media as the enemies of such values.[2] Notwithstanding such developments though, the tabloidisation of the Nordic news media remains

comparatively modest, its impact mediated by influential broadsheet journalism that seeks to educate rather than sensationalise (Lappi-Seppälä, 2007, Green, 2008). Indeed, it would be inconceivable that the levels of intrusion and corruption of the tabloid press in Britain that have been revealed in the Leveson Inquiry[3] could take place in this region. Apart from anything else, the ethical codes covering journalistic practices are much stronger in these countries and are more rigourously enforced (Green, 2008): a way of protecting relatively powerless citizens from the obtrusions of the powerful. Meanwhile, state-owned television channels, where programmes with violent themes are little in evidence, still perform public education functions and attract much higher audiences than in other Western countries (Wilensky, 2002).

(v) The relationship between welfare provision and population politics. The intention of the social democratic welfare state was to improve the material conditions of life of its subjects. In addition, it was intended that it would also ensure the reproduction of the nation itself. By 1930, Sweden's birth rate was the lowest in Europe, raising concerns about the viability of the Swedish race. Two Social Democrat intellectuals, Alva and Gunnar Myrdal (1934), were asked to address the problem for the Social Democrat led coalition government. The central theme of their report, *Crisis of the Population Question*, was that low fertility was caused, first, by unemployment which disproportionately affected child rearing families, immiserating them in poverty and driving married women to have abortions; and second, by low standard, overcrowded housing that again impacted most on those who wanted children. If the state were to remove these 'living standard penalties', fertility would increase. In effect, reproduction was an issue for the state as well as the individuals involved. By providing the social conditions whereby 'every child would be a wanted child', it would then be able to guarantee its own reproduction: 'the population question powerfully raises the political demand that social relations be altered in such a way that citizens will voluntarily bring a sufficient number of children in the world so that our nation shall not become extinct' (Myrdal and Myrdal, 1934: 117). However, as Alva Myrdal (1947: 175) later wrote: 'A population policy could not aim at obtaining just more children, regardless of whether they had parental care, regardless of whether they were wanted or not, regardless of whether they were being born at the right time in the right families'. Instead, population policy had to respect the rights of women to seek paid employment – in accordance with the egalitarian ethos of social democracy and Nordic values – rather than confine them to domestic labour. In this way, the 'living standard penalties' that had worked against child bearing would be minimised. But what was then needed to make up for the deficit of home care were wide-ranging measures of assistance that would allow women to both pursue careers *and* bear

children. As such, child-care provision should be a community, not simply a family, responsibility:

> As the family deteriorates as an environment for rising children, the school or society through some other organ must conceive its task as assuming the functions that have come uncoupled from the family. It must organise collective care for children, so that it harmlessly and efficiently replaces and expands on care at home – in just the measure that home care becomes insufficient. (Myrdal and Myrdal, 1934: 368)

Their report was widely read and highly influential. As British demographer David Glass (1938: 317) wrote, their book 'dropped a bombshell on the thinking public of Sweden. And apparently the thinking public of Sweden is much larger, proportionately than in England, for so far the book has sold 16,000 copies, equivalent to a of over 100,000 here – a figure rarely reached even by popular books.' It also informed subsequent Social Democrat population policy. In this way, the Social Democrats were not only able to engineer the reproduction of the nation, they were also able to engineer a population that had a vested interest in the reproduction of social democratic polity itself. Maternity benefits that covered ninety per cent of the population, marriage loans, additional grants for needy mothers and free school meals for all children (to avoid the stigma of this otherwise being associated with poor relief) were introduced in 1937. In addition, new homes designed around the idea of collective living were provided by the municipalities and housing associations. Once again, the social democratic welfare state was able to cement values of egalitarianism, trust and co-operation into the social fabric. Childs (1936: 51) thus observed that:

> *it is the co-operative method* [emphasis added], together with assistance from the state in a variety of ways, that has made low cost housing possible in Sweden. In Stockholm fifteen per cent of all families live in co-operative apartment houses... there are many cooperative advantages of all member tenants... cooperative laundries are equipped with most modern washing machines and mangles. Each woman who desires it is assigned a laundry period by a committee in charge of the laundry. The cost of power for the machines and gas for the mangles and special drying racks is a part of the general cost of maintenance of the apartment building and is shared among all member tenants.

Strode (1949: 205) then noted that:

> [Swedish improvements in designs for city living, in which there are no ugly alleys and no unsightly backyards, but green areas for children's play

> and landscaped gardens, are due in considerable measure to the cooperative housing movement... many blocks are equipped with public dining rooms... in the kitchens equipped with stainless steel sinks, smooth faced cupboard doors, and glass brick walls, everything is made as convenient as possible. A garbage disposal chute is conveniently located, and beside it a laundry chute. In the basements are washing machines and drying rooms where the housewife may do the family laundry... Apartment house nurseries are located on the top or ground floor.

Furthermore, free or heavily subsidised holidays for children and housewives were provided by the state: 'due to the length and severity of the Nordic winter it is of special importance that the brief summer be utilised to build up the health of children... since 1945, all Swedish children in families below certain income levels are entitled to travel once a year for a nominal fee' (Nelson, 1953: 265). From the 1950s, the state also provided day care centres – the intention was to build up an encompassing system of public child care that would allow both parents to pursue their careers (Lundberg and Amark, 2001). Thereafter, all the Nordic countries provided financial support during pregnancy and maternity. In Sweden, housewives were given the right to claim sickness benefit. In 1991, *a right* to state provided day care for children was introduced and extended in 2000 to unemployed parents. These arrangements may be free, or a nominal fee may be charged – in Sweden this is 1–3 per cent of one's salary, compared to around 20 per cent or around eight thousand pounds *per annum* in the Anglophone countries. Parental leave entitlements have been gradually extended to their existing levels and provide some of the most obvious distinguishing features between the levels of assistance provided by the two models of welfare state, as Table 4.1 indicates.

Table 4.1 Maternity leave entitlements

Country	Entitlement
Finland	18 weeks at 70% salary, followed by 26 weeks shared parental leave at 70% salary
Norway	57 weeks at 80% salary, or 47 weeks at 100% salary
Sweden	69 weeks, 56 weeks at 78% salary, then flat rate of SEK 180 per day
New South Wales	18 weeks at federal minimum wage of A$590 per week
New Zealand	14 weeks at gross salary or NZ$459 per week, whichever is lower
England and Wales	39 weeks; 6 weeks at 90% salary, then 33 weeks at 90% salary or £135.45 per week, whichever is lower

Source: For websites accessed, see endnote.[4]

At the same time, the links that had been established between welfare provision and the reproduction of the population in the Nordic countries also ensured that large sections of these societies had a vested interest in maintaining the services of the social democratic welfare state and supported the values on which it was based and on which it was entrenched: most obviously women, who have not only been more able to pursue careers but, at the same time, by the nature of 'care work' in the welfare state, are more likely to find employment within it. As it is, public sector employment in the Nordic countries – around 30 per cent – is nearly twice the level of that of the Anglophone.

The continuity of social democratic penal policy

However, Castles' (1978) book has since been overtaken by events. Since 1979, Conservatives, in conjunction with Centre Parties, have won four out of ten elections in Sweden since 1979; in Norway, five from eleven since 1981; in Finland, two from seven. In addition, the Nordic countries have not been able to insulate themselves from broader social and economic changes: the homogeneity that had provided such strong social bonds has been undermined by large-scale immigration (to Norway and Sweden especially) since the 1970s; at the same time, economic uncertainties have put constraints on the welfare state in Finland and Sweden, while Norway's oil industry has brought previously unknown disparities in wealth. As these shifts have occurred, so a new body of what might be termed 'catastrophe literature' has regularly proclaimed, usually in apocalyptic terms, the end of the social democratic model of welfare and, by extension, the erasure of the social democratic image of society. Amongst the business and current affairs periodicals, *The Economist* (16 November 1991: 12) carried a report headlined 'Sweden Shakes Off the State', going on to quote 'an imaginative representative of the building industry' who told its reporter that 'This is like the fall of the Berlin wall. Socialism has gone.' In the academic literature, Lindvall and Rothstein (2006: 50) refer to 'the fall' of Sweden's 'strong state', claiming that 'centralism, rule by experts and large-scale solutions are criticised. Policy steering has been reshaped, as central planning and common national norms have had to bow to demands for local influence, decentralisation and individual freedom of choice'. Similarly in popular literature: in *Whatever Happened to Sweden?*, Ulf Nilsson (2007: 133) denounces the social democratic welfare state for bringing about 'a condition of induced helplessness': 'the growth of the public sector [led to] an unbalanced economy and dependent morality by being too expensive... and most importantly, by making the clients passive'. There are obvious resonances here with what is known as 'dependency culture' – thought to be the scourge brought about by the liberal welfare state in the Anglophone world. But, as we have seen, if the parameters of the social democratic welfare state have been drawn

back somewhat – school leavers without a job and no involvement in any training, along with newly arrived immigrants with no local record of employment are dependent on means tested social assistance – its familiar features remain largely in place. Benefits may have been cut from 90 to 80 per cent replacement value – which in these Nordic societies may seem dramatic and shocking but which still sounds extraordinarily generous for those who know only of the meanness and sense of desperation that claimants can experience from the liberal welfare state. In Finland, education is free for everyone all the way up to and including MA level. Then, of course, there are the child care provisions. Ugelvik (2013: 2) thus writes of Norway that:

> The welfare state is everywhere, and everywhere it is trusted and regarded as mostly benevolent. It is a source of Norwegian pride and identity, and as a national symbol and rhetorical trope, all-important for the legitimacy of many state initiatives. 'The state' may be criticised, but 'the welfare state' is beyond reproach.

In much the same way, there have also been apocalyptic messages about Nordic penal trends. Snare (1995: 7) claimed that 'colder winds, primarily from the West, have reached the Nordic shores as regards the penal climate. Both in society at large and in criminal law policy, values have become more harsh.' While these have affected Sweden the most, she claims, 'the Swedish development in crime control does not, however, stand out as a lonely star since tendencies in the same harsher direction are found in the other Nordic countries as well.' The reality, though, has been rather different. Imprisonment rates in Norway and Sweden increased by 24 and 23 per cent respectively between 1992 and 2010, from a relatively low starting point, while they declined in Finland by 16 per cent. In contrast, in England, from a relatively high starting point, the increase in imprisonment was 73 per cent over the same period; New Zealand 67 per cent; New South Wales, 35 per cent. In the light of this, the 'cold winds' that are meant to have been blowing in this region seem more like relatively gentle breezes. And rather than rebranding themselves with the 'tough on crime' logo of the Anglophone Labour parties, the Nordic Social Democrat and Labour parties have reaffirmed their longstanding commitments to rehabilitation, inclusion and prevention. Thus in Norway, the Labour Party was elected to government in 2006 and 2010 with the following penal policy:

> With good welfare services for everyone, crime can be prevented and many of the initial incentives for a life of crime can be removed. Given that 60 per cent of violent crime is committed under the influence of alcohol, it is important to adhere to a restrictive drug and alcohol policy. Good psychiatric health care services and an active labour market policy

> are important for comprehensive crime fighting. (Norwegian Labour Party, 2006: 1)

Within the prisons, although security in Swedish closed institutions has certainly become a lot tighter in the aftermath of high profile escapes in 2004 (involving the murder of two police officers and organised crime gangs), there has been no significant pressure for change within its open prisons (which accommodate around one third of the prison population) or the general prison conditions of the other Nordic societies. One of the reasons for this has been that important sections of the Nordic media continue to demonstrate a commitment to the social democratic image of society. Crime and punishment issues are still reported more dispassionately and descriptively, meaning that there is relatively little public pressure on the authorities to abandon the conditions for which they have become internationally renowned. For example, on prison escapes in Sweden: 'The wet [that is, alcohol present] birthday party in Hedemora went off the rails. Fighting started and two of the guests were stabbed by a thirty seven year old man who was later identified as an escaped prisoner. The man, who was later arrested, had absconded from the prison in Uppsala' (Escapee Stabbed Birthday Guests, 2006: 2). And as regards its reaction to new crimes committed by prisoners on parole in Norway:

> As soon as the 23-year-old had completed his sentence and was attending therapy, he is suspected to have brutally raped [the woman]... in 2002 he was sentenced to five years in prison for aggravated assaults and rapes in Kristianstad. The Prison Service released [him] on parole in May 2004. He then had one year and 255 days left to serve of his sentence... The Prison Service states that 'we never comment on individual programs, not even when the people we are dealing with will be charged in new cases or the reasons for parole' said Signe Gunn Ropstad of Correctional Services, Western College. (Raped Woman (62) While Going to Therapy, *Verdens Gang* 11 May 2006: 6)

It is evident, from this particular example, that the prison service still controls the flow of information to the public and the report was content to leave the matter at this. There was no attempt to undermine or criticise the prison authorities for their parole decision.

Furthermore, there are clearly defined limits to the extent that security will be allowed to dominate Norwegian prison policy: 'public safety is a paramount objective of the government's crime policy... *security work in the Norwegian Correctional Services shall not, however, mean an unnecessary high level of security for all inmates and convicted persons* [emphasis added]. It is only a minority that constitute a threat to public or individual safety' (*Report of the Norwegian Ministry of Justice and the Police*, 2008: 4). At the same time,

penal institutions should neither be shameful buildings, nor should they be buildings intended to emphasise suffering and deprivation. Instead, there is pride in the very fact that they are not built in this way, amidst recognition that prison design is a signifier of Norwegian society as a whole, not just the particular penal institution. The newly opened Halden Prison (described by Adams (2010, online) in *Time Magazine* as 'the world's most humane prison' has thus received a number of awards for interior design and innovation. The jury nomination for the innovation award thus stated that:

> [this] is the first prison in Norway that does not have bars in front of the windows, but rooms with lots of light, space and good views out over green areas. There are different colours for different areas in the buildings... Emphasis has been placed on the movement between different buildings and functions, so to reflect the difference between home, school, and work place... The project touches very important aspects of how we design our society. The way this has been resolved touches us and makes us reflect on our common values. (Norwegian Design Council, 2011: 1)

More welfare, not less; more social democracy, not less

If the state's capability to provide security is no longer as great as it was, there has been no significant departure from the expectations that this *should* be its role. Ultimately, when social problems do occur in the Nordic countries, these are not represented as the failure of the welfare state *but as demonstrations of the need for more welfare resources and of the need to further strengthen the social democratic image of society, rather than diminish it.* Thus, after a shooting massacre at a school in Jokela, Finland in 2007, the Finnish President, in her New Year address, stated that:

> We have grown accustomed to seeing the functioning of our society to be self-evident, and it is good that we can have confidence in the security of everyday life. But it must not mean indifference, and should not lull us into a false sense of security. *Basic services need to be taken care of.* (emphasis added, Halonen, 2008: 1)

This was still so in the reaction to the even more hideous mass murder – 77 victims – committed by Anders Breivik in the vicinity of Oslo in July 2011. He claimed to be 'saving Norway' from the perils of mass immigration. After he was apprehended, there were no calls for the reintroduction of the death penalty, nor for 'life meaning life' imprisonment (in this country the maximum penalty for murder is a twenty-one year prison sentence). Instead, the emphasis was on reaffirming solidarity, democracy and unity. Four days after the killings, Norway united in a march that crowded the

streets of Oslo. This, though, was not a march with demands for savage retribution, backed up with threats of vigilantism if this was not forthcoming, against either Breivik himself or, for that matter, Norway's immigrant population. Instead, the citizens held hands and carried roses. Speaking to the crowds, Crown Prince Haakon declared that 'tonight the streets are filled with love' (BBC, 2011). Prime Minister Jens Stoltenberg, at the same event, reaffirmed Norway's unwavering commitment to social democratic values: 'by taking part [in the march], you are saying a resounding "yes" to democracy... a march for democracy, a march for tolerance, a march for unity... Evil can kill a person but never conquer a people' (BBC, 2011). Similarly, Nils Christie has since written in a newspaper article headlined *Han er en av oss* [He is one of us] that:

> What has happened is a catastrophe that which can only be met by holding on to the foundational values of Norwegian society. If we abandon those, then Breivik has achieved something... Of course a society has to react, otherwise there would be no society. But with most terrible crimes, we also see the helplessness of punishment clearer than at other times. We cannot pay back like with like, it has to be something less. And to find standards for this 'something less', we ought to look for help in the old-fashioned values of mercy and compassion. We should not label him as a 'monster' and put him aside... If we dehumanise Breivik as an evil monster, then he will disappear from us. He will disappear as something we have to learn to protect ourselves against, which is not something we should provide fertile ground for through childhood, school or adult life, or by accepting forms of society that means we are constantly moving further away from each other and therefore see each other less as full human beings. Breivik is one of us, that is the terrible reality of the situation, and at the same time the unavoidable reality. (Christie, 2011, original article in Norwegian supplied to the authors)

Here, then, the social democratic image of society has not only been able to withstand such a profound test of its depth and character, it has actually been strengthened by it.

Notes

1. Australia has both commonwealth and state jurisdictions. Each state develops its own penal policy independently of the federal government. This means that there is no penal policy for Australia *as a whole*. We thus decided that the best way to present this was to use its largest and oldest state (New South Wales, population 6.89 million) for fieldwork and data collection purposes.
2. See, for example, Pollack (2001), Rossland (2007), Smolej and Kivivuori (2008).

3. This is an inquiry set up by the British government in 2011 to inquire into the culture, practices and ethics of the press in the aftermath of the phone hacking scandal at the Murdoch owned *News of the World* (at the time of writing it has yet to conclude).
4. Sources for the Maternity Leave table are as follows:
   Finland: Available at http://www.tulane.edu/~rouxbee/soci626/finland/familyleave.html
   Norway: Available at http://www.nav.no/English/Stay+in+Norway/805369034.cms
   Sweden: Available at http://www.sweden.se/eng/Home/Work/The-Swedish-system/Employment_based_benefits/Parental-leave/
   New South Wales: Available at http://www.familyassist.gov.au/payments/family-assistance-payments/paid-parental-leave-scheme/working-parents—payments.php
   New Zealand: Available at http://www.dol.govt.nz/er/holidaysandleave/parentalleave/paid-unpaid.asp
   England and Wales: Available at http://www.direct.gov.uk/en/MoneyTaxAndBenefits/BenefitsTaxCreditsAndOtherSupport/Expectingorbringingupchildren/DG_10018741

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5

Prison Rates, Social Democracy, Neoliberalism and Justice Reinvestment

David Brown

Introduction

This chapter will begin with a brief summary of some recent research in the field of comparative penology. This work will be examined to explore the benefits, difficulties and limits of attempting to link criminal justice issues to types of advanced democratic polities, with particular emphasis on political economies. This stream of comparative penology examines data such as imprisonment rates and levels of punitiveness in different countries, before drawing conclusions based on the patterns which seem to emerge. Foremost among these is that the high imprisoning countries tend to be the advanced western liberal democracies which have gone furthest in adopting neoliberal economic and social policies, as against the lower imprisonment rates of social democracies, which variably have attempted to temper free-market economic policies in various ways. Such work brings both social democracy and neoliberalism into focus as issues for, or subjects of, criminology. Not in the sense of new 'brands' of criminology but rather as an examination of the connections between the political projects of social democracy and neoliberalism, and issues of crime and criminal justice. In the new comparative penology, social democracy and neoliberalism are cast in opposition, simultaneously raising the questions of to what extent and how adequately both social democracy and neoliberalism have been constituted as subjects in criminology and whether dichotomy is the only available trope of analysis?

The latter question will be considered through a move to the new terrain of 'justice reinvestment', a notion or movement involving the targeting of high-risk communities from which prisoners are drawn, in order to redirect funding from expensive and arguably criminogenic incarceration towards building social infrastructure in these same communities, in ways which can be expected to reduce reoffending and crime rates and promote public safety. Justice reinvestment is a development of promise and interest in and of itself, despite facing numerous conceptual and implementation

problems. But it is also of interest for the way it appeals across major political divides, drawing support from right wing Republicans in the USA, and conservative political leaders in, for example, the United Kingdom (UK), New Zealand, and New South Wales (NSW) (Australia), attracted in part by the potential cost savings to the state, and from social democrats and left wing progressives attracted by the more traditional social justice appeal of reduced imprisonment rates through building social infrastructure and community cohesion.

This tendency to appeal both to neoliberals concerned with cost, effectiveness and waste, and to social democrats concerned with social justice, is an intriguing aspect of justice reinvestment. For it challenges the tendency to conceive both social democracy and neoliberalism as fully formed, closed, unitary and antagonistic forms of polity and political economy. In this sense justice reinvestment serves as a vehicle to raise the possibility of a criminology and a criminal justice politics which explores the spaces beyond the dichotomies of social democracy or neoliberalism. In those spaces lie potential benefits, as the 'floating signifier' effect of movements such as justice reinvestment provides a respite from the anchored, already known and aligned discourses of law and order and popular punitiveness, raising the possibility of a reconstitution of the politics of criminal justice through new forms of discursive articulation which rework both the constituencies for, and the terms of, criminal justice debates and penal populism itself. The argument of this chapter will be that such an exploration may well be productive.

Comparative penological analysis: political economy and inequality

The last book of the late Ian Taylor argued strongly for an unpacking of the criminogenic tendencies in market society (Taylor, 1999; see also Box, 1987, Box and Hale, 1986, Hale, 2005, Taylor, 1990). But by and large, the focus of the leading criminological accounts of recent decades (Garland, 2001a, Simon, 2007, Young, 1999, 2007) has been the looser and more culturalist concept of 'late modernity'. Eugene McLaughlin argues that, with a couple of notable exceptions there has been an abandonment of interest in political economy/materialist analysis of crime and social transformation (McLaughlin, 2011). But a range of work in the emerging field of comparative penology has engaged in a comparative analysis of political economies and their penal tendencies, in an attempt to explain the significant national differences in imprisonment rates and the measures of penal tolerance and severity which underlie them (Cavadino and Dignan, 2006, Lacey, 2008).

Cavadino and Dignan (2006) built on earlier comparative work (Downes, 1988) and on the sociology of welfare states, in particular that of Esping-Anderson (1990), who makes a threefold distinction between liberal

market economies, conservative corporatist, and social democratic forms of 'welfare regimes', what Hall and Soskice (2001) describe as 'varieties of capitalism'. Applying this basic classification to the 'penal tendencies' (Cavadino and Dignan, 2006: 15, table 1.1), imprisonment rates, and 'attitudes to punishment' of the political economies of selected advanced western style democracies, Cavadino and Dignan show that those countries with the highest imprisonment rates are 'neoliberal' countries with liberal market economies: USA, South Africa, NZ, England/Wales and Australia. The next bracket with lower rates is 'conservative corporatist' with 'co-ordinated market economies' such as The Netherlands, Germany, France and Italy. With lower rates still come the 'social democracies' with 'co-ordinated market economies' such as Sweden, Norway, Finland and Denmark, followed by 'Oriental corporatist' with a 'co-ordinated market economy' such as Japan (Cavadino and Dignan, 2006: 22, table 1.2). Similarly attitudes to punishment are broadly, but not so neatly, in line with the different types of political economy (Cavadino and Dignan, 2006: 30, table 1.3).

One advantage of this type of analysis is that it draws attention to national, regional and local difference, rather than focusing on the similarity of rising imprisonment rates across the advanced western democracies. In general, imprisonment rates have been rising in the west over the period 1970–2000 but there are significant differences, both between countries and within countries across regions or States. In Australia, for example, the 2009 national imprisonment rate was 174.7 per 100,000 population, with the rate in the Northern Territory above the US national rate at 657.6, more than six times that of Victoria at 104, while the Victoria rate is roughly half that of the contiguous State of New South Wales, which is 204.1 (ABS, 2010). In the US, the national imprisonment rate in 2008 was 504 per 100, 000 population but the state rates ranged between Louisiana at the top with 853 and Maine at the bottom with 151 (USDJ, 2009). This type of comparative analysis highlighting difference rather than similarity can be applied not only to imprisonment rates (see, for example, Barker, 2009, Lynch, 2010, Miller, 2010) but also to the considerable regional variation in the use of the death penalty, private prisons, three strikes legislation and mandatory minimums in the US between states (Barker, 2006, Baker and Roberts, 2005, Hinds, 2005, Newburn, 2006, Zimring and Hawkins, 1991).

The argument is that the sociocultural, political and economic variables affecting the capacity to deliver inclusionary and reintegrative criminal justice policies (which should be the aim of liberal democracies) vary in different forms of democracy around the 'liberal/co-ordinated market economy' distinction. Lacey enumerates the key factors in the different forms democracy takes as including: the structure of the economy; levels of investment in education and training; disparities of wealth; literacy rates; proportion of GDP on welfare; co-ordinated wage bargaining; electoral systems; constitutional constraints on criminalisation; and institutional

capacity to integrate 'outsiders'. These are social democratic issues par excellence and, moreover, issues which might more readily be scrutinised within criminology through a re-examination of the residual durability rather than the erasure or eclipse of the 'penal welfare complex' and the 'solidarity project' (Brown, 2005), and articulated to a criminal justice and penal politics (on criminology and social democracy, see Reiner, 2006, 2007a, 2007b, Newburn and Rock, 2006). For, as Lacey (2008: 109) argues: 'liberal market systems oriented to flexibility and mobility have turned inexorably to punishment as a means of managing an excluded population consistently excluded from the post-Fordist economy' while 'co-ordinated systems which favour long-term relationships – through investment in education and training, generous welfare benefits, long-term employment relationships – have been able to resist the powerfully excluding and stigmatising aspects of punishment' (Lacey, 2008: 109; see also Beckett and Western, 2001, Downes and Hansen, 2006, Pratt, 2008).

John Pratt's work on Scandinavian 'exceptionalism' in comparison with Anglophone countries supports Cavadino and Dignan's (2006) and Lacey's (2008) broad thrust. The relatively low Scandinavian prison rates and generally exceptional prison conditions have their origins in cultures of equality; strong welfare states with universal social security; high levels of trust and solidarity; the abolition of bodily punishments; strong state bureaucracies with considerable autonomy and independence from political interference; a strong interventionist central state; mass media controlled by public organisations; high levels of social capital; and the continuing power and influence of expertise (Pratt, 2008).

Cavadino and Dignan's (2006) comparative analysis fits with previous work (Beckett and Western, 2001: 50, Young and Brown, 1993: 41–3) which shows that 'as a general rule, economic inequality is related to penal severity: the greater the inequality in society the higher the overall level of punishment' (Cavadino and Dignan, 2006: 29). Wilkinson and Pickett (2009) mount a broader argument outside criminology, summarised in the title of their book *The Spirit Level: Why More Equal Societies Almost Always Do Better* (2009), an example of a highly successful public intervention outside, but of relevance to, criminology which can be articulated to a broader politics of defending and recuperating social democracy. To select just the crime related data they examine, homicide rates are higher in more unequal countries and states, as are levels of punitiveness, and imprisonment rates; income inequality in rich countries is correlated with higher rates of police per unit of population and the diversion of money away from education and welfare into criminal justice systems.

There are obvious dangers and problems with taking this sort of analysis too far. Cavadino and Dignan caution that: 'We cannot explain all variations in punishment and penality by reference to the differences in political economies and cultures we have mentioned' and that 'penality remains

irreducibly relatively autonomous from any particular factor or combination of factors, however powerful' (Cavadino and Dignan, 2006: 36). Ellison (2006: 12–16) summarises a number of criticisms of Esping-Anderson's (1990) welfare regime models, namely that there needs to be a 'fourth' regime; that the assignment of particular countries to particular categories needs reconsideration; and that alternative classificatory schemes are needed. On the imprisonment rates measure, arguably the crucial significance of race and colonialism/post-colonialism in the production of imprisonment rates is significantly underexplored. By and large, with some exceptions, the leading neoliberal political economies are also former colonial or post-colonial countries (USA, UK, South Africa, Australia, New Zealand) with very high Indigenous and racial minority imprisonment rates compared with the social democracies. Even within the social democracies, immigrants or foreign nationals are massively over-incarcerated, as indeed they are right across the European Union (Wacquant, 2006). In short, imprisonment rates may be more strongly linked to racial composition, colonial and post-colonial histories, immigration, refugee, and citizenship policies, and the way these play out in the labour and housing markets than to any broad characterisation of 'varieties of political economy' like social democracy and neoliberalism.

Whatever the limitations of this type of work so far, for the purpose of the argument here it has several benefits, summarised elsewhere:

> First, it returns political economy and a concern about inequality to criminology centre stage. Second, in its interest in different 'varieties of capitalism' and links between these differences and levels and forms of punitiveness, penal regimes and strategies, it serves to undermine the dominant tendency common in 'late modernity' type analyses to see homogenising globalised convergence everywhere. Third, it restores social democracy to consideration as an established variety of welfare regime and polity, in a way that opens up debate around its capacity to resist or 'adjust' to 'neoliberal drift' (Ellison, 2006). Fourth, it invites criminologists to think about how their research might be articulated with political policies and programs which combat exclusion, inequality, loss of trust, resentment, and other criminogenic forces. (Brown, 2011b:83)

Constituting neoliberalism: criminogenic and inherently punitive?

The stream of comparative penology outlined briefly above tends to contrast neoliberalism with social democracy, both as general 'varieties of capitalism' and on the specific criteria outlined by Lacey (2008) above, involving a range of political, economic, welfare and equality measures. To grossly simplify the argument, neoliberalism is characterised as both

criminogenic and excessively punitive. Loic Wacquant is the criminologist who has done the most to promote a focus on the criminogenic and punitive tendencies of neoliberalism, encapsulated in the title of his *Punishing the Poor: The Neoliberal Government of Social Security* (2009). For Wacquant, neoliberalism is a 'transnational political project' comprising four 'institutional logics': 'economic deregulation'; 'welfare state devolution, retraction, and recomposition' to support the 'intensification of commodification and discipline labour'; 'the cultural trope of individual responsibility which invades all spheres of life'; and 'an expansive, intrusive, and proactive penal apparatus' 'to contain the disorders generated by diffusing insecurity and deepening inequality' (Wacquant, 2009: 306–7). The relationship between neoliberalism and the causes of crime, high imprisonment rates and punitiveness evident in the 'penal surge' posited here, is a directly causal one, for *'the invasive, and expensive penal state is not a deviation from neoliberalism but one of its constitutive ingredients'* (2009: 308, emphasis in original). Punitiveness and high imprisonment rates and the 1970s onward 'penal surge' are part of the *'very architecture'* [emphasis in original] (2009: 308) of neoliberalism.

For Garland, by way of contrast, neoliberalism plays a relatively minor role in his analysis of the processes of social and cultural change described as the 'coming of late modernity' (Garland, 2001b: x). Late modernity however is linked to a second force, 'free market socially conservative politics' (Garland, 2001b: x). On this analysis, it is the articulation of free market ideology (neoliberalism) with neoconservativism which is vital (for an elaborated comparison between Wacquant and Garland on this issue see Brown, 2011a, 2011b; and for various reviews of Wacquant's work see Brown, 2011b, Pratt, 2011, Review Symposium, *British Journal of Criminology*, 2010, 50(3): 589–608, Review Symposium, *Criminology and Criminal Justice*, 2010, 10(4): 327–415). Others such as O'Malley have pursued a similar approach, attributing the 'volatility' of law and order debate and policies to the instability of this articulation (O'Malley, 1999, 2000; see also Harvey, 2005, Hogg and Brown, 1998).

England and Ward (2007: 11–12) provide a fourfold classification of approaches to neoliberalism: as an ideological hegemonic project; as policy and programme; as state form; and as governmentality. It is as governmentality, that neoliberalism is best known in criminology (Garland, 1997), through concepts like 'responsibilisation' (Garland, 1996), actuarialism (Ewald, 1991, Feeley and Simon, 1994) and the rise of risk technologies (O'Malley, 1992, 2004, Stenson and Sullivan, 2001). Within the wider social science literature there is a considerable tension between, at the one pole, political economy approaches which emphasise similarities in 'global' developments, tending in the process to unify neoliberalism as manifest everywhere, universal and monolithic, rolling over all before it; and, at the other pole, governmentality type analyses which see neoliberalism as a diverse

series of political projects, contextual, partial, 'articulated along with other political projects', a 'hybrid assemblage of different rationalities and technologies', working precisely because of 'its fluidity, hybridity and tendency to mutate' (England and Ward, 2007: 255).

A range of criminological research has traversed neoliberal policy effects in the criminal justice field generally (see Bell, 2011) and in more specific discussions of: the reconfiguration of criminological research funding and policy in the UK (for example, Newburn, 2007); policy transfer (Jones and Newburn, 2007); contractualisation, partnership and public order (Crawford, 1997, 2003); work on police reorganisation (McLaughlin and Murji, 2000); and New Labour criminal justice policies, (McLaughlin, Muncie and Hughes, 2001); to mention but some. As I argue elsewhere (Brown, 2011b), Pat Carlen's work (2005, 2008) provides a devastating critique of some of the effects of neoliberal managerialism and the way in which formulations of risk, key performance indicators and audit criteria with their emphasis on narrowly defined notions of 'efficiency' and 'cost', increase the tendency for audit measures to become inward looking ends in themselves, eschewing more broadly defined social aims and outcomes that were and are aspirations under social welfarist and social democratic regimes, however much they might be difficult to measure, flawed or unmet in practice. Other work discusses some inflection or other of neoliberalism in criminal justice without naming it as such.

The advantage of less totalising analyses in criminology which examine aspects of neoliberalism as policy and programme is that they constitute their subject matter in a way that enables rather than constricts consideration of how developments might have been other, and might be reconfigured, subverted, reconstituted. In short, they leave open far more space for contestation. It is difficult not to recognise the force in Larner, Le Heron and Lewis's (2007) characterisation that 'we tell and retell stories of unrelenting doom; of the global hegemony of market logic, the decline of the nation state, the erosion of democracy, and the dissolution of the social' (Larner, Le Heron and Lewis, 2007: 226–7). It is here that an examination of the new movement around 'justice reinvestment' might serve to illuminate some of the problems and prospects of a penal politics which attempts to work in the ambiguous spaces between social democracy and neoliberalism. Spaces that justice reinvestment may open up.

Justice reinvestment

The recent provenance of Justice Reinvestment (hereafter JR) is evident from the fact that the term was first articulated in 2003 by Tucker and Cadora (2003) in a paper written for George Soros' Open Society Foundation and subsequently promoted in the US by the Council of State Governments Justice Center (CSGJC) – a national NGO which provides advice to government

policymakers. Justice reinvestment involves advancing 'fiscally-sound, data driven criminal justice policies to break the cycle of recidivism, avert prison expenditures and make communities safer' (CSGJC, 2010). The key distinguishing features of JR are 'justice and asset mapping' and budgetary devolution and localism.

The 'mapping' process is two-fold: first to identify high-risk and high-crime neighbourhoods. Second to map the community 'assets' in those communities: the various government, non-government, civic, community, business, educational, familial, religious, sporting, cultural and community organisations and agencies that are a source of strength and social cohesion. Justice reinvestment funding is used to bolster those existing organisations in various local community-building projects. JR is, then, a 'place based' approach, whereby resources spent on incarceration can be redirected into the local communities from which offenders come and to which they will return. It has been described as a form of 'preventative financing, through which policymakers shift funds away from dealing with problems "downstream" (policing, prisons) and towards tackling them "upstream" (family breakdown, poverty, mental illness, drug and alcohol dependency)' (Lanning, Loader and Muir, 2011: 4).

Depending on its national and geographical location, JR schemes typically involve a form of budgetary devolution. In the UK context, devolution is from central to local government; in the US federal or state jurisdictions, devolution is to county administrations. Those budgetary devolutions can take the form of block grants; fiscal incentives; the use of social bonds by trusts, local businesses or social entrepreneurs (as in the English Peterborough prison scheme involving post-release mentoring and advice provided by charitable trusts and foundations using social impact bonds); or the use of various voucher systems. There is a strong strand of localism in much of the JR literature, encompassing existing local community organisations, NGOs, church and welfare agencies, and the private sector.

The JR approach is an outgrowth of the 'evidence-based public policy' strategy which seeks to promote social policy based on research outcomes rather than on the politics of legitimation crises and media and popular or 'new' punitiveness (Pratt, 2007, 2008, Pratt *et al.*, 2005). It is at least in part cost driven, in recognition that law and order has traditionally been closeted from the calculations of economic rationality, with expensive institutions such as prisons treated as somehow immune from the accounting that lies behind decisions on investment in other forms of social infrastructure such as schools, hospitals and public transport (Maxwell, 2011). Todd Clear argues the need to 'realign the incentives of the justice system so that it becomes in the business (and residential) community interest to reduce prison populations' (Clear, 2011: 606). In the attempt to encourage the use of economic incentives to change public policy, justice reinvestment is compatible with various tenets of neoliberalism, while the emphasis

on social cohesion and community building draws heavily on traditional social democratic concerns (for a range of assessments of justice reinvestment, supportive and critical, see the Special Issue of the American Society of Criminology Journal, *Criminology and Public Policy*, 2011, Volume 10(3)).

The backgrounds, motivations and locations of those pushing for justice reinvestment, penal moderation (Loader, 2010), and a reduction in penal incarceration are varied. Motivations include: opposition to fiscal 'waste'; a desire for more 'rational' 'evidence-based' policies that 'work'; concern over high levels of recidivism; and a sense of the loss of productive potential, through to more oppositional concerns over the social effects of mass imprisonment on individuals, families and communities (Garland, 2001b, Mauer and Chesney-Lind, 2002, Rose and Clear, 1998); the pernicious racial basis of imprisonment; penal warehousing; the various pains and brutalities of imprisonment; the paucity of internal and post-release support programmes and resources; human rights concerns; and so on. The agencies involved include business leaders, politicians, political parties and governments of varying political persuasion, think tanks and policy institutes, sections of government departments and bureaucracies, researchers, a variety of penal, welfare, social justice and political social movements and community groups, activist organisations and sections of the media, to mention but some. As with many such movements, they are 'impure', hybrid and unstable coalitions of forces which cannot be reduced to some singular character such as 'conservative', 'neoliberal', 'welfarist', 'reformist', 'social democratic', 'radical'; these are all poles in a constantly shifting set of discourses, struggles and alliances of forces.

Thus a key feature of the appeal of JR is its potential to attract bi-partisan support from both left and right. Bi-partisanship in criminal justice policy is arguably a key pre-condition for the adoption of 'evidence-based' policies (Lacey, 2008, 190–6) although this does not mean a return to the domination of criminal justice policy by Loader's (2006) 'platonic guardians' of the public service and respectable lobby groups (see also Loader, 2010, Loader and Sparks, 2010, Ryan, 2005). However political bi-partisanship in criminal justice has been in short supply across the political spectrum as political parties have jostled to portray themselves as 'tough on crime', with little evidence of action on the Blairite corollary, 'tough on the causes of crime' (on Australian law and order politics see Hogg and Brown, 1998, Weatherburn, 2004). On the right, a number of international conservative convergences over the need to reduce imprisonment rates have emerged (Brown, 2010). In New Zealand under a National Party (Conservative) Coalition, the Deputy Prime Minister and Finance Minister, Bill English, recently described prisons as a 'fiscal and moral failure' (Steketee, 2011; see generally Maxwell, 2011). In the UK, Justice Secretary Kenneth Clarke has argued for significantly reduced imprisonment rates, and in the US, right wing Republicans have promoted JR approaches. At the same time Labour

opposition parties in the UK and in NSW have criticised Conservative government proposals to reduce imprisonment rates, and a re-evaluation of the criminal justice and law and order record of 'New Labour' policies is charting the damaging effects of Labour policies and comparing them unfavourably with aspects of the criminal justice record (as against the belligerent rhetoric) of Thatcherism (Bell, 2011, Farrell, 2006, Farrall and Hay, 2010, Newburn, 2007, Tonry, 2010).

The limitations of justice reinvestment and the 'floating signifier' effect

While justice reinvestment policies have been successfully implemented in various US states, it remains at this stage largely an aspiration, at least in the UK and Australian context. Rather than stress its potential (see generally Brown, Schwartz and Boseley, 2012), it may be more instructive to outline a number of apparent difficulties which may limit the potential implementation and effects of justice reinvestment policies. These include: ambiguity; lack of a clear theoretical and normative base; the potential to be used to justify 'disinvestment' strategies; the extent to which the 'rationality' of 'evidence-based' and cost arguments fail to address the emotive and retributive sentiments central to criminal justice politics; and the difficulty in securing key pre-conditions in the Australian context, including bi-partisan approaches to law and order and the appropriate political structure for the devolution of funding and responsibility.

First, the lack of a clear definition and a clear differentiation with other concepts such as 'social investment bonds', the tendency of justice reinvestment to mean different things to different people, and its appeal to different political constituencies, may affect its prospects of adoption. On this view JR could become a vague catch-all to cover a range of post-release, rehabilitative, restorative justice, and other policies and programmes and thus lose both any sense of internal coherence and the key characteristic that it involves a redirection of resources.

Secondly, some critics have argued that justice reinvestment should be about values and that the emphasis on cost savings and programme effectiveness is disingenuous, impractical and instrumental rather than normative (Tonry, 2011). Others argue that it has no clear theoretical base and has 'moved from beautiful idea into real-world without a stopover first in academic theory development' (Maruna, 2011: 662). For some, such as Michael Tonry, justice reinvestment must be connected to fundamental progressivist ideas and practices and traditions of economic and political equality, democracy and redistributive justice; to others such as Todd Clear (2011), gains can be made within existing frameworks by stimulating neoliberal incentives to create a community and business interest and market in crime reduction programmes, for example in employing ex-offenders.

Thirdly, there are dangers that cost-saving imperatives may feed into cuts to prison services and programmes and that generalised statements of the need for 'justice reinvestment' may become a cover for strategies of *disinvestment*, especially in a cost cutting environment. This objection is based on seeing neoliberal economic and social policies as inherently criminogenic and weakening traditional forms of social solidarity. The fear is, then, that cost cutting and 'austerity' policies will create more crime, while in-prison and post-release programmes and services are cut.

Fourthly, fiscal 'rationality' arguments do not necessarily trump emotive law and order policies that are electorally popular. The limits of rationality are shown in studies where large sections of the public believe that crime rates are higher than ever (although they have been decreasing), and that judges are too lenient, when sentences have actually become considerably longer (Jones, Weatherburn and McFarland, 2008, Judicial Commission of NSW, 2010). Retributive sentiments are central to long established justifications for punishment as 'deserved' and are deeply culturally embedded, such that they cannot (and arguably should not) just be 'wished away' or ignored. Similarly, the Durkheimian view that punishment is not aimed primarily at affecting offenders but at defining and promoting community cohesion and a collective morality, is not sufficiently addressed in the calculus of fiscal rationality. A key issue then is the extent to which justice reinvestment approaches can overcome a reliance on economic rationalities and be theoretically articulated with various moral and socially grounded approaches to penality.

Finally, justice reinvestment approaches require changes to sentencing, parole and bail, and subsequent reinvestment in post-release and community programmes – all of which may be difficult to implement where opposition political parties continue to run a popular punitive 'tough on law and order' line, seeking to exploit fear and division for perceived electoral advantage. Bi-partisan or multi-partisan approaches would significantly improve the prospects for implementation of justice reinvestment policies. It is precisely here that the ambiguity of JR and its potential appeal across diverse political constituencies may play a significant role in creating more favourable political conditions. Indeed it might be a vehicle through which to challenge the taken-for-granted character of the notion of 'popular punitiveness' and its invariably negative connotations. As Russell Hogg (2013) suggests elsewhere in this volume, following Laclau (2007), it may be timely to attempt to take 'populism more seriously both conceptually and politically' by detaching it from its heavily pathologised 'punitive' companion and examining it 'as both a normal and necessary dimension of politics and one with no essential ideological or social belonging' (see Chapter 7 this volume: 105–19).

It may come to pass that JR is looked back on as a passing fad, a catchy slogan that appealed to many, but foundered on its tendency to mean all things to all people, and on the difficulty of fashioning the appropriate

political structures through which financial resources and social responsibilities might be devolved to a local level. Worse still it could provide cover for disinvestment in social support. But alternatively it is conceivable that it is a notion that captures the deep disillusionment with nearly three decades of popular punitive approaches to law and order across the political spectrum and gives expression to the desire for more social and cost-effective strategies to rebuild local communities blighted by crime and other forms of social dysfunction. While its potentially broad constituency of appeal can be seen as a weakness, it might be reconstituted as a strength, a route out of the partisan politics of regressive 'tougher than thou' posturing over criminal justice policy. As a floating signifier, cut adrift from any fixed or essential ideological or social moorings, it might just be a notion for the times, a way of socialising criminal justice out of the moral and legal stranglehold of individual wrongdoing and culpability and on to the plane of social policy.

The key point is that neither of these possibilities is already given or determined in theory or in politics. Nor can the outcome be derived from tracing theoretical origins, or the lack of them, to particular varieties of capitalism, whether social democratic or neoliberal, or to particular subjectivities or constituencies assigned a fixed location in the political firmament (Laclau and Mouffe, 1985).Outcomes depend on the way that discourses constituting justice reinvestment are articulated to a variety of popular democratic constituencies. That is the project of a criminology and a politics in which cost and 'evidence-based' arguments need to be situated within a moral and political vision that connects with popular, cultural imaginings concerning crime and punishment.

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Part III
The Legitimacy of Criminal Justice

6

Against Rehabilitation; For Reparative Justice

Pat Carlen

Introduction

The difficulties of re-imagining the possible relationships between crime and justice in capitalist societies, and imagining the possible meanings of democracy in societies characterised by gross inequalities of knowledge, and exclusion of the majority from political decisions are well known. One such difficulty stems from the impossible necessity of maintaining stances of both constant reform and constant critique (see Carlen, 2012). Confronted with economic and cultural inequalities which routinely deny ideals of justice and democracy, there can be a temptation to suppress (or bracket-off) troubling knowledge of criminal justice's and democracy's maligned underbellies and instead talk 'as if' criminal justice's ideal play of governance is always and already realised in its rhetoric. In some senses, this 'as if' talk is aspirational and it is difficult to see how it could be otherwise if more just conceptions of criminal justice and more democratic forms of democracy are to be conceived. However, when, as often happens, aspirational criminal justice concepts become routinised and acted upon as if they can be realised without fundamental social change, they become penal imaginaries, part of a taken-for-granted ideological baggage which, because it is taken-for-granted, obstructs critique (see Carlen, 2008). One such penal imaginary is the concept of rehabilitation, a concept which has a long history of justifying almost every kind of non-lethal response to lawbreaking and which is currently being reborn yet again in theories of criminal desistance and anti-prison campaigns as well as in the more invidious rehabilitation industry with its sales of programmes for cognitive reform. Yet, I hear no talk of rehabilitation as an across-class response to crime. Rehabilitation's sights are still firmly focused on working-class lawbreakers (working and unemployed) even though it might be thought that if cognitive therapy practices really had anything going for them, they might conceivably have been construed as being more relevant to corporate and political criminals than to those lawbreakers with less material resources and less cultural

capital. (Alternatively, of course, it could equally be wondered why, after so many years and different kinds of rehabilitative programmes, the prisons do not nowadays stand empty instead of being overcrowded and perennially increasing in number.) In view, therefore, of the blatant class bias in all forms of rehabilitationist talk, I thought it might be timely to attempt a deconstruction of rehabilitation's historical and contemporary ironies. The aim is to point up the extraordinary absurdities that have been and still are being realised as the ideal of rehabilitation is played out through different disciplinary, welfare and security rhetorics, and yet with always the same effect: of malignantly returning poorer and already-disadvantaged lawbreakers to their place at the same time as benignly keeping richer and more powerful criminals in theirs. The argument is that the discriminatory concept of rehabilitation should be replaced by a concept of universalisable reparative criminal justice based upon principles of inclusive citizenship and socio-economic reparation applicable across all classes. At the same time, existing rehabilitative practices actually empowering and increasing the need satisfaction of poorer lawbreakers should be increased and enhanced as part of a reparative justice that respects the poor, the powerless, the homeless, the ill, the stranger, the foreigner and troubled youths as critical citizens rather than objectifying them as risk-laden 'Others' either requiring treatment for faulty cognitions or assessment for levels of risk.

I begin the argument with a story that I've told several times before. It is about a 45-year-old ex-prisoner whom I interviewed in London several years ago. When I inquired about her American accent she told me that her family had emigrated to the United States when she had been two years old and she herself had first returned to England only 12 months previously. She had been a drug user since the age of 17, in and out of prison for various thefts and minor frauds. She had never been granted American citizenship and after the last sentence of twelve months had been taken straight from the prison with her few belongings and deported to England which she had last seen 43 years before. During her many short terms of imprisonment she had taken a variety of in-prison programmes designed to help her rehabilitation. But what was she to be rehabilitated to now, in an alien country where, although she formally had citizenship, she had no occupation, accommodation, property, family, friends, or cultural knowledge?

And I begin with that story because for me it is a parable for our time. It reflects the experiences of countless deportees and economic migrants whose illicit border crossings render them illegal (see, for illustration, Sandberg and Pederson's 2009 gut-wrenching description of the plight of stateless lawbreakers in Norway). It also illuminates – in metaphoric-mode – the impossibility and undesirability of rehabilitating the majority of released prisoners who, even though they will have been prisoners in the lands of their birth, are, none the less, frequently released to environments where, prior to their imprisonment, they already had nothing which they might be

rehabilitated to upon release. What, therefore, can rehabilitation mean in jurisdictions where many prisoners will be released to conditions of poverty, homelessness, statelessness, and various forms of economic, political, racist and cultural oppressions? What has it ever meant? Is there an alternative?

The theory and practice of rehabilitation

The concept of rehabilitation is notoriously difficult to define though notions of changing either the character or the social situation of lawbreakers – with a view to preventing their future lawbreaking – have likely been around at least since the eighteenth century (Robinson and Crow, 2009:1). Today, re-integration, re-settlement or re-entry is often used instead of re-habilitation. Yet all these terms, with their English prefix 're', imply that the lawbreakers or ex-prisoners who are to be 're-habilitated'/'re-integrated'/' re-settled'/'re-stored' previously occupied a social state or status to which it is desirable they should be returned. Not so. The majority of criminal prisoners world-wide have, prior to their imprisonment, usually been so economically and/or socially disadvantaged that they have nothing to which they can be rehabilitated. Sure, they are returned to their place in society but from that disadvantaged place they are too frequently returned to prison again and again and again. And it could be argued that more often than not it is desirable for governments, markets and capital accumulation that the poor and the powerless be kept 'in their place' – and the rich in theirs. Nonetheless, for the purposes of this chapter I will initially assume a benign definition of rehabilitation: the return of a lawbreaker, ex-prisoner or wrongdoer to civil society (that is, citizenship) with an enhanced capacity to lead a law-abiding life in future. This rehabilitative response to lawbreaking is optimistically known as the Welfare Model in contrast to the Justice Model where the concern (again optimistically) is primarily about imposing punishment and parole conditions proportionate to a crime's seriousness. However, what has happened most frequently is that the justice model has been combined with a rehabilitation model (see, for a recent example, Steen, Lacock and McKinzey, 2012) so that governments can seemingly say (to retributivists) 'We will punish lawbreakers' but (to rehabilitationists) 'We will make sure that the punishment has no painful effects on their lives' which is absurd.

Early conceptions of rehabilitation in Europe were provoked by the formal and legal argument that once lawbreakers have paid the penalty for a crime, all record of the criminal conviction should be removed so that they can begin with a 'clean slate' and re-assume all the usual opportunities and privileges of citizenship and especially in relation to employment. Even so, formal recognition of the stigmatising effects of a criminal conviction was not incorporated into English law until the 1970s though it had been recognised in French law several centuries before (Robinson and Crow, 2009: 2) as well as by various charities and social movements designed to

help ex-prisoners keep out of trouble. And if the concept of 'rehabilitation' had remained focused solely upon the formal removal of criminal stigma, it would not have become so difficult to define. By the beginning of the twentieth century, however, it was also widely recognised that while many lawbreakers go to prison ill-equipped mentally, culturally, materially and socially for leading law-abiding lives, the effects of their imprisonment are usually so debilitating and exclusionary that, when they are released, their chances of being law-abiding are even slimmer than they were before their incarceration. As a result and to meet the challenge of minimising the chances of offender/prisoner recidivism, a profusion of rehabilitationist philosophies, strategies and programmes has been developed over the last hundred years though it could well be argued that rehabilitationist political rhetoric has never been wholeheartedly put into practice (Mascini and Houtman, 2006); instead it functions primarily to legitimise the state's power to punish.

Yet however rehabilitation is defined in the books and by the policy-makers, throughout the twentieth and early twenty-first centuries, offender rehabilitation in its many guises has continued to be one of the main inspirations and justifications for a variety of hostels and custodial and non-custodial projects and programmes designed variously to address the social, psychological, educational, employment, health and other needs of those convicted by the criminal courts. The long-term explicit aim of rehabilitation practice is supposed to be a net reduction in crime via the reduction of recidivism. But the roots of rehabilitation discourses are diverse and analysis of the underlying assumptions about crime, lawbreakers, punishment, justice and citizenship which the different rehabilitationist projects realise suggests a variety of slightly different combinations of often opposed and contradictory assumptions about the causes of crime, the purposes of sentencing, the ways to reduce harmful lawbreaking, and the relationships between social justice (in terms of access to human and citizen rights) and a criminal justice variously designed to effect the discipline and control of migratory workers, the punishment of harmful lawbreakers, and the recognition, containment and removal of threats to the state whether real or imagined (cf. O'Malley and Bougen, 2008).

Dimensions of rehabilitation

Rehabilitation discourse has at least five main dimensions, each with different aims and assumptions rooted variously in: formal legal discourse; psychological, psychiatric and psychoanalytic discourse; social welfare approaches; psycho-social discourse; and the sociopolitical discourse of community corrections. Each has overlapped with one or more of the other dimensions at some time during the last 100 years. The purpose of this section is to demonstrate that while the premises and promises of all varieties

of rehabilitationism are essentially false within systems of criminal justice that realise one law for the rich and another for the poor, some of them are also indicative of principles and practices that might one day be effectively reconstructed within a more equitable system of reparative justice.

Formal rehabilitation law is concerned with helping lawbreakers shed the stigma of criminal labelling by erasing the conviction from the public record. It has been primarily responsible for laws which have allowed criminal convictions to be expunged after a specified period during which an offender has received no further convictions. Psychological, psychiatric and psychoanalytic rehabilitative approaches, by contrast, focus on changing those aspects, characteristics, habits and attitudes of lawbreakers which are thought in part (or wholly) to predispose a specific person to break the law. On the one hand, manifestations of psychological, psychiatric and psychoanalytic rehabilitation can be seen in various forms of behaviour-modification programmes, group therapy, and individual counselling and supervision. Social welfare approaches, on the other hand, work on the assumption that, if poor people's social circumstances are improved, there will be less crime. They recommend making specialist provision to redress deficits in offenders' education, employment skills and housing. Psychosocial approaches, as the term implies, combine individualised and social approaches on the assumption that, as lawbreaking is such a complex phenomenon, rehabilitative attempts should focus both on the psychology of a lawbreaker and the social environment in which the crime was committed and to which the lawbreaker must return. In fact, the majority of rehabilitative programmes are at least partly based on assumptions about the causes of crime with rehabilitation discourses, programmes and projects oscillating between social and psychological causality and sometimes mixtures of the two. Most recently, however, a so-called community corrections approach has attempted to combine or practise one of two types of community response to crime: the 'popular/populist justice' model; and/or therapeutic jurisprudence.

The 'popular/populist' (depending on your politics) model of penal justice is less concerned with the causes of crime and more concerned with popular support for current sentencing practices, the popularity of a state's governing party, and with developing victim-oriented sentencing policy. Accordingly, the emphasis in popular/populist justice community rehabilitation models is upon making alternatives to prison as tough as prison itself with the result that many defendants on community sentences can be said to have been 'set up to fail' by having had imposed upon them non-custodial sentencing conditions which are all but impossible to fulfil (Carlen and Tombs, 2006).

Therapeutic jurisprudence cherishes a more benign vision of rehabilitation than the community 'popular justice' model, being a jurisprudential position that argues that courts should not only do justice but also become

involved in the positive reinforcement of a defendant's efforts to give up crime in recognition that people attempting to live without breaking the law should be supported and applauded in their efforts and especially if their lawbreaking and poverty have been aggravated by an addiction. The principles of therapeutic jurisprudence, similar to the assumptions about support and befriending inherent in the early probation movement, have received empirical reinforcement from research in which a number of people who have desisted from crime claim that they became law-abiding once they received in-depth support from criminal justice personnel who, as well as recognising their especial psychological or social needs, also indicated that they were recognising them as citizens with rights and needs rather than mechanically assessing them solely as past lawbreakers and potential risks. These findings have resulted in the growth and spread of a relational (not an individualised/isolationist) approach in projects where offenders are not only enabled and empowered to desist from crime but where their attempts are supported, encouraged, recognised and applauded. Examples might include some types of restorative justice projects, drugs courts, re-entry courts, re-entry ceremonies, friendship circles, one-to-one therapeutic support, one-stop day centres and, finally, support, therapy and re-education for specific types of offenders – for instance, those convicted of driving, addictions, sex and violence offences.

The foregoing identification of dimensions of rehabilitation dominant at different times is in no way intended to denote a progressive criminal justice. For although philosophies of rehabilitation were, in the early twentieth century, directed either at restoring reputation to criminals by removing their convictions from public record after a specified period during which they had received no further convictions or, in the early probation movements, at supervising and befriending convicted lawbreakers who would agree to such supervision – either as an alternative to imprisonment or as a condition of release from prison – Maurice Vanstone (2008: 752) is right to remind us that even probation was 'never to escape the prison.' Like other discourses, penal discourses never die (Carlen, 2005, Foucault, 1972, Pratt, 2002) and this has proved to be especially true of discourses which promote imprisonment as the panacea for all the ills of class injustice.

As the twentieth century progressed, any demarcation which might have been presumed to exist between custodial punishment and non-custodial rehabilitation became more and more blurred. In-prison programmes of work, education and a variety of therapies were developed together with in-prison health schemes and pre-release social assistance with post-prison accommodation, family problems, drugs and employment. But despite the massive amount of official rehabilitative rhetoric and the much smaller amount of rehabilitative reality (whether carceral, non-carceral or transcarceral – see Lowman, Menzies and Palys, 1987), by the 1980s it was being argued in the UK that custodial rehabilitationism violated the rights of

lawbreakers by punishing them for the continuing risks inherent in their disadvantaged economic and social positions rather than in proportion to the crimes they had committed: in other words, that lower class lawbreakers were more likely to be seen as being in need of rehabilitative incarceration than business class and other more powerful criminals; and, most importantly, that rehabilitationist policies had not reduced crime rates.

The return to official favour of the justice model with its increase in punitive rhetoric and policies did not kill off rehabilitationism either in discourse or in practice; nor was there any greater proportionality in the punishment of apprehended lawbreakers according to the amount of social harm they caused. But a more correctionalist form of rehabilitation was developed aimed at changing prisoners' erroneous cognitions and consequently their behaviour. What has happened since the 1980s in most (though not all) Western jurisdictions is that rehabilitationist rhetoric has continued to be used in conjunction with technologies and discourses of risk-reduction to justify the imprisonment of less serious offenders whose economic and social deficits are assessed as being both more likely to make them candidates for recidivism than business or political class criminals and less likely to allow them to pay a fine (cf. O'Malley, 2009). Concomitantly, a more punitive justice model combined with decreases in welfare spending has undermined non-custodial rehabilitative material support (for example, job schemes and hostels) for those lawbreakers arguably requiring the greatest social and economic empowerment.

By the end of the twentieth century, prison populations in the US, UK and Australia were increasing rapidly (World Prison Brief, 2004, quoted in Stern, 2006) while the rehabilitative ideal of reducing prison populations by addressing *outside* prison the psychological and social conditions likely to predispose an ex-prisoner to recidivate, was being largely nullified by the strategy of neoliberal governments seeking legitimacy via an increase in punitive and risk rhetorics and a decrease in welfare spending (Cavadino and Dignan, 2006). The net result was a decrease in welfare support for the poor outside prison and lack of rehabilitative support in prisons too overcrowded to make the rehabilitative rhetoric a reality (Comfort, 2008). Moreover, with imprisonment replacing welfare responses to crime, there has recently been such an acceleration and accretion of opposed responses to lawbreaking – welfare, disciplinary and technological – that personnel within the criminal justice system who are still being enjoined to provide 'rehabilitative programmes' have become openly despairing of the hypocrisy of rehabilitationist ideologies (see Carlen, 2008).

In a positivistic pursuit of 'what works', neoliberal governmental discourse on reducing crime has gradually erased the citizen-subjects of the welfare state from the penal frame replacing them with the risk-laden techno-entities of surveillance and security fetishism (Franco Aas, 2005, Hallsworth and Lea, 2011, Hörnqvist, 2007). To make assurance doubly sure, in the

UK there has also been a growth of in-house evaluation of official crime reduction strategies which appositely proclaim that government projections of 'what works' have been reflexively proved accurate and thereby legitimated (Hope, 2008). Yet whatever the official claims regarding 'what works', criminal prisons in most jurisdictions are still filled primarily by the poor, the mentally ill, the homeless, ethnic minorities and the stateless (SURT (Cruells and Igareda), 2005, Wacquant, 2009) and rehabilitationism lives on. Before proposing an alternative to this most tenacious of imaginaries I would like to discuss the twofold question that has been systematically ignored by rehabilitationist theorists. Who is to be rehabilitated to what?

Who is to be rehabilitated to what?

The first anomaly in rehabilitation discourse concerns its subject. *Who* is to be rehabilitated? With the exception of those who have committed traffic or addiction-related crimes, rehabilitation programmes in capitalist societies have tended to be reserved for poorer prisoners found guilty of crimes against property and for prisoners released after serving long sentences for non-business-related crimes. Rehabilitation projects and programmes have not been designed for corporate criminals however long their records of recidivism. But, you may say, given the dominance of theories that causally relate some crime to adverse social circumstances, surely it is understandable that remedial social support should have been reserved for offenders most in need? Yes indeed; and where such support has manifested itself in increased access to services, education, housing, addiction therapy and community support programmes, there has been some evidence that it has been strategic in enabling past offenders to remain law-abiding. Research published at the beginning of the twenty-first century reinforces the long-held, common-sensical belief that, although offenders themselves have to make the decision to desist from crime, their initial resolve to become law-abiding has a greater chance of success when bolstered by good social support (Maruna, 2000). Unfortunately, however, in too many jurisdictions during the welfare eras, the charitable impulse to provide such support was repeatedly undermined by persistence of the notion that no-one should be better off because they have committed a crime. This doctrine of less eligibility, moreover, has translated into a popular belief that offenders should always be last in the queue for any available welfare goods whatsoever. As a result, and despite over a century of rehabilitationist discourse, actual responses to crime have remained largely punitive (see Steen, Lacock and McKinzey, 2012) with contemporary governments engaging in a punitive managerialist rhetoric which has led some criminologists to argue that crime control is nowadays a prime mode of governance (Simon, 2007); others to contend that crime control is also a major industry by which even rehabilitation programmes have been compromised and corrupted through

their incorporation into exploitative systems of punishment and control (Christie, 1993, Beckett and Sasson, 2004, Carlen, 2007); and yet others to focus on the technologies of coercion which, though they may still employ the terminology of rehabilitation, are primarily concerned in surveillance of the spaces and places wherein the risks of deviant populations may be contained, monitored and controlled in what Hallsworth and Lea (2011) term 'the security state'. En route from 'welfare' to 'security' state, meanwhile, the citizen subject of rehabilitation has been transformed into a security object whose points on a risk-assessment scale are currently used to determine whether human and/or citizenship (welfare) rights are to be of paramount consideration in determining a penal sanction or whether human, citizen and legal rights are to be sacrificed to the terrified and terrible imaginings of the security state (see O'Malley and Bougen, 2008).

At the time of writing – the second decade of the twenty-first century – prison populations continue to expand as non-punitive rehabilitation projects are axed by governments who, powerless to curb global corporate greed, malpractice and law violations as well as some forms of international malfeasance (such as war-mongering and media corruption), recoup their debts and losses where they can: in the public sector of their national jurisdictions. The ensuing cuts in public expenditure fall most heavily on the most vulnerable citizens and especially on those vilified as being the least deserving and receiving welfare benefits of any kind whatsoever.

The second anomaly in rehabilitation discourse is in relation to its social and political context. In Western societies, legitimation of the state's power to respond to crime and resolve disputes has been implicitly rooted in some kind of contract theory predicated upon a conceit that the state is founded upon the citizens' consensual agreement to surrender to state agencies their individual capacities to redress wrongs done to them. In welfare states, an expectation has also been raised that citizens will receive 'minimal need satisfaction' (Gough and Doyal, 1991). Thus, ideally, a moral reciprocity is set up: the state is obligated to satisfy the minimum needs of its citizens and protect them and their property from attack; citizens are expected to obey the law and fulfil other civic responsibilities laid upon them by virtue of their citizenship. It could be argued, moreover, that it was the implicit if not always explicit recognition of the state's obligation to satisfy citizens' basic needs that was the mainspring of welfare state philosophies and then, by extension, of the welfare approaches to criminal justice which gave birth to the rehabilitative ideal. But this has all changed. What has happened consistently over the last 50 years in most of Western Europe, and the United States is that, when very disadvantaged citizens have broken the law, their economic and social needs in terms of, for example, their poverty or mental illness have not been viewed as qualifications for rehabilitative measures by the state but rather as positive risk factors predictive of future lawbreaking and, consequently, requiring either disciplinary imprisonment

to make them come to terms with poverty, low wages or unemployment or, if they are foreign nationals, repressive incarceration or deportation to reduce their risk.

It should, however, be noted that the link between risk and penal policy was not born of the globally-oriented security state even though it has been immensely strengthened by it. Despite the persistent rhetoric of rehabilitation (implicit in both carceral and non-carceral responses to crime), there have been, at least from the sixteenth century, periods of recurrent recognition that, because the majority of lawbreakers have nothing to be rehabilitated to, it is more politic to pay greater attention to their risk potential than to their rehabilitative requirements and to keep them in (or, in the case of foreign nationals, send them back to) their place, either by laws controlling mendicancy (see Slack, 1990) or (at times when pacification via welfare has been thought to be impolitic) by poverty, unemployment, repression, border controls and deportation. By contrast, many white collar and corporate criminals are either too embedded in (or, increasingly, too dislocated from) local jurisdictions for prosecution to be possible. When successful prosecution does occur, rehabilitative measures in terms of changing corporate cognitions are not usually seen as being necessary, desirable or possible.

Rehabilitation is not necessary for corporate and other white collar criminals because their punishments seldom *de*-habilitate them in either material or status terms. Nor is rehabilitation considered to be desirable in terms of turning corporate offenders away from wrongdoing. Corporate lawbreaking is such a celebration of capitalist societies' subterranean values and its miscreants are so embedded in their constitutive economic and political systems that, on those infrequent occasions when offenders are brought to trial, they, unlike their poorer brothers and sisters in crime, are seldom stigmatised as people whose cognitions require changing. Instead, after being fined or serving a short prison sentence, they are quietly reinstated in their former positions.[1] More practically, however, governments are reluctant to see corporate criminals in court at all as there is always the fear that adverse publicity will result in public agitation for more corporate regulation, a destabilising of markets or an exodus of corporate capital to more sympathetic jurisdictions (Levi, 2009). Powerful political criminals (those guilty of wartime atrocities, for example) may also benefit from being embedded in a changing social structure and, if they escape death, may merely be accommodated (rather than rehabilitated) in post-war regimes more interested in national reconciliation (via social amnesia about the past) than in wreaking revenge (see Karstedt, 2010). Finally, rehabilitation is not seen as being possible because corporate and other powerful criminals nowadays have such unprecedented access to world-wide communications, global travel and hospitality that they can ensure they are sufficiently dislocated from their national jurisdictions to make bringing individual suspects to

trial impossible and certainly to render laughable any talk of attempting to change their future behaviour by rehabilitative reprogramming.

Imagining reparation

A basic postulate of this chapter's argument is that rehabilitationism is one of the many penal imaginaries whereby jurisdictions have, over the years, tried to make sense of the obviously nonsensical idea of doing justice in grossly unequal societies.

When commencing this analysis of rehabilitation discourse and practice, I had no expectation that a symmetrical comparison could be made between penal responses to the rich and the poor. I only intended to analyse the differential placement of criminals from different social classes in relation to rehabilitationist practices and ideologies. Like most people, I already knew that there is an asymmetry between the penal response to street crime and suite crime. But until I started thinking specifically about rehabilitation I did not realise how difficult it is to talk about a penal imaginary which has given birth to a discursive absence – the absence of the powerful criminal from rehabilitationist discourse – especially when it is a systemic absence and not merely a design fault! And there was also the absence of any history of wholehearted rehabilitationism. If twentieth-century rehabilitationist practice had been totally welfarist, the evidence of Wilkinson and Pickett (2009) suggests that it might then have reduced both inequality and crime. But rehabilitationist practice never has been solely welfarist and has recently become less so. At least from the nineteenth century (and most probably earlier) there has been the reiterative desire to mix punishment with treatment, welfare with pedagogy, and to base any redistribution of income or opportunity on contract rather than on right.

In the criminal justice context, rehabilitationism's fundamental flaw has always inhered in its individualism, routine targeting of poorer lawbreakers and irrelevance to corporate, political and other white collar criminals. Yet, nowadays 'rehabilitation' is a penal imaginary seen to be so fundamental to criminal justice that it blinds policymakers and even some justice campaigners to its dangerousness when misrepresented as the humane face of criminal justice systems still primarily focused upon keeping 'risky Others' in their place. It has therefore been argued that the concept and practice of rehabilitation should be replaced right across the board with a concept of citizen reparations and that criminal justice itself should be subsumed to a notion of social justice as inequality reduction (cf. Wilkinson and Pickett, 2009).

The rehabilitation industry as we know it today is an inchoate mass of commercialised rehabilitative programmes and charitable endeavour. Lawbreaking, imprisonment and recidivism have not been reduced and analysis of rehabilitationism's non-relevance to the rich and injustice to the

poor suggests that the concept of rehabilitation should be abandoned. If the reparative principle were to be accepted in place of the rehabilitative principle, one way to move away from conceiving of criminal justice as being primarily a response to the crimes of poor, migrant and/or non-respectable 'Others' (Young, 2007) might be to rethink criminal justice within a two-dimensional reparative social justice: reparation from all lawbreakers (across all classes) to the state in proportion both to the harms committed and the ability to pay; and reparation from the state to those citizens whom it has failed materially and culturally in terms of ensuring satisfaction of their minimum material and cultural needs.

The main purpose of this chapter has not been to outline a blueprint for reparative justice. Radical suggestions for responding to corporate crimes in more appropriate and equitable ways have been in existence for years (for example, Braithwaite, 1984, 2009, Braithwaite and Drahos, 2001) as have imaginative projects relevant to a reparative justice for lawbreakers who have never had anything to be rehabilitated to (for example, the many non-carceral combined education, training and accommodation schemes run by socially-committed workers in a variety of NGO and state-sponsored projects – see Carlen, 1989). As far as corporate crime is concerned, the pursuit of individual criminals is sometimes (though not always) less appropriate than the international regulation of corporate greed, harm and corruption, and a reparative justice might well begin its task by acting upon the proposals of restorative justice supremo, John Braithwaite (2009): that the crimes of corporations should result in serious confiscations, disqualifications, financial reparations, compulsory corporate restructuring, increased regulatory supervision and other measures designed to engender a moral regeneration of financial institutions. However, the crimes of super powerful individuals should be responded to according to the same reparative principles operative for less powerful individuals and where social structural properties make such responses impossible, the causes should be publicised and addressed.

For poorer lawbreakers, reparative justice might result in community regeneration via state funding including *critical* education in the rights and duties of citizenship (that is, not the coercion involved in some in-prison programmes of cognitive reform), critical instruction in the legal forms of protest, and *critical* identification and reconstruction of the legal channels for pursuit of individual rights and community support.[2] In short, the re-education of lawbreakers does not have to involve the brainwashing techniques of some criminal justice cognitive programmes. Instead, it could be undertaken as part of a progressive community response to crime (see Currie, 2004).

Over the last decade, it has become almost routine for criminologists to characterise any court or prison-given opportunities for lawbreakers to act responsibly as coercive responsibilisation by states absolving themselves

from responsibility for punishment outcomes (for example, Garland, 1996, Hannah-Moffat, 2001, O'Malley, 1992). Going against the trend, Goddard and Myers (2011) have recently and persuasively argued that such opportunities can also be usefully mobilised as sites of education in critical citizenship. After describing the critical and progressive response of the Free Los Angeles High School in its work with youths excluded from school, they claim that:

> rather than rehab interventions based on a risk model (Ward and Maruna, 2007) in which youths learn to cope with their marginal status through behavioural interventions, the... school's curriculum helps students to understand the social forces behind the personal problems they encounter ; and it prepares them to make social changes by learning the trade of social movement organising. In this way... personal change becomes linked with social change. (Goddard and Myers, 2011: 653)

In other words, instead of the young people becoming passive actors in a programme of tutelage directing them to learn and keep their place, they are receiving some measure of reparation by being taught how to change that 'place' to better meet their own desires. Who knows: one day they might demand that a cap be set on prison numbers, that custody be reserved for the most serious crimes of violence, and that no-one should be imprisoned because they are too poor to pay a financial penalty. They might even suggest that a new approach to democratic reparative justice would result in the publication of annual statistics indicating both the type of penalty imposed on, and the scale of financial penalties paid by, criminals across all income groups together with the comparative costs of the crimes recorded. It is not impossible. For, as De Giorgi (2006: 143) has cogently argued, presently repressed populations should not be seen reductively as being nothing but the products of ever-changing control techniques; they should also be viewed as 'collective life trajectories inspired by individual choices and new desires'.

This essay has aimed only to help change contemporary conversation about desirable responses to crime by calling into question one tenacious and taken-for-granted assumption shared by all shades of political opinion – that 'rehabilitation is a good thing' – and to argue for its discursive replacement by the concept of reparative justice. And even though at the present time it may be easier to imagine pigs flying than to imagine any society adopting a principle of reparative justice as described here, at least the notion of 'citizen reparations' is a concept that chooses to imagine an inclusive social justice giving primacy to the values of citizenship, democracy and inequality reduction rather than to the completely contrary values of international capital. The concept of rehabilitation, by contrast, has been and still is exclusively focused upon the crimes of the poor and the powerless.

It has no relevance to corporate and other powerful criminals posing the most serious criminal risks both locally and globally and very little to the bulk of those presently filling the prisons and who have never had anything to be rehabilitated to.

Notes

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1. Pat O'Malley (2009: 70) has argued that 'the punitive turn is not simply directed at the underclass', and that 'heavy fines imposed on corporations are intended to indicate a moral opprobrium of the crimes committed'. Maybe so but what is relevant to the argument of this chapter is that when it comes to corporate crimes, there is no attempt to change either the context or the worldview of the executives of the offending corporations. Conversely, a UK Government Report (Home Office, 2000: 7) claimed that 'experiences such as poverty, abuse and drug addiction lead some women to *believe* [emphasis added] their options are limited. Many offending behaviour programmes are designed to help offenders *see* [emphasis added] there are always choices open to them that do not involve crime.'
2. I am not arguing that inequality licenses crime – only that it is a cause of most crime, that it provides justificatory discourse for other crimes, and gives impunity to the most powerful criminals. Reparative justice would involve all lawbreakers (rich and poor) in making amends for any harms done and might certainly be experienced as either a constraint on freedom or as painful. But it would be as applicable to the crimes of the rich and powerful as to those of the poor and powerless.

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7

Punishment and 'the People': Rescuing Populism from its Critics

Russell Hogg

Introduction

The term 'penal populism' is now reflexively used by criminologists to describe what many see as a dominant trend within penal policymaking in many western countries. The epithet 'populist' is used with no less frequency by media and other public commentators to refer (always pejoratively) to this or that political announcement, policy or style of political leadership, whether the context be specifically related to crime or some other arena of public affairs.

In most accounts 'penal populism' (or 'populist punitiveness': Bottoms, 1995) is treated as a composite term. The two words are inseparably coupled and it is the penal that receives most of the detailed attention. As in more general political commentary, populism is tacitly understood as a negative and rather dangerous phenomenon, suggestive of manipulation, shallowness and demagoguery: in short, a corruption of normal, healthy democratic politics.

As against such accounts, I want to suggest that debate about penal policymaking and its future – and particularly the prospects for more progressive policymaking in the area – would be assisted if populism was taken more seriously both conceptually and politically. This requires a decoupling of the concept of populism from what is habitually taken to be its punitive partner and that which defines its content. Currently the term is used without clear definition, let alone conceptual elaboration, to reference political pathology. Instead populism should be examined as a regular, meaningful dimension of contemporary political practice that has to be understood and engaged, not just denounced and extirpated. That is, I am seeking to make a case for bringing populism in from the despised margins to the centre of political practice and reflection. I will also briefly consider some of the implications this may have for penal politics specifically.

Conventional accounts of penal populism

The concept of penal populism is now widely invoked to describe and explain political and social forces that have driven the adoption by most western liberal democratic governments of increasingly punitive penal policies and sentencing laws since the 1980s (see, for example, Bottoms, 1995, Freiberg and Gelb, 2008, Roberts *et al.*, 2003, Pratt, 2006). In many countries, like Britain and Australia, social democratic and labour governments embraced penal populism with no less enthusiasm than their conservative counterparts, thus forging a new law and order consensus around the need for overtly harsh and stigmatising measures against crime.

Such measures sought to address what politicians saw as declining public confidence in the justice system and government (especially in the courts and sentencing), associated primarily with perceptions of undue penal leniency in the face of rising crime rates (Butler and McFarlane, 2009, Gelb, 2008, Hough and Roberts, 2004, Indermaur and Roberts, 2009, Jones, Weatherburn and McFarlane, 2008, Roberts *et al.*, 2003, chapter 2). When polls and surveys showed voter disaffection to be unmoved by harsh policies, the political response was not to query their efficacy but to ramp up the punitive rhetoric and implement even tougher measures. In the broadsheet press in NSW this became widely known as the 'law and order auction'. In that state there has been no apparent impact on public confidence from more than 20 years of tougher sentencing regimes and rising imprisonment rates (Hogg, 1988, Indermaur and Roberts, 2009: 18–20, Jones, Weatherburn and McFarlane, 2008).

Penal populism however alludes to more than the punitive character of policies. It also seeks to capture a shift in the process and dynamics of penal policymaking itself (and politics more generally), involving new patterns of political communication and an altered relationship between politicians and publics. Crime captured major political attention in the context of these changes but of course their effects ranged over public policy and the political process more generally. One of many thinkers providing critical insight into these changes, John Pratt, describes what he calls a shift in the 'axis of penal power' (Pratt, 2002: 181–4, 2006; also see Garland, 2001, Pratt *et al.*, 2005, Ryan, 2003). Surrounding themselves with media advisers and pollsters rather than civil servants and policy specialists, and using new techniques of political marketing and polling (like focus groups) to continuously 'track' and 'target' voter sentiment, governments and politicians have sought to align themselves much more directly with public opinion, over the heads of traditional policy elites (for an early analysis see Mills, 1986). This has been further fuelled by the technologically and commercially driven recasting of the media environment: the rise of the 24 hour news cycle, abrasive talk-back radio, explosion of social media, and so on.

This was also a response to new 'push' factors in the political culture: evidence of growing public disaffection with traditional politics and institutions, declining party memberships and voter turnout at elections, the dwindling of voters with life-long party allegiances and the rise of independents and third parties (Burchell and Leigh, 2002, Nye, Zelikow and King, 1997, Reich, 2005: 5). Increasing numbers of swinging voters and growing electoral volatility require new means to reach a more detached and sceptical citizenry and build the coalitions of electors needed for political success.

Tracking opinion on crime and punishment over time and from place to place has uncovered a consistent finding: that members of the public believe criminal justice policies are too lenient and that the rules are unduly weighted in favour of the welfare and rights of offenders over victims and law-abiding citizens. Almost without exception across the Anglo countries polls and surveys find that the public have little confidence in the effectiveness of the justice system. Law and order is also an issue that taps a reliable stock of widely shared and deeply felt concerns about security, order, authority and social change. It touches core values and deeply felt emotions and anxieties. This is fertile ground for the much more value-oriented and emotive media of communication that have come to dominate both the commercial and political landscape and indeed blur the two (Tanner, 2011). The symbolism clustering around crime and punishment is a valuable political prize that parties seeking to connect with disaffected voters in an increasingly volatile political climate cannot afford to ignore.

The strategy to represent public opinion with greater directness and immediacy in public policy and legislation has also had the effect of reducing the role of the insider groups and processes traditionally involved in policy-making (public servants, recognised experts, judges, academic advisors). A more pointed message is often conveyed in political rhetoric. Disparaging references to 'elites', 'special interests' and 'armchair critics' project images of complacent middle class lifestyles cosseted from the effects of unwanted change, like rising crime rates and urban decay, which are the lot of ordinary people whose voice on these issues has not been heard or listened to in the past. Whilst invariably repudiating allegations of populism (such is its negative connotations), practitioners and defenders of this new style of politics stress its essentially democratic nature. What, they ask, could be wrong with accessing the views of ordinary voters (through polling, focus groups and other means) and seeking to reflect those views in policies and laws? Isn't this what political parties in democratic societies are meant to do?

Critics of populism, on the other hand, point out that the new forms of political practice and communication are a two-way, not a one way, process. Public opinion is not a naturally occurring phenomenon; it is socially constructed and the media (polls, focus groups, the press, talk-back radio) that claim to reflect it also play a vital role in forming it. They question whether views that are ill-informed, prejudiced or little more than artefacts

of the polling process itself should be accorded the same weight as views based on evidence, reflection and deliberation. Critics of penal populism in particular argue that politicians are prone to talk up criminal threats and public fears in pursuit of partisan electoral advantage, nurturing the very climate in which harsh punitive measures are embraced by the public and adopted as solutions by governments and oppositions. This self-perpetuating cycle proceeds with little regard for the effectiveness of punitive policies or the evidence regarding crime and the sorts of policies that might actually work to combat it (see Roberts *et al.*, 2003: 5).

This is necessarily a simplified account of penal populism. Few, if any, commentators claim that it has been the only critical influence on penal policy in recent times. Many point to a range of other forces, including the increased salience of risk and the rise of the new public managerialism (Bottoms, 1995, Pratt, 2006, chapter 5). Others stress the uneven impact of populism and variation across different national and local settings (see Pratt *et al.*, 2005), and a few even dismiss the stress on punitiveness as a myth that masks more fundamental developments (Matthews, 2005). Some are more optimistic about the growing role of the public voice in penal policy. While regretting its populist manifestations, they nonetheless detect a general, healthy advance of democracy and express confidence that in a 'post-materialist' age it may be extended and deepened so as to transcend the present populist moment (Johnstone, 2000, Ryan, 2003, 2005).

Responding to penal populism

In addition to the proliferation of polls, surveys, and focus group activity that have become a pervasive feature of contemporary political culture, there is now a substantial body of social scientific and policy literature around public attitudes to, and public confidence in, the justice system, and particularly sentencing and punishment (see references above). The findings of the latter are commonly pitted against both the assumptions of penal populism and simplistic faith in the results of polls and focus groups (Freiberg and Gelb, 2008).

In particular it is argued that punitive attitudes are based to a large extent on misperceptions of crime and punishment (Gelb, 2008, Roberts *et al.*, 2003), misperceptions created or sustained by populist forces in politics and the media that are more intent on fomenting and exploiting public fears than promoting rational, effective penal policies. The same research shows that when people are armed with more information about the issues, punitive views and demands moderate. Punitiveness also generally declines as education levels increase (Warner *et al.*, 2009).

The implication is that reflex punitive responses to superficial tabloid representations of public opinion and poll and focus group findings are to be avoided. It is necessary instead to foster more informed opinion and

a more rational foundation for penal policymaking. The problem is one of overcoming distorted political communication through public education, increasing access to reliable information, fostering more accurate media reportage, and establishing institutional buffers against populist political pressures (for example, sentencing advisory bodies). Drawing on a longer tradition and a broader contemporary body of democratic theory and practice, some argue for the adoption of deliberative democratic forums and strategies (like citizen juries and panels) in penal policymaking (Freiberg and Gelb, 2008).

As far as they go, these may be good and worthy goals and strategies for improving the quality of penal policymaking. I would make two comments, however, concerning the limits of these proposals in the context of a critique of penal populism. First, there is little ground for confidence that such measures, including deliberative democratic processes, will occupy anything more than a secondary, perhaps marginal, place in contemporary liberal democratic polities given their current constitution and trajectory. It is interesting that the inexorable decline of the most ancient and significant institutional expression of deliberative democracy, the jury, occasions so little comment in these debates.

Secondly, if populists are accused of placing naïve faith in the unmediated expression of the popular will (or disingenuously invoking it as a mask for their own political agendas), their critics are not free from similar tendencies. Margaret Canovan has pointed out that there is 'a large dose of redemptive faith intermingled with the rationalism of most theories of "deliberative" or "discursive" democracy: faith in the transforming power of deliberation, and faith that if the people at the grassroots were to be exposed to it, their opinions would be transformed in the correct (antipopulist) direction' (Canovan, 1999: 15). The necessary indeterminacy of what constitutes a fully *deliberative* process and *complete* or adequate public understanding of an issue in complex, large-scale, democratic polities also means that there is always a 'get out' clause to dismiss unwelcome expressions of (punitive) public opinion as insufficiently informed and renew demands for yet more complete deliberation, knowledge and transparency.

Therefore, as useful as this research and many of the related reform recommendations are, they somewhat miss the larger point; in crucial respects they evade rather than engage the unsavoury realities of contemporary penal politics. The demonising of populism as an irrational intruder on healthy democratic practice is a further manifestation of the same difficulty.

The need to take populism seriously

Needless to say it is difficult to find in any of the literature on populism (penal or otherwise) anyone who has anything positive to say about it. Similarly, there are few if any people or movements that embrace the

label despite the growing frequency with which it appears as a descriptor in media and academic commentary on politics. It is striking that a political phenomenon that now appears so ubiquitous (if academic and media commentary are anything to go by) requires no effort at definitional clarity let alone theoretical elaboration. So too with penal populism: it is the *penal* that receives virtually all the attention. Allusions to populism serve as little more than shorthand for what are assumed to be malign, irrational influences on penal policy that produce punitive measures like '3 strikes' laws, 'zero tolerance' policing and preventive detention.

Most analyses of penal populism therefore do little more than 'gesture to the political', avoiding any serious engagement with the question of the relationship between the political realm and the penal realm. As Richard Sparks has pointed out, populism is not invoked to explain so much as it is 'introduced when explanation fails' (Sparks, 2001: 172). Nonetheless such accounts cannot be said to lack a theory of politics. That it is more often implicit is testimony to its strong hold in modern western intellectual traditions. The theory consists of an idealised conception of the political realm in which politics is (or should be) normally transparent to knowledge and rationality. The core of the problem lies in the fact that the mixed normative and explanatory assumptions at work in the theory usually remain unexamined. Phenomena, like populism, that are seen to thwart the reign of reason in public life are, instead of being subject to analysis, simply consigned to the status of irrational blockage or interference.

'Machiavellian' (another familiar pejorative in everyday political discourse) implicitly references a phenomenon that belongs in this same political nether world. This is despite the fact – or much more likely because of it – that Machiavelli was an implacable critic of normative political critique, warning of the danger that 'a man who neglects what is actually done for what should be done learns the way to self-destruction' (Machiavelli, 1961: 49). Citing Machiavelli, Bent Flyvbjerg more recently challenged the rationalist assumptions underpinning most modern political theory, observing: 'Modernity's elevation of rationality as an ideal seems to result in, or at least to co-exist with, an ignorance of the real rationalities at work in everyday politics, administration, and planning' (Flyvbjerg,1998: 2).

The consequence is that what is sought is often a politics emptied of politics, purified of its distorting effects on rational policymaking. Populism is a synonym for such distortion, and seems only capable of being described as a perversion of the political process.

My argument to the contrary is that rather than continuing to treat populism as a deviant or aberrant political form destined to wither away with the spread of knowledge and the dawning of rational enlightenment, it is necessary to grasp it as a positive political rationality (in the sense of being an autonomous, meaningful, efficacious force in the world).

This is not to dismiss the value of those many critical analyses of penal populism and related developments in penality cited earlier. They help lend intelligibility to penal populism as a *sociological* phenomenon (and help redress the simplistic emphasis on political manipulation and demagoguery to be found in some other accounts). They nevertheless still treat penal populism as a composite concept in which populism derives its negative character from the association with the punitive content of the policies and developments under examination. That is to say, these accounts show no particular interest in populism as a *political* logic or rationality.

It has been argued with some force that 'the logic of state punishment is at bottom "political ... rather than penological"' (Sparks, 2001, citing Garland, 1995: 18; also see Garland, 2010). This further underlines the importance of grasping the logic of populism as a positive *political* phenomenon or practice, a normal dimension of the democratic political repertoire rather than a deviant departure from it.

How should this question be tackled?

Populism as political rationality

A necessary preliminary to offering a more adequate account of populism is to recognise something of a more general nature about politics. Contrary to a widely held conception, it is unhelpful to see politics as a realm or process in which pre-existing interests and identities are simply *represented*. Rather politics constructs or constitutes the interests it claims to represent. Thus, far from being understood as *ideally* transparent to, or an imperfect expression of interests or forces that are anterior to politics (the will of the people, class interests, patriarchy, or rational principles of penal policy), which is then to be understood in terms of blockage, distortion, interference, or betrayal, the autonomy of the political domain and its effects need to be respected and analysed according to their own logics and dynamics.

So what, it might be asked, is distinctive about populism in this respect. Of what is populist political practice constitutive? The specific political logic of populism relates to 'the people' and the constitution of 'the people' as a political actor and a source (more or less direct or unmediated) of political authority (Laclau, 2007). 'The people' in question are of course only ever one part of society (not the population as a whole or even necessarily some notional arithmetical majority or plurality). But populist movements claim (with widely varying degrees of effectiveness) to embody the interests of 'the people', to speak for the people, to be their legitimate voice.

We could take Pauline Hanson's 'One Nation' in the Australian context or the Tea Party movement in the US as examples that confirm for many the negative images and implications of populism. But viewed historically, political phenomena that have embraced or attracted the label populist constitute no single type of movement so far as ideology or social base is

concerned.[1] Robert Menzies' building of an enduring electoral political base for conservatism in post-war Australia, based on an appeal to 'the forgotten people', incorporated a powerful populist element that successfully cut across the class logic of Labor politics (see Brett, 1992). Nixon's 'Middle America', the British Conservative Party's appeal to 'Middle England' under John Major and Tony Blair's deployment of the rhetoric of 'community' are other examples.

Equally, the uprisings in 2011 in Tunisia and Egypt involved the populist interpellation of 'the people' as political actor and embodiment of legitimate political authority in opposition to the autocratic regimes they successfully removed. There are many other current examples – the occupy movements that sprang up in the US and other parts of the world in the second half of 2011 and protest movements in countries like Greece, Spain, Chile, Israel to name a few. Attempts to define populism in sociopolitical or ideological terms will always perish on the rock of the diversity of the movements in question. The consistent factor is their appeal, in some form, to 'the people'. Understanding the dynamics and effects of populist politics might be aided if, in the first instance, ideological prejudices were not permitted to dictate judgments about when such appeals are authentic and when they are mere manipulation or demagogy.

References to 'the silent majority' or 'forgotten people' also signal the particular nature of the populist appeal as being one to those who are conventionally thought of as being *outside* politics: the 'little people', the 'underdog', those interests that are not organised and represented in parties, trade unions, large corporations, and so on. It is no surprise therefore that the crime victim has occupied a central symbolic position in penal populist politics of recent times.

Populism therefore has a strong anti-political element, or at least anti-'business as usual' in politics. The characteristic populist style reflects this: simple and direct forms of communication, often overt anti-intellectualism, suspicion of impersonal, bureaucratic processes and modes of organisation, and impatience with institutional procedures and constraints. Populism elevates to the status of profound cultural conviction the democratic idea that moral, political and scientific truths are within the grasp of ordinary people. This is often coupled with a derision of experts and political insiders as self-interested and dismissal of their ideas as contrary to commonsense. Many of these features are often exemplified in the personality and style of a strong leader, for example Pauline Hanson.

Thirdly, populism is an *insurgent* form of politics. Its characteristic methods and style introduce an element of overt division, antagonism or protest into politics and society. 'The people' as a source (the *only* true source) of legitimate political authority is typically set against illegitimate, corrupt or misguided government or elites or other powers. Populism embodies an anti-system, anti-establishment logic. What this means in concrete terms

depends of course on contingent historical and political circumstances. Populism need not therefore be anti-state in any straightforward sense, as examples like the Peronist movement in Argentina or Margaret Thatcher's 'authoritarian populism' demonstrate (Hall, 1979, 1980, 1983).

Beyond identifying these common traits of populism, the other critical question is how this articulation of 'the people' – an apparent unity – is actually achieved given the heterogeneity of beliefs, interests, and demands to be found at any time in a given society. In a theoretically dense and challenging study, to which this analysis owes a large debt, Ernesto Laclau (2007) seeks to answer this question drawing on many conceptual sources, including group psychology, contemporary post-structuralism, lacanian psychoanalysis and Gramsci's theory of hegemony. Against both the widespread dismissal of populism as an intrinsically empty and reactionary political phenomenon and attempts to capture its essential character in ideological-political or social terms, Laclau seeks to develop a theoretical framework for grasping populism as a definite political rationality (and thus a legitimate and intelligible political practice) and to illustrate its workings in particular political and historical settings. The analysis embodies a deeper critique of political theory, its characteristic conception of politics and its habitual rationalist prejudices towards popular political and cultural forms. Populism, he argues, is at the core of politics because it is intimately implicated in the processes of formation of political identity, and in particular, the analysis and articulation of 'the people' as a historical, political actor and social category. It is impossible to do complete justice to his argument here, but some key points might be noted.

First, he argues that the populist constitution of 'the people' cannot be understood as a logical process. It does not involve aggregating popular demands, elevating one or some demands above the others, or extracting their lowest common denominator. Rather the unifying element or symbol is one in which the specificity of constituent demands may be lost, subsumed or suppressed. That is to say, the unifying element is emptied or devoid of content derived from or dependent upon any of the chain of heterogeneous demands it represents. It is this *empty signifier* that is the key to performing the unifying role in populist formations. It also means that they are inherently unstable and volatile. The more disparate and diverse the demands and grievances the more imprecise, vague, and protean the signifiers required to unify them. Hence demands for 'justice' or 'freedom' often play a role in populist articulations because different groups can in effect pour their own content into such amorphous concepts. It is not hard to think of examples in the penal area, like 'zero tolerance', '3 strikes', and so on.

Of equal importance is that this is a process that operates on the *affective* domain of life – on the non-rational, the emotions, hidden desires and motives, the unconscious. This is of course what was both described, and found troubling, in a long tradition of thought concerned with collective or

mass phenomena – early group psychology, Le Bon's work on 'the crowd', and many later theories of mass society (LeBon, 1926). Suggestibility, imitation, disinhibition, contagion, and hysteria were seen as intrinsic to collective behaviour, leading to distortions of reality, manipulation of language, the elevation of the emotional over the rational, appeals to naked instinct, and the ever present risk of regress from civilised norms and restraints. As Laclau shows, the pathologising of collective phenomena led to their being expelled from political theory and in effect handed over to the social sciences, including criminology.

Laclau undertakes a recovery operation. He argues that there is much 'descriptive validity' in these theories, and particularly the emphasis on the non-rational and the affective dimensions of group processes of identity formation. But he rejects their framing by reference to the normal/pathological binary. Stripped of their negative overtones, he suggests the processes in question can be readily understood and recast in the conceptual terms of contemporary post-structuralist theory. Post-structuralism rejects correspondence theories of language and knowledge. Language, discourse, and knowledge do not conform to the model of a transparent conduit for conveying meanings or reflecting realities that are external to the means of their communication; rather, they actively constitute meaning and reality. The absence of a fixed relation between signifier (word/sound/image) and signified (concept or meaning) and the related creation of open-ended chains or pluralities of meaning ensure there is no ultimate foundation upon which claims to truth versus falsehood, the rational versus the emotional, the real versus the imaginative, and so on can be sustained. The collective processes that theorists like Le Bon depicted as distorting reality, perverting meaning and destabilising identity are, for post-structuralism, *intrinsic* to language and all sign systems. Meanings are always unstable. The fictive is always present in the constitution of what we take to be 'the real'. Because identity is mediated by signs and discourse it is subject to all the processes and instabilities that are characteristic of these systems.

The treatment of populism as a corrupted form of politics in political theory, the academic social sciences and everyday political commentary is underpinned by precisely those assumptions and prejudices which Laclau challenges. His critique seeks to restore populism to a more central place in the formation of political identities and thus also in contemporary political reflection and practice.

Populism and penal politics

It is now necessary to briefly reflect on how this analysis might relate to the penal realm, not just as regards the *content* of penal policies and practices (which has been the central focus of analyses of penal populism), but the manner in which, under historically specific and contingent conditions,

populist discourse incorporates themes of crime and punishment into a political practice, into particular modes of address or construction of political subjects and constituencies.

Recalling the features of populist rationality described above – the appeal to 'the people', the commonplace construction of 'the people' as victims of a malign, corrupt or indifferent system of power and political mobilisation around some sharply drawn principle of social antagonism – it is not difficult to see how crime and punishment can operate as important populist signifiers. And perhaps this is particularly so in conditions, such as those of many late modern societies, where the political bond has been thinly stretched.

Needless to say, this points to the likely conservative role of such populist interventions in the contemporary world: the temptations to nurture a sense of shared victimhood at the hands of indifferent elites and to displace widely experienced insecurities onto readily identifiable scapegoats, both of which engender support for punitive, exclusionary policies. These are precisely the developments we associate with penal populism. And that crime and punishment is very difficult ground for left and progressive politics is hardly in doubt. It is nevertheless a mistake to conflate populism with punitiveness (as analyses of penal populism invariably do). Rather it is necessary to divorce the two in order to begin to consider the very different ways in which (populist) politics and the penal might be articulated.

It is, after all, possible to point to left or progressive populist interventions around crime and punishment, although they rarely announce themselves as such. Left realism in the 1990s involved at the least a flirtation with populism. John Pratt's analysis of scandalising around prison issues in New Zealand could be seen as commending a populist response to penal populism in that country (Pratt, 2008). The current 'Justice Reinvestment' movement, which has enjoyed some success in the US at curtailing penal excesses, trades in its own way on the notion of justice as a floating signifier that may draw together very different constituencies: from fiscal conservatives who disdain public waste to liberals whose central concern is with a 'just' and effective criminal justice system to left, social democrats for whom justice encompasses a redistributive agenda to communitarians who would like to see a greater emphasis on local control and accountability. The increasingly influential restorative justice movement seeks to cut across the traditional victim/offender binary upon which penal populism has operated so effectively. By reflecting on such examples from this political standpoint, we might better grasp their popular appeal and their potential role in a reconfiguring of penal policy and politics.

We might recall also that the fixed and entrenched moral boundaries suggested by the abstract categories of criminal law are frequently belied by more complex social realities. The moral tables are often turned, conventional hierarchies are mocked and legal norms neutralised by more

compelling values. There is no dearth of populist symbols from the wrong side of the tracks, including Australia's most famous outlaw son, Ned Kelly. The outsider, the bandit, the criminal, has on more than a few occasions been the popular bearer of a critique of power, privilege and oppressive authority and its chaffing constraints; a figure who sometimes lends a political inflection to the 'subterranean values' of society, which always include some reservoir of anti-institutional, anti-status quo sentiment (Hobsbawm, 2001).

Consider the recent example of David Hicks as political symbol in the context of Australia's participation in the US-led global war on terror. The former Australian Government's highly publicised disavowal of Hicks, and any responsibility to him as an Australian citizen, served initially as symbol of the country standing shoulder-to-shoulder with George Bush in a popular 'war on terror'. At the time Hicks did not cut a very sympathetic figure with average Australian voters. As time passed however his situation became a much more ambiguous and contested one. For many he came to symbolise the political cynicism and deceit surrounding Australia's participation in these campaigns and the national toadying to US power at the expense of Australian interests, a symbol the Howard Government took strenuous steps to neutralise at the time of the 2007 election. Media commentators point to gaps in Hicks' account and query that he was quite the innocent victim he claims, but this is largely irrelevant to understanding Hicks as political symbol. For many people it fails to alter the central fact that he was a minor player who became a political pawn in a cynical system of power.

It is also helpful to see contemporary populist interventions against the backdrop of the advance of a 'post-ideological' rationality of politics as mere administration, a disenchanted realm in which problems are managed and interests coordinated according to technical criteria and pragmatic calculation. This strips politics of what Margaret Canovan calls its secular 'redemptive' face, of the moral and emotional appeal of the democratic 'promise of a better world through action by the sovereign people' (Canovan, 1999: 11), a promise that was potently, if only momentarily, stirred by the 2008 Obama presidential campaign. Populism is surely in part a response to this ascendancy of the pragmatic and managerial over the redemptive face of politics.

In like fashion penal populism may be a response to – or part and parcel of – the moral and cultural sanitisation of the penal realm, reflected in the rise of risk and managerialism and the central preoccupation with system maintenance and efficiency in the justice system. Richard Sparks argues that we should not (as others have done) see managerialism and populism as *competing* trends or influences, but consider the possibility that a populist political rationality and an administrative rationality may be mutually necessary and simultaneously in play: one operating in the political foreground – the domain of representation – and the other backstage – where the logic of pragmatic, managerial calculation prevails (Sparks, 2001).

If Sparks is correct, one reason for the struggling political fortunes of the left is that it has become suffused by a rationality of politics as administration and is seemingly incapable of articulating a credible, progressive political vision. Taking populism more seriously (which involves more than dressing political leaders in hard hats, fluoro vests, or Akubra hats as occasion demands) will hardly suffice to rectify this, but it may be a necessary element in any revival of left ideological and political fortunes.

Conclusion

The argument of this chapter is that we should take populism more seriously as both a regular, inescapable dimension of politics and one with no essential ideological or social belonging. In assuming it to be inherently reactionary, the critics of right wing populism and contemporary penal populism, surrender significant political ground to opponents.

For those who see populism as unavoidably exclusionary in its implications, two general considerations are worth bearing in mind. First, it may be that any effective, democratic, inclusive (and legitimate) system of politics will be exclusive in some sense. Building the forms of political identity essential to inclusive polities can only be undertaken within limits, which are presently predominantly national in scale (Hirst, 2005).

Secondly, the emphasis on exclusion can be politically lopsided, overlook the challenges of building national popular identity (what Gramsci saw as *the* hegemonic project) and downplay the political achievement this represents. As Judith Brett, the foremost historian of Australian conservative politics, has pointed out: 'Nations are not simply formed and defined by their opposition to or difference from some Other; they are also formed and defined by shared experiences and collective memories. They have centres as well as borders' (2005: 40). National popular identity and sentiment make certain forms of cooperation and collective political action possible. This should not be sniffed at.

In similar vein, Canovan has pointed out that the populist promise that political power might be made transparent to the popular will '... is not entirely illusory: it really is the case that people who can manage to believe in the possibility of collective action and to unite behind it can exercise more power than if they give up and concentrate on their private affairs... Unrealistic visions may be a condition of real achievements as well as being a recipe for disappointment' (1999: 13). There is no better contemporary example than the 2011 uprisings of the 'Arab spring'. They are instructive in so many ways: as reminders of the volatility of politics, the suddenness with which apparently stable power blocs can crumble and realignments occur in the face of unpredicted, unlikely assertions of popular will, the power on occasions of imitation and the role that localised events (one street vendor's self-destructive protest against the quotidian corruption of the Tunisian state;

the vicious killing of a student dissenter by Egyptian police) can play in personifying oppression and crystallising the will of 'the people'.

Note

1. This is the starting point for Laclau's (2007) attempt to analyse the political logic of populist political practice in preference to those studies that have strived, in vein, to define it in social or ideological terms. Useful historical studies are provided by Canovan, 1981 and Kazin, 1998. Kazin provides a history of populist politics in the US only (a country with strong populist traditions), but in so doing demonstrates Laclau's key point that populism is without any necessary ideological belonging to the left or right of politics.

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8

Image Work(s): The New Police (Popularity) Culture

Murray Lee and Alyce McGovern

Introduction

This chapter identifies emerging forms of police 'image work' (Mawby, 2002) that we argue also operate as a form of 'simulated policing' (O'Malley, 2010). This policing takes place not on the beat or in the patrol car or even at the police station. Rather, the policing we identify here occurs in virtual cyber-spaces, on tele-visual 'observational documentaries', and through the lens of the police digital video camera as reproduced on the daily news bulletin. Yet while these forms of simulated policing rely on a swathe of new technologies, they are traditional in nature. That is, they generally seek to achieve traditional goals of public policing such as the deterrence of crime, social control, compliance with the law, and seeking to secure public consent for policing.

Drawing on qualitative data from research interviews with key public relations (PR) professionals with New South Wales (NSW) and Western Australia (WA) police, we argue that policing and its relationship with the media and the public is undergoing significant change and that many contemporary images and representations of policing, *are* policing. That is, the divide between operational policing and police media work is collapsing. Policing organisations are putting representations to work for them in ways that not only aim to improve their corporate image, but which seek to increase the legitimacy of the organisation, deter potential offenders, and increase public compliance and co-operation. In the process, this new police popularity culture has resulted in the line between policing, the media and popular culture becoming increasingly blurred and fluid.

Police popularity culture

Criminology has long discussed and researched policing cultures (Chan, 1997, Waddington, 1999). Likewise, images and popular media representations of policing have been long-standing topics of interest (Reiner, 2003,

Manning, 1999). Moreover, there has been considerable research on the relationships fostered between news journalists and police (Freckelton, 1988, Surette, 2001, Mawby, 2002, 2010). However, the place of police as 'knowledge brokers' (Ericson and Haggerty, 1997) within media discourse and public representation has, for the past decade or so, been going through a significant transformation. Only now are we beginning to understand the scope and shape of that transformation. The changes to which we refer are not simply a rebirth of police media relationships: that change began in the 1980s with the development of professionalised police media and public relation units (McGovern and Lee, 2010). Rather, we are in a period where police media public relationships have become liquid, continually shifting, folding in on themselves. Policing, news, and popular culture are colliding, feeding off themselves, being reproduced and represented in ways Baudrillard (1983) could have only imagined 30 years ago. Welcome to the new police (popularity) culture, where Scotland Yard employs ex-News Corporation staff to manage their media profile and public relations, where (supposedly) routine policing becomes entertainment, and where police organisations are popular Twitter and Facebook friends. To paraphrase Ferrell, Hayward and Young (2008: 81), criminology needs to make sense of the 'blurred line between the real and the virtual' where 'mediated processes of cultural reproduction constitute the experience of crime, self and society under conditions of late modernity'. This chapter seeks to make sense of these blurred lines in relation to the new environment of mediatised policing.

We live in an historical moment where image is paramount. While image has always been important for the legitimation of policing organisations (Emsley, 1983, Reiner, 2010), there is now a significant difference in the ways in which images are produced and circulated (Manning, 1999). While the examples we give here are certainly not exhaustive, three recent developments in policing strategies are illustrative of these changes:

1. Police engagement with social media – Twitter, Facebook, YouTube, and blogs;
2. Increasing police engagement with reality television – so-called 'ob docs' or 'observational documentaries';
3. The introduction of police 'multi-media units' or what are essentially in-house television production facilities.

Add to this the expansion of police media units/offices which has taken place over the past 20 to 30 years and what we see is the development of a new police public-relations apparatus, the likes of which would have been unthinkable even ten years ago.

We and others have argued elsewhere that in many ways this expansion is not so surprising (McGovern and Lee, 2010, Lee and McGovern, 2012,

Mawby, 2002). After all, police agencies have come under increasing observation from a population and media hungry for stories and information about crime and a 24-hour media cycle desperate for images, stories and print. Factor in the explosion of citizen journalism facilitated by the growth of the internet, and the police are perhaps the most watched organisation in the world in a panoptic/synoptic relationship, as has been outlined by Mathieson (1997); that is, while the few watch the many, the many also watch the few. It is not just the size of the expansion of the police public-relations apparatus that is significant: it is its form.

'Simulated policing'

In order to better interpret these developments, we draw on an emerging body of criminological theory. In a recent influential article, Pat O'Malley (2010) has outlined what he argues are new forms of 'simulated justice' which include 'simulated governance' and 'simulated policing'. This 'simulated justice' is a form of governance operating at the level of 'the bar code reader at the supermarket, the freeway, the passport gate, the ATM, the baggage carousel, [which] all exist to govern and police without touch, and thus to maximise good – desired – circulation and interfere only with "bad" circulation' (2010: 796–7). Such policing indeed governs at a distance. It '... governs distributions and complements individual discipline' and 'simultaneously expands the reach of policing while at the same time reducing its unit cost and visibility, and minimising the friction imposed upon "good" circulations' (2010: 797).

Quite obviously the specific policing techniques to which we refer here are quite different in nature to that outlined by O'Malley. We are not looking at a growth in 'telemetric' policing, or indeed a reduction in the 'visibility' of policing; quite the opposite in some cases. However we want to identify a simulated form of policing that we believe has grown in chorus, and indeed in contemporaneously, to the simulated processes and strategies outlined by O'Malley. Moreover, like the policing processes outlined by O'Malley, the techniques we wish to identify also rely on a swathe of new technologies.

The simulated policing to which we refer means a number of things but first and foremost it refers to the fact that policing is increasingly occurring at the level of the policing image – simulations of policing. While the Peelian model of policing has always relied on the image and representation of policing to legitimate the institution (Emsley, 1983, Reiner, 2010), the difference is that now the representation of policing *is* policing – or at least an operational simulation of traditional policing. The image not only represents policing but increasingly the images of policing and actual operational policing are inseparable – they are, for all intents and purposes, the same thing. This is not the loss of the referent, in the Baudriardian (1983) sense. There is little doubt that policing is happening. Rather, policing is

occurring through often disembodied image work, and this image work is also occurring though policing.

The second point about this simulated policing is that those engaged in its production and reproduction believe in its authenticity, its operational utility, and its capacity to increase confidence in policing and the legitimacy of the police organisation. As one WA Police PR respondent put it when discussing the value of police observational documentaries:

> I think the positive thing is, particularly, the community can see the sort of work police do and for instance a lot of the work police do at night time and in night spots where all the action is, it is all about alcohol related violence really...

And as a second WA Police respondent put it:

> Well the most important thing is to maintain public confidence. That really is the central tenet of the whole business. We want to communicate to the public through the media and I often say to my staff, when you are dealing with journalists you have to take the view that you are communicating to the public and they're just a conduit to that.

Simulated policing is not just about (re)presenting images of police work – although it does this too – rather, policing operates virtually. So this simulated policing is more than a cynical attempt at spin produced by increasingly professional and savvy public-relations units – although it most certainly is this at times. Rather, it insinuates itself into the public conscience through an ever-increasing number of virtual media formats.

The third point about simulated policing is that it potentially has an almost unlimited public reach – much as O'Malley (2010) identifies in the simulated policing practices to which he refers. Such ideas are reflected in responses such as this from a NSW Deputy Commissioner:

> Because there's a bit of research in the UK, and there's a lot of anecdotal information, that says visibility – police visibility... the community always says they want more police and want to see more police, etcetera. But visibility doesn't have to actually be a physical presence. You can be visible in other ways.

Where traditional public policing is temporally and spatially confined to public spaces and private spaces (in particular circumstances), the continuous 24-hour cycles of police shifts and the limitations of staffing levels, simulated policing enters the private and public spheres through the internet, the television, the phone application, the tablet or iPad. It is not big brother watching, it's rather more like a continuing reminder

that police are there on your behalf if you are law abiding, that you can interact with them, and that they are doing, well, 'something' as one head of police public affairs told us. Watching, interacting and being entertained by policing (the synopticon) (Mathieson, 1997) simultaneously operates as a form of bio-power aimed at regulating freedoms (Rose, 1999, Foucault, 1977). The following discussion uses in-depth qualitative research interviews conducted with seven public relations professionals in 2010 in the NSW Police Force and WA Police to highlight some specific examples of this simulated policing.[1]

Policing through social media

Within the space of two to four years, social media has become a key component of policing strategies, both in terms of police investigations as well as media and public engagement. Indeed, while police organisations see the great potential of the latter as a policing tool in its own right, they can easily become overwhelmed by the amount of information they manage (Manning, 2008). As a WA Police media professional noted:

> Oh the demands for the ready-made immediate story, I think in the last few years we've had a huge increase, a massive increase in different types of media. It's not just television, radio and newspapers anymore, it's online news who have a deadline every ten seconds, so they're on the phone all day and with Twitter and Facebook, we'll get phone calls saying 'Oh so and so just said on Twitter this...' well we don't know 'cause we can't cover every Twitter entry in the whole world. So we've got to...you know, it's a huge challenge, particularly when we've got our staff level here is a fraction of what Sydney and Melbourne have – that hasn't even changed and the media has quadrupled in that time.

The rapid pace at which social media is moving has meant that whilst police jump on the bandwagon, the potential challenges and trajectory of these developments is unpredictable. These very issues are already being deal with by the NSW Police Force which has over 50,000 Facebook fans alone. If the number of fans one has on a Facebook page is a reflection of popularity, NSW Police are one of the most popular kids in the simulated policing class. The page operates largely as a news feed, with police media releases constituting the bulk content on their Facebook page. A story/release posting on the page will then typically attract a multitude of comments and feedback from the public who are fans of the page. One post from Friday, 1 July 2011 at 5:50 pm is pretty typical of the standard post content:

> Police investigate after child approached – Phillip Bay
> by NSW Police Force on Friday, July 1, 2011 at 5:50pm

> Police in Sydney's eastern suburbs are investigating after a child was approached in Phillip Bay yesterday. About 8.15 am, the 11-year-old boy and a friend were waiting for a bus on Anzac Parade when it is alleged a dark-coloured sedan pulled up next to the boy.
>
> It is alleged the driver attempted to entice the young boy into the car however the boy walked away and got on a bus. Police were notified and officers from both Botany Bay and Eastern Beaches Local Area Commands are investigating the alleged incident.
>
> Detectives are appealing for anyone who witnessed the incident or any suspicious activity in the area, to come forward. Police believe the driver was trying to disguise his or her appearance by wearing an orange wig, large reading glasses and heavy makeup. Anyone with information should contact Eastern Beaches Police via Crime Stoppers on 1800 333 000.

Fan comments and responses are also fairly typical of the reaction to such content, and indicate the extent to which to the public are drawn on and drawn into this simulated policing:

J L S: What is our world coming to. That is disgusting.

B S: We have had a child approached in the Woolgoolga area too.

J N: yes we also have had around 20 children approached now in the shell harbour area, in a matter of 4 weeks.

V M W: so r u saying their 'heavy make-up' made then look lighter then [sic]they were or it was light so they wouldnt [sic] look as dark.

J N: Im [sic] sure if it was the prime minister that was kidnapped they would have 24 hr broadcasts, thank you NSW police force for keeping us involved in these attempted kidnappings, i just wish the news would do the same. I really hope that young girl is found safe.

B B: As far as Im [sic] concerned I will break the Law If anyone touches my kids AMEN

S B: I'm sure you would have a whole army of people who would do that Bianca if anyone knew who these low life mongrels are...

B D: Drag queens lol

S A: this is becoming a sick world people who do tht [sic] should be locked up 4 life

So here on the NSW Police Force Facebook page, motives are imagined, single cases are projected on to greater crime and social problems, similar experiences are shared, and information on crimes is revealed. Very often police are congratulated for their work. In all, the page provides a space for

expanded discussion about policing and police related matters. Occasionally negative comments are posted such as this:

> P of the family K: Looks likes a fag page to me...

However, almost immediately upon such a comment being made, 'fans' come to the rescue of the NSW Police, such as these:

> P C: illiterate knob-jockey!! ... and obviously Centrelink pays your wages Mr K...
> M B: this idiot wants all of this attention ... so just stop giving to him ... ppl [sic] with his mentality thrive off of everyone attacking it ... just ignore it and hope it crawls back in its hole.

As the director of the NSW Police Force Public Affairs Branch told us, he rarely has to mediate when such negative comments appear. Fans on the police Facebook site often do the job for police, putting the offending contributor in their place.

As the public interaction with and response to police social media activities demonstrates, policing is simulated and played out in an on-line web culture where interested members of the public engage in crime talk and policing discourse – a kind of on-line virtual or simulated community policing. Indeed, in NSW and Victoria, Facebook has recently expanded down to the Local Area Command (LAC) level, where it increasingly plays the role of a localised community forum (McGovern and Lee, 2012).

Policing and reality television

Policing agencies have also become increasingly keen to partner television production companies in producing reality television series of policing, or 'observational documentaries' (ob-docs) as they are somewhat euphemistically known. In NSW at the time of our interviews the Police Force were contracted to be involved in no less than six separate observational documentaries. Western Australian Police were also engaged in a number of 'ob-docs' and had been for some time. As the head of WA Police Media told us:

> We were the first state to sign up to *The Force*. It was a wholly a West Australia Police program when it commenced, I think four-and-a-half years ago. It now involves New South Wales, Northern Territory and Tasmania. We see that as a highly valuable way of, high impact way of – you know what the greatest benefit is? It's been able to portray the realism of policing and also our professionalism. I'm not so interested as the media boss is in showing us catching a crook as how courteous or

> helpful the police officers are. It's difficult to measure the value of that. We've done one set of external research that came back that said people's views had significantly changed about policing as a result of seeing that. So we're doing that. We're doing a spin-off series with the Seven Network on dogs. We've just commenced a series with Foxtel called *Kalgoorlie Cops* which focuses on the gold fields and we're also doing a project for the BBC which will involve one of our officers going to the UK...

While these commercial arrangements also provide an income stream for police organisations (although not originally for WA Police as they were quick to point out), this appears not to be the key justification for police involvement. Rather, these provide another outlet for the extension of simulated policing; not only showing police 'doing something' as our NSW Police respondents put it, but also providing narratives of deterrence and attempting to build trust in police and legitimacy in the police organisation. As Tyler (2006) and Hough, Jackson, Bradford, Myhill and Quinto (2010) have noted, legitimacy in the organisation can also have the effect of increasing public compliance with the law and co-operation with police. Thus the governing rationality here suggests this simulated policing is perceived by its advocates to have very real effects. As the head of the NSW multi-media unit put it:

> Deterrent, it's the word... Actually the catchword of an awful lot of these programs is that at the end of the day it's deterrent that will stop them. It's to stop them drink driving, it's to stop someone who watches *The Force* – and *The Force* is another one, an observational documentary, just tracking cops in their various roles from general duties right through to specialist squads and literally sticking behind them like glue and following their moments.

While humanising policing was another justification for police engagement in these programmes, it was clear that there was a broader strategy that saw particular programmes partnered for specific purposes, as the NSW Director of Public Affairs notes:

> there's three sides to that, humanising the job is good, there'd be those who are saying... some elements of the organisation rely on a fear factor simply to stop something happening so if the riot squad turn up at a party that's out of control they want people to stop what they're doing the moment their presence is there so they actually don't have to do anything... human... that's why they cruise around in [black] vehicles and wear... scary looking clothes because people go 'ok I get the picture'... [E]ach show will have a different corporate objective like you know *Crash Investigation Unit* clearly has road safety messages in it so that's why we

> make that show and because when you're confronted with those investigations you get people thinking about those sorts of issues.

Clearly then this simulated policing is targeted. A range of operational messages are being disseminated in an attempt to foster behavioural changes in, or at least a reflection by, members of the public. Moreover, these messages are controlled when need be and depending upon the programme itself. Not unusually though, one would expect that production companies self-regulate what they put to air in any event, given the mutually beneficial status of the programmes to the producers, the network and the police. The Director of Corporate Communications at the NSW Police Force put it thus:

> We get to vet it. We get to vet it. We make sure that we're not going to portray ourselves in a way that is wrong and we're not going to let something that is clearly wrong go to air. But we've allowed things going through, it's run with the legal side as well and some people mightn't like some of the stuff. As we said with *Drug Lords*, I mean there's material there that some of the police don't like seeing but in some ways other officers see that as a ... other senior officers see that as a great education process, so that's there. So yeah, we oversight it ... I can't think of many programs where we'd even make dramatic changes on anything.

The Director of the WA Police Media unit saw the objectives of 'ob-docs' similarly:

> [The objectives of these programs are to] [d]emonstrate the professionalism of the police; raise public confidence in policing in our jurisdiction; allow the community to better understand the challenges that the police face; allow the community to understand the types of decision-making that the police have to make. For example, there's been recent controversy about the use of Tasers and the roll out of those to general police. Through shows like *The Force*, we're able to show that the training that occurs with things like Tasers and how people don't just immediately whip it out and Taser somebody but often, how a situation in a street might evolve. So if initially there's an argument, the police try to talk, to use verbal judo to talk the person around and then ultimately, if it escalates and they have to use their force option.

Interestingly, the West Australian Corruption and Crime Commission released a critical report in October 2010, shortly after this interview, demonstrating that Tasers were now a 'compliance tool' and 'were increasingly being used against people resisting arrest, up from 20 per cent of Taser deployments in 2007 to 43 per cent in 2009' (Watson, cited in Guest, 2010).

The report followed the public release of video footage of a man in police custody being tasered 13 times by WA Police.[2]

Police and multi-media production

If you were watching the television news on Channel 7 and other networks on 22 June 2010, you would have seen a 67-year-old Sydney man arrested and charged with 31 sexual offences against three young boys. The man was arrested at his Northbridge home on Sydney's North Shore and escorted, handcuffed by police, to a waiting police van.

You would have been forgiven for thinking that Channel Seven News – or whatever network you were watching – was reporting from the scene, cameras ready, reporter in on the action. They weren't. The footage was filmed, cut, edited, produced, placed on YouTube, linked to the NSW Police Force web site and social media accounts, and eventually delivered to the networks by the NSW Police Force Multi-media Unit soon after the arrest. Similarly, the detailed reports of the arrest in the daily papers were primarily taken from NSW Police Media Unit media releases.[3]

Multi-media production units are gradually finding their ways into police services. As Ferrell, Hayward and Young, (2008:184) put it, 'police shoot more images than they do people'. Many of the images related to crime and policing that we see on the evening news bulletin or in the daily newspapers have often been shot by police camera crews. Not only that, in many cases the film has been edited in-house, and the story presented as a completed news item, ready to report. Thus, what viewers perceive as an objective news story is actually one completely framed, produced, and delivered by a policing organisation and its media staff.

On one level this is not so surprising. Our earlier research has shown how police media releases are often reproduced in newspapers verbatim (McGovern and Lee, 2010). In this sense a more sophisticated video production unit is simply an extension of the already existing police-media apparatus. However, the primacy of the image in contemporary culture means that this extension is significant. The ability of policing agencies to frame policing and crime issues is great. To return to the news story that began this section of the chapter, the NSW Police Corporate Communications director noted in his discussion with us:

> we shot some video today of a chap arrested in Northbridge this morning for some crimes where he has assisted Dolly Dunn way back when in procuring young lads for child sex assaults... it sounds like a bit of a mastermind in this sort of area, so he's about to face something like 200 charges this afternoon, a 67 year old. Now we shot some video of his arrest... it's not all about us just shooting the videos and releasing it to the media but it is about protecting the neighbours, there may be family

> involved. If you tell the whole media to be there at the same time you do the collateral damage to the case; it could be quite large. So in this case we would shoot it but the media would know a whole lot of other background information by other ways, through fact sheets and stuff like that, or depending on the nature of the story we might get them in and have them there soon after the arrest. So the actual arrest part is protected in the sense that we're not allowing things that are going to allow cases to fall over later on for legal reasons.

Once police would have relied on media tip-offs and preferred journalists to get the coverage required to get their story to press. No doubt this still occurs, although we imagine much less than in the past, especially with more detailed policies in place that frown upon favouritism in media access. Police now have the capacity to control these stories in ways that their forebears could only have dreamt, and with the expansion of police media activities in more proactive ways, what does not make the news will almost certainly make the Facebook, Twitter and YouTube accounts, reaching many more citizens than previously possible.

Conclusion

These new techniques and technologies being deployed by policing organisations signal a significant intensification of police engagement with the media and the public. While in many senses these strategies are simply extensions of traditional forms of media and public engagement and, indeed, traditional forms of public policing, the examples we have discussed here all take place in newly emerging virtual and tele-visual contexts. These are representations of policing that simultaneously *constitute* policing: they are 'simulated policing'. These strategies break down the boundaries between popular culture, policing culture, operational reality and fictional entertainment.

That most watched of institutions (Mawby, 2002) is revelling in the spotlight, and developing new capacities for taking advantage of its popularity as knowledge brokers for crime and policing to extend the reach of its regulatory capacities. As the NSW Police Corporate Communications Director succinctly put it in relation to the increasing police use of YouTube:

> We put [media] on YouTube not just our successes but we'll put on these appeals, we've got crime prevention tips and if there's a statement by police to be put out we put it up through that various ways. So YouTube's used – we've got about 108, 109 videos up I think on YouTube at the moment under the police channel website, and I look at the number of views we get – we're into the many thousands of views, it's equivalent of LAPD.

> It's certainly equivalent of LAPD and rivalling New York in some other ways, and they've been in that space a couple of years longer than us.

Images of policing are no longer simply re-presentations. Policing itself is being altered by its engagement in these virtual fields, these simulations. On one level this is a more democratic model of policing, with constant public feedback and (virtual) interaction. On the other hand it demonstrates how police, as knowledge brokers, have increasing capacities to produce and disseminate preferred narratives and images.

Moreover, as the recent News International scandal in the UK demonstrates, there are dangers for police organisations that become blinded by their own popularity culture. Like the UK Metropolitan Police, most of the public affairs professionals in Australian police organisations are former journalists – generally senior figures who have experience covering crime news. The mutually beneficial relationship between the media and police has the potential to blind both to their responsibilities. A critically engaged media has been vital to the detection of police corruption and misconduct, for example. So while there are potential regulatory benefits in these modes of simulated policing, there are dangers in embracing a police popularity culture where only image works.

Notes

1. This is part of a broader research project *Policing Public Opinion*, which seeks to interview public affairs/public relations professionals from across all Australian policing organisations.
2. Available at http://video.theaustralian.com.au/1606567920/WA-Police-Taser-man-13-times, date accessed 20 September2011.
3. See, for example, http://www.smh.com.au/nsw/sydney-paedophile-ring-arrest-20100622-ytu1.html#ixzz1SdFcGl9x, date accessed 22 September 2011.

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9

Islamophobia, Human Rights and the 'War on Terror'

Scott Poynting

Introduction

When, in September 2001, the right-wing Republican president of the US proclaimed the 'war on terrorism', which he also dubbed a 'crusade', George W. Bush was soon joined in such battle by his staunch British ally Tony Blair, a Labour prime minister. A populist prime minister of the conservative coalition in Australia, John Howard faithfully entered the fray on behalf of this nation, which likewise imagines itself to have a special relationship with the USA. All these allies participated in the unlawful invasion of Afghanistan the following month, in the name of this war on terrorism, and of Iraq eighteen months later. The forces of all three countries are still in Afghanistan, with very little difference to this fact having been made by the now *Democratic* presidency in the US, the now *Tory-led* coalition in the UK, or the now *Labor* government in Australia. Really, existing labour parties – when in government, that is – have taken a very similar stance in relation to securing militarily the US-led global empire to that of their conservative opponents. All have participated similarly in state crime in the 'war on terror'; indeed all have been comparably complicit in what I call 'empire crime'.

Global Islamophobia

In the global 'West' during the course of the 'war on terror', the racialised 'Muslim Other' has become the foremost 'folk devil' of our time. This process of constructing this Other didn't *begin* with 9/11 but since then has intensified to undermine civil liberties and indeed human rights in liberal democracies that I have mentioned – the US, the UK and Australia – but equally in western Europe, Canada, and other 'Western' nations. Social-democratic governments have been no less prone to these developments than their conservative rivals; indeed in Britain they have arguably shown even less regard for traditions and conventions of civil liberties and even the rule

of law. The Muslim Other can be spied and eavesdropped upon, secretly filmed or recorded, stopped and searched, intimidated and harassed, and ultimately detained without trial, or even rendered and tortured, assassinated or summarily executed. The 'war on terror' has had its home front and its enemies within, as well as its military interventions in Afghanistan, Iraq and more covertly and undeclared in Pakistan (O'Connell, 2010) and the Sahel in Africa, from west to east (Keenan, 2012). Counter-terrorism has involved state political violence – unlawful, ethnically targeted and deploying terror tactics – in the hot wars, the covert wars, and the homeland security type of 'war on terror'.

In arguing that the Muslim Other as folk devil is a construction that legitimates imperialist grabs on the global stage and provides distracting scapegoats in the national arena for the real casualities of global capital under neoliberalism, I am proposing that the moral panic model, developed in the conditions of the 1960s, can be extended to recognise the *globalisation* since then of the social processes that the framework described and explained (Morgan and Poynting, 2012). In renovating the moral panic model for a global era, questions of geographic scope, of relations between the local or national and the global, and also of duration and fixity of the panics need to be addressed. Moral panics can now be transnational in ways that the 1960s furore and crackdown over Mods and Rockers (Cohen, 2002) were not. Outrage over specific local or national issues can be linked ideologically to globalised folk demonography: for instance as in Australia with the xenophobic vigilante Cronulla riots in 2005 and as in the United Kingdom since an Islamist anti-Iraq war demonstrations in Luton in 2009 prompted the formation of the violent anti-Muslim English Defence League. That popular media, right-thinking citizens and populist politicians condemned the violence in each of these instances does not mean that they did not also empathise to a significant extent with its motivations and share the common sense of the proponents, demonising the 'Muslim Other'.

Such demonography endures, these days, far longer than the relatively short-lived 'splutter of rage' envisaged by Stan Cohen (2002: xxxvii), with nowadays cycle after cycle of panic, of a variety of scopes and localities, drawing on an ongoing and cumulative global stock of othering and moral outrage. Public worrying in Sydney, for instance, in the first decade of this century, was ideologically linked almost instantaneously via internet, with issues in France during the moral panic over so-called ethnic gang rapes, which invoked internationalised ideology about the purported propensity to sexual violence of misogynist Muslim immigrant young men, be they North African, South Asian or Middle Eastern (Poynting *et al.*, 2004: 140–4; Dagistanli and Grewal, 2012).[1] The plight of Afghan women in the backwardness and misogyny of the Taliban regime was given by western ideologues – Bush and Blair among them – as a reason for invasion and regime change, once the supposed support for al Qaeda was nowhere to be found

there. So we have a globalised Muslim folk devil, assembled over a decade or more, informing and motivating sporadic panics that are often local or national.

Thus updated, the moral panic model can usefully comprehend how Western societies have increasingly responded since the 1970s and 80s to 'global' Islam and to Muslim minorities amongst their citizens. In the post-9/11 West, some categories of citizen are represented as dangerous to 'our way of life' and their communities are suspected of harbouring enemies of the nation. This demonisation conflates particular cultural forms with disregard for the law and enmity towards the nation. In this ideology, Muslim minorities appear as a divisive and even subversive influence, refusing to integrate, and undermining national values. The racialised folk devil that is thus constructed as an 'enemy within' is linked, in a powerful ideological articulation, with the global Islamist terrorist threat. Media coverage of 'radical' Islamists along these lines implies that many of Muslim background are taking advantage of liberal democratic freedoms to undermine liberal democracy and even to support terrorist violence to that end. The familiar hysteria is circulated and othering is amplified, stern measures are called for and tough responses are elicited from the state (Morgan and Poynting, 2012).

Labour's record

It appears that in imposing these stern measures and making populist tough responses, social-democratic governments have been anxious to match or even outdo those proposed or previously effected by their seemingly more natural proponents on the right wing. Each party proclaims itself 'tough on terrorism' and accuses its opponents of being 'soft on terrorism' in a bidding war that induces an amplification spiral mobilising against suspect communities.[2] In a recent example, a Labour MP in England's West Midlands claimed that: 'The public could be put at risk during next year's Olympic Games because the Government has gone soft on terrorism' (Walker, 2011). The Conservative-led government was introducing 'a charter of rights for would-be terrorists', he said, after the government abandoned the regime of control orders which were imposed under the former Labour government. These orders effected a form of house arrest and strictly limited association and communication of those whom police and security agencies believed were involved in terrorism but could not prove it in court for want of admissible evidence. The Supreme Court in 2010 found that the control orders contravened the European Convention on Human Rights (ECHR).

The control orders themselves had been introduced after the regime of indefinite detention without trial of terrorism suspects who were foreign nationals but could not be deported, imposed under the 2001 Anti-Terrorism Crime and Security Act introduced by the Blair Labour government, was

found by the Law Lords in 2004 to be in breach of the same convention. Lord Nicholls of Birkenhead stated in his ruling that, 'Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law' (House of Lords, 2004: 47). Lord Hoffmann in a dissenting judgment with respect to the breach of the Human Rights Convention, nevertheless ruled in favour of the appeal on the grounds that 'threat to the nation' conditions for derogating from the ECHR were not met, averring (House of Lords, 2004: 53): 'The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.'

Over that period it was ironic to see the draconian excesses of a nominally social-democratic government being tempered in the House of Lords in part through the opposition of more liberally inclined Conservatives. A case in point is the struggle over the maximum period of detention without charge of terrorism suspects. The Blair government had compromised on the 28 days introduced in its 2006 Terrorism Act, having wanted to increase it to 90 days; Gordon Brown settled for 42 days in 2008, having pushed for 56; under the Cameron government it reverted in 2011 to 14 days.

Given political pressure on police – which doesn't exist formally of course – and media attention and crusades and the interaction between these in moral panics, police inevitably make mistakes in the use of such powers. For instance, in 2010 Nottinghamshire police apologised and paid £20,000 compensation for the unlawful imprisonment and subsequent harassment of postgraduate student Rizwaan Sabir who was reported by his own university and arrested and detained for downloading an edited version of the *Al-Qaeda Training Manual* from a US government website as part of his studies at the University of Nottingham, where the work was available in the university's library (Thornton, 2011).

In September 2011 in Manchester, a 54-year-old Pakistani immigrant and former Taliban volunteer Munir Farooqi was sentenced to four life sentences with a non-parole minimum of nine years, alongside his protégé, a white Muslim convert Matthew Newton, who was sentenced to six years for attempting to 'radicalise' undercover policemen who had pretended to be converts to Islam and had kept them under surveillance for two years (Carter, 2011). They were arrested when they attempted at their local market bookstall to recruit the officers to fight for the Taliban in Afghanistan. *The Guardian* called it 'grooming', a handy word for folk devils, since it is commonly used for sexual abusers of children (as we have seen, above). Farooqi was found guilty, in thus recruiting, of soliciting for acts of murder. By contrast, the RAF drone that killed four Afghan civilians in Helmand province in March 2011, like the US drones that have killed hundreds of civilians, including children, in Afghanistan and Pakistan, are not defined as committing murder, let alone terrorism. The judge in the case of Farooqi and Newtown reminded the convicted men: 'As residents of this country you

owe allegiance to the crown; that appears to have escaped your attention' (Carter, 2011). There was no suggestion that Farooqi and Newton were planning to do anything that would be conventionally regarded as terrorism, nor any action on British soil. Their activities were found to be preparing for acts of terrorism, under the 2000 Terrorism Act introduced by New Labour even prior to 9/11. This was terrorism merely because of the definition in that law, which defines as such activities very similar to supporting, say, the Spanish civil war in the 1930s or indeed the Bosnians in their civil war in the early 90s. This legislation, prepared primarily with resistance to the British occupation of Northern Ireland in mind, proves very serviceable in the 'war on terror' against the *new* suspect community.

Margaret Thatcher would not have been unhappy with this law; indeed she famously declared Tony Blair and New Labour among her greatest lasting achievements. Labour has no claim to be less authoritarian in such matters than the Tories; indeed they rather boast that they are tougher.

State crimes

A British-born Muslim from Rochdale, 34-year-old Rangzieb Ahmed, was also convicted under the Terrorism Act 2000 at Manchester Crown Court in 2008 and received a life sentence. Much of his trial was held in camera. Manchester police had colluded with MI5 in outsourcing his torture, in the judgment of former shadow home secretary, the Tory MP David Davis (Cobain, 2009a). Flying from Britain to Pakistan, Ahmed was allowed to leave the UK, with the notorious Pakistani security forces, the ISI, having been tipped off by the British MI5. In Pakistan he was imprisoned without trial for 13 months, kept blindfolded, hooded, manacled and shackled, beaten with sticks the size of cricket stumps, whipped with a one metre length of tyre, and had three fingernails pulled out with pliers, the visual evidence of which was obvious upon his unlawful removal to Britain. During his detention by the ISI, Ahmed was interrogated with questions written by Greater Manchester Police and passed by MI5 to the Pakistani interrogators. Despite all of this, Rangzieb Ahmed's appeal was rejected in February 2011 (Court of Appeal, 2011).

Over 20 cases have been documented of British nationals or residents being taken unlawfully into captivity abroad in the 'war on terror', held without charge or trial, and interrogated under torture (Poynting, 2010a). The great majority of these were subjected to 'extraordinary rendition' by US forces, mostly to Guantánamo Bay but also (sometimes as an intermediate measure) to Afghanistan, being subjected to physical and psychological abuse and interrogation by and on behalf of US agencies. In many cases there is clear compliance of UK security services in the torture of its citizens and residents by foreign powers, by being present and failing to intervene – contrary, of course, to the UN Convention against Torture

(1984). This includes the failure to intervene to attempt to remove British nationals and residents from detention regimes such as at Guantánamo Bay where torture and abuse were known to have been systematically and routinely practised. British citizens and residents rendered by the CIA and tortured, with various degrees of British complicity, include the following. UK resident Ahmed Belbacha was sold to the US for bounty in Peshawar in December 2001, interrogated and tortured in Afghanistan and rendered in March 2002 to Guantánamo where he remains, despite being approved for release in 2007. He cannot be deported to his native Algeria, where he faces certain torture, and the UK has meanwhile rejected his asylum application. Former British resident Farhi Saeed bin Mohammed was seized in Pakistan in December 2001 after fleeing Afghanistan, rendered to Guantánamo in February 2002, and incriminated by evidence of Binyam Mohamed under torture (whose case will be outlined below). He won a habeas corpus case in 2009 but could not repatriated to his birthplace Algeria for likelihood of torture there and was kept incarcerated in Guantánamo. Nevertheless, he was transferred against his will into the custody of the Algerian government in February 2011.

Other cases, which space precludes detailing here, include Bisher al-Rawi, Jamil el-Banna, Richard Belmar, Omar Deghayes and Martin Mubanga, all of whom, with Binyam Mohamed, successfully sued the British government for abuse and wrongful imprisonment. The incoming conservative coalition was very willing to settle these cases last year for millions of pounds in compensation, since they occurred on Labour's watch, and the closure would spare their security forces from further embarrassing revelations in court. All of these men were rendered to Guantánamo and tortured (Deghayes was blinded there) and all allege that MI5 and MI6 colluded in this. Mubanga attests that an MI6 agent and a US military operative tried to recruit him as an undercover agent when he was arrested in Zambia in 2002 and that MI6 connived in his kidnapping and rendition to Guantánamo.

An even higher level of complicity involves actual collaboration by UK intelligence services in the interrogation, under torture, of their own citizens and residents, as in the case of Rangzieb Ahmed. Many such cases came to light in the campaign for the release of Moazzam Begg and especially after his repatriation from Guantánamo, through his subsequent activism on behalf of those still incarcerated there and public testimony about the regime there. Further evidence still, particularly of a documentary nature, has been disclosed in the case of Binyam Mohamed and other instances of British state complicity in torture that have been brought to public attention in association with Mohamed's case.

UK citizen Moazzam Begg was taken by the CIA in Pakistan in 2002, was kept a year in Afghanistan and then rendered to Guantánamo, where he was illegally detained and finally released without charge in 2005. He was

tortured in all three sites and British agents were present at every stage of his journey (Begg with Brittain, 2007). Ruhal Ahmed, Shafiq Rasul and Asif Iqbal, all British citizens from Tipton in the West Midlands, were seized by Northern Alliance militia in November 2001 and turned over to US forces in Afghanistan where they were detained under abusive conditions before rendition to Guantánamo, where they were unlawfully imprisoned until March 2004. In Guantánamo they were severely tortured: hooded, beaten, kept naked, menaced with dogs, chained in painful postures, subjected to extreme cold and noise and light, sleep-deprived, and threatened with shooting (Rasul, Iqbal and Ahmed, n.d.). These, by the way, were exactly the conditions under which the Australian Mamdouh Habib was kept, with the complicity of Australian security services and the compliance of the Howard government (Habib with Collingwood, 2008, Poynting, 2010b). The Labor government has compensated him for this but continues to tough it out with the other Australian unlawfully rendered and incarcerated at Guantánamo, David Hicks (*PM*, 2011). Each of the Tipton Three was interrogated by MI5, as well as US personnel, in both Afghanistan and Guantánamo.

British citizen Tarek Dergoul was also brutally tortured in both Afghanistan (where he had successive toe amputations – once without anaesthetic – after untreated infection) and Guantánamo, where he was also sexually humiliated. He was repeatedly interrogated by MI5 and MI6 in both countries during the regime of torture.

Ethiopian-born UK permanent resident Binyam Mohamed was arrested in Karachi in 2002. US authorities refused to let him go and denied him a lawyer (Reprieve, 2009). Pakistani security services tortured him, hanging him for a week by his wrists with his feet barely taking weight. MI5 operative 'Witness B' went to Pakistan in May 2002 to interview Mohamed. MI5 was informed by the CIA before this that Mohamed was being subjected to ongoing sleep deprivation and threats of 'rendition', which, combined with earlier interrogations, were causing him 'significant mental stress and suffering' (Norton-Taylor and Cobain, 2010a). In July 2002, the threat of rendition was realised and Mohamed was unlawfully transported in a CIA jet to Morocco, where he was tortured over eighteen months. His testimony details scalpel slashes inflicted on his penis and his chest, some 20 or 30 of them over a period of one, sometimes two hours, then a 'burning' liquid poured on the wounds. He was also beaten and starved at various times and continuously deprived of sleep. While Mohamed was being tortured in Morocco, MI5 was providing information to the CIA to aid in his interrogation. Indeed, MI5 agent 'Witness B' travelled to Morocco three times over that period.

British resident Shaker Aamer remains in unlawful detention at Guantánamo (Peirce, 2012). Like Begg, he was taken into captivity by Afghan militias in late 2001 and handed over to US forces. He claims to have been tortured and threatened with death in Afghanistan by US agents in the

actual presence of MI5 and MI6 officers. He was rendered to Guantánamo in early 2002 and has been tortured there.

All of this happened under Labour governments. Security officials could, and often did, plausibly claim that they were all along acting in accordance with secret ministerial guidelines. Former British Ambassador to Uzbekistan, Craig Murray, testified to the Parliamentary Joint Committee on Human Rights in April 2009 that Labour's Foreign Secretary Jack Straw had approved in writing the obtaining of intelligence extracted under torture and received from the CIA in Tashkent; he has a letter to this effect from Sir Michael Wood, legal adviser to the Foreign Office. He claims there is a written minute, classified top secret, of the meeting in 2003 deciding this, with a handwritten note on it by Jack Straw showing 'that this torture policy was under his personal direction' (Murray, 2009). According to Ian Cobain, the prize-winning *Guardian* journalist who broke the torture story, David Miliband similarly during his three-year term as Labour's foreign secretary, 'gave MI6 the green light to proceed with intelligence-gathering operations in countries where there was a possible risk of terrorism suspects being tortured' (Cobain and Karim, 2010). Miliband was always personally consulted by MI6 'before embarking on what a source described as "any particularly difficult" attempts to gain information from a detainee held by a country with a poor human rights record'. MI5 likewise regularly sought such permission from a succession of Labour home secretaries. Home secretary Jacqui Smith faced legal action over allegations that MI5 under her ministerial responsibility colluded with Bangladeshi intelligence officers in the torture of former British public servant from South Wales, Jamil Rahman, who was never charged with any offence (Cobain, 2009b, Cobain, 2010, Norton-Taylor and Cobain, 2010b).

After the torture scandal broke, Prime Minster Gordon Brown promised in 2010 to issue new guidelines and to publish these but he reneged on the promise of transparency.

In September 2011, during the Libyan overthrow of the Gaddafi regime, hundreds of documents came to light in the abandoned Tripoli office of Moussa Koussa, Gaddafi's former security chief, showing how, over 2003–04, Britain's MI6 not only collaborated in 'renditions' of designated terrorist suspects to Libya for certain torture, nominating suspects, tipping off their whereabouts, and supplying information and questions to their interrogators but actually led some of these rendition operations itself (Cobain, Khalili, and Mahmood, 2011). Those tortured include Abdul Hakim Belhaj, the commander of the Libyan rebels' Libyan military council during the rebellion against the Gaddafi regime, who was unlawfully apprehended and rendered by the CIA after an MI6 tipoff in 2004. He was held without trial for seven years by the Libyan state and subjected to brutal torture. During this regime of interrogation under sleep deprivation, noise torture and regular hanging from walls, Belhaj was repeatedly visited and taunted

by Moussa Koussa who enjoyed cordial relations with MI6 (Walker and Sengupta, 2011). Belhaj was also over this period visited and questioned by intelligence officers from the CIA, then from Britain, and later from various European states including France, Germany and Italy, because of his role in the Libyan Islamic Fighting Group (Chulov, Hopkins and Norton-Taylor, 2011).

According to Cobain, Khalili and Mahmood (2011), in respect of the Libyan renditions, 'Whitehall sources defended intelligence agencies' actions by saying they were following "ministerially authorised government policy"'. Labour government ministers gave the go-ahead for the rendition operations, reported *The Guardian* (2011), citing Foreign Office, Cabinet Office and Downing Street sources.

Conclusion – empire crime

The collaboration of the British and other states with the US state in rendition and torture can be designated as 'empire crime' in the service of what Meiksins Wood (2003) dubs the US-led empire of capital. The 'subcontracting' of state terror to collaborating states and their agents has long been part of the counter-insurgency toolkit of the US and British states. As Poynting and Whyte (2012) argue, much of the violent counter-insurgency of the fading British empire during post-war decolonisation, and that of the succeeding US-led one, have amounted to 'empire terrorism', with the sharing, development, laundering and routinisation of its techniques. For instance, the practice of extraordinary rendition has long historical antecedents. Subcontracting terror has also always been in the repertoire of US imperialism.

Over the course of the sorry record of state crime instanced in this chapter, the culpability of Labour governments is palpable. I am not saying that conservative governments would not have done precisely the same; indeed the historical record is that they do – and as clearly so in Australia as anywhere. I will say, to use George Orwell's (1949) allegory, that at least since Tony Blair and New Labour, it has been increasingly hard to distinguish the pigs from the humans. Another famous writer, Anthony Burgess (1978: 24), once observed of Orwell's *Nineteen Eighty-Four* that the date actually alluded to *1948*: it was a picture of post-war austerity Britain.[3] This was also the period in which NATO was forged, Britain's 'special relationship' with the USA was established, and British military committed atrocities in the Malayan 'emergency'. On this reading, Big Brother was a social democrat.

Notes

1. Recent moral outrage in the media, then the trial in Liverpool of members of ethnically identified 'gangs' accused of 'grooming', sexual exploitation of,

and sexual violence towards vulnerable young women (crimes over which no ethnic group has a monopoly), have led to racist vigilante action against ethnic minority shops in Lancashire (Brown, 2012). In a subsequent case in Oxford, police sources have been somewhat more circumspect (Wright, Martin and Parveen, 2012), but have publicly identified a similar demographic pattern. The point was not lost on the plethora of Islamophobic internet posts that followed, whose authors knew all along that it was 'Mussies', 'Pakis', and other vilifying categories.

2. The concept of 'suspect community' comes from Paddy Hillyard (1993) *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (London: Pluto Press in association with the National Council for Civil Liberties).
3. Burgess makes this observation astutely in what is nevertheless a problematic Islamophobia dystopia.

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Part IV
Sex, Gender and Justice

10

Sex Work, Sexual Exploitations and Consumerism

Jo Phoenix

Introduction

The last two decades has witnessed significant changes to the governance of youth prostitution. Most western democratic countries now distinguish adults from young people in prostitution and frame government interventions with young people in terms of the provision of justice for child victims of sexual exploitation. The first European country to make such a move was Sweden when, in 1999, the purchase of sex was completely criminalised. The Netherlands followed in 2000 when they criminalised childhood sexual exploitation and forced prostitution. France followed suit in 2003 by criminalising the purchasing of sex from young people (aged 15–18 years of age) as well as from those defined as 'vulnerable' prostitutes. The UK reformed its sexual offences in 2003 by criminalising the commercial sexual exploitation of young people. Denmark, Italy and Norway have all brought in primary legislation that extends criminal justice powers against those who would exploit or prostitute young people.

Accompanying these legislative changes, there is also a growing body of empirical research. This research charts how statutory and non-governmental agencies regulate and police not just the involvement of young people in the direct of exchange of sex for money but also a much broader set of sexual encounters. In effect, it is the sexual vulnerabilities of young women that are increasingly policed and regulated. For the most part, social-work scholars, practitioners and campaigners have taken this as a welcome step in ensuring justice for young women (Bradford, 2011, Brodie *et al.*, 2011, Easton and Matthews, 2012). In the context of the UK, however, where policy change occurred over a decade ago, there is a concern that shifts in these practices have a variety of unintended consequences which, at times, undermine the laudable desire to protect young girls and women from the predatory and sexually abusive actions of men (Phoenix, 2002a, 2012). These concerns focus on the gap between the political construction of the 'the problem' (as sexual abuse) and the complex empirical realities of what

is being regulated. There are two main points of contention. First, there is a concern that addressing 'the problem' of youth prostitution as a problem of child sexual abuse over-simplifies the complexities of the young people's sense (and realities) of agency. Where policy instructs police and other practitioners to treat young women involved in prostitution as victims, the young women do not always see themselves as such. Second, this political construction of the problem erases or occludes the complexity of the material – and most importantly, the economic – conditions shaping young women's involvement in prostitution. So whilst interventions are now geared towards providing justice for these young women, their economic and social security is often rendered less relevant than bringing their sexual offenders to account. In short, what is lost is any official recognition of the economic context of prostitution and the understanding that selling sex is one way that these young women survive their poverty and their social marginalisation. There is a small body of empirical literature that is beginning to chart some of the less desirable, unintended effects of how the policies are being implemented. These include: the disproportionate criminalisation of sexually exploited young women (not just those in prostitution), the routine denial of justice for the crime committed against them and the lack of appropriate social and financial support (Phoenix, 2012).

One of the background arguments presented in the chapter is that at the heart of the policies implemented to deal with youth prostitution is, paradoxically, the discursive disappearance of youth prostitution. By this I do not mean that 'voices' of young people in prostitution are not recognised in policy or practice. Nor do I mean that, at the empirical level, there are no longer any young people engaged in prostitution. What I mean is that policies and practices in the UK purporting to deal with 'youth prostitution' are based on a discursive denial of 'youth prostitution' in favour of a discursive construction of sexual exploitation. This is the key discursive condition that makes possible a return to a governance, not of prostitution per se, but of 'wayward' young women; that is to say, young women who, because their behaviour is both moralised and problematic, are deemed in need of 'special' regulation.

The aim of this chapter is to describe some of the key political, ideological and sociocultural changes shaping the regulation of youth prostitution in the last decade in the UK and, in so doing, offer an analysis of the conditions of possibility for the emergence of a new form of – or indeed return to – regulating young women's wayward behaviour.

Political reconstructions: from prostitution to sexual exploitation

In the UK, although exchanging sex for money is not now, or has ever been, illegal many of the activities associated with how, where and who

is involved have been regulated through the criminal justice system. Throughout most of the twentieth century, that regulation was shaped by the fundamental principle outlined in the Report of the Committee on Homosexual Offences and Prostitution (1957) (the Wolfenden Report): that commercial sexual exchanges are a matter of private morality and not as a matter of criminal justice or legal intervention; and that the law should intervene only to protect vulnerable individuals from the exploitation of others and communities and individuals from the public nuisance or affront caused by having to witness soliciting or loitering. The subsequent changes to legislation (and in particular the Street Offences Act, 1959) created a system wherein police constabularies usually had either vice squads or dedicated officers whose responsibility was to control and regulate visible prostituting activities in the locality. Much has been written about the Wolfenden Report, its recommendations and its effects on different constituencies of individuals involved in prostitution (see especially Matthews, 1986, Self, 2003, Phoenix, 2001). It inaugurated a way of policing prostitution that not only contained a number of legal and social anomalies (see Scambler and Scambler (1997) and Edwards (1996) for a critique of the legal process for prosecuting 'common prostitutes') but also ensured that the burden of punishment fell almost exclusively on the most visible (and arguably the most vulnerable) adults and young women in prostitution: street-based sex workers.

By the turn of the millennium, however, the policy landscape was in a state of rapid change as prostitution (and young people's involvement in it) moved up the UK Government's political agenda. In a relatively short space of time, a large number of guidance documents were issued and new legal instruments were passed. So, in 1999, the UK Government recommended, as part of modernising the laws on sexual offences, that young people in prostitution should be protected by criminalising commercial sexual exploitation (that is, the exploitation of children and young people in prostitution or in pornography). In May 2000, the Department of Health and the Home Office jointly issued guidance (Safeguarding Children Involved in Prostitution) that recommended that those under the age of 18 years involved in the commercial exchange of sex for money be treated as victims of child sexual abuse. By 2002, this guidance was further formalised in the Department of Health's National Plan for Safeguarding Children from Commercial Sexual Exploitation. The Sexual Offences Act (2003) and the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 both criminalised any adult involved in the commercial sexual exploitation of children and young people. This was achieved by inter alia making it illegal to purchase sex from any young person (that is, anyone under the age of 18 years) or to facilitate or encourage the sexual exploitation of any young person. In a related move, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and the Scottish Criminal Justice (Scotland) Act 2004 brought in

a set of measures that have criminalised the trafficking of women and children for the purposes of commercial sexual exploitation. In 2006 the Home Office published its consultation on human trafficking, the result of which established the UK Human Trafficking Centre in Sheffield. By March 2007, the Home Office published the UK National Action Plan on Tackling Human Trafficking. The National Action Plan and legislative changes produced a set of measures that criminalised the movement of women and children for the purposes of prostitution.

In August 2009, the then government published its comprehensive guidance on the issue of children, young people and sexual exploitation which brought together the array of different protocols, guidance and strategies that had been developed in the preceding six years. Safeguarding Children and Young People from Sexual Exploitation: Supplementary Guidance to Working Together to Safeguard Children (SCYPSE) (Department for Children, Schools and Families, 2009) adopted a very broad definition of sexual exploitation, in contrast to the specific definition recommended by the Sexual Offences Review Commission and the Sexual Offences Act 2003.

> Sexual exploitation of children and young people under 18 involves exploitative situations, contexts and relationships where young people (or a third person or persons) receive 'something' (for example food, accommodation, drugs, alcohol, cigarettes, affection, gifts, money) as a result of them performing, and/or another or others performing on them, sexual activities. Child sexual exploitation can occur through the use of technology without the child's immediate recognition; for example being persuaded to post sexual images on the Internet/mobile phones without immediate payment or gain. In all cases, those exploiting the child/young person have power over them by virtue of their age, gender, intellect, physical strength and/or economic or other resources. Violence, coercion and intimidation are common, involvement in exploitative relationships being characterised in the main by the child or young person's limited availability of choice resulting from their social/economic and/or emotional vulnerability. (Department for Children, Schools and Families, 2009: 9)

Safeguarding Children and Young People From Sexual Exploitation (Department for Children, Schools and Families, 2009) is intended to help practitioners identify and work with the full range of experiences that young people might have in relation to the exchange of sex for something else. Unlike the law, however, the focus is not on prostitution per se but rather on exploitative sexual relationships involving young people.

The broader focus is significant. In shifting the definition away from commercial sexual exploitation, government guidance now directs police,

criminal justice and other practitioner's attention to the sexual relationships that young people have, rather than to young women's involvement in prostitution (Phoenix, 2012). With that said, what the law is attempting to regulate and what the policy is attempting to regulate are now two quite different things: prostitution (or to use contemporary parlance, the commercial sexual exploitation of young women) and exploitative sexual relationships. Beneath this split between law and policy is a story of the changing ways in which politicians and practitioners have grappled with the issues. This story can be traced simply through the language that has been used.

Since the late 1990s, nomenclature has changed from 'youth prostitution', to 'children abused in prostitution', to 'commercial sexual exploitation of children', to 'sexual exploitation of children'. These changes signify critical changes in the way that politicians, policymakers and practitioners think, highlighting, in particular, an ideological shift regarding the issue of 'consent'. The Children's Society was fundamental in shaping this shift in thinking through their publication The Game's Up: Redefining Child Prostitution (Lee and O'Brien, 1995) which was rapidly followed by Barnardo's' Whose Daughter Next (Barnardo's, 1998). Together, these documents pointed out the legal anomaly of prosecuting and convicting girls under the age of sexual consent with any prostitution-related offence. They also made the case that most, if not all, girls and young women who were in prostitution were (i) exceptionally vulnerable and (ii) exploited, that is, taken advantage of by older men for sexual gratification or pecuniary gain. The policy implication of these two reports was clear: children in prostitution needed to fall within child protection legislation and policy frameworks. As government developed law and guidance, specialist services were established and these services provided, in the first instance, training for the police, as well as other criminal justice agencies and social services. By 2003, there were 43 specialist services covering the 13 major conurbations in England, Wales and Scotland (Phoenix, 2003). As an unintended consequence of the establishment of so many specialist service providers in such a short period of time (three years), there was a rapid accumulation of information about the backgrounds of the girls and young women and the circumstances that surrounded their involvement in prostitution. This information soon found its way back to local authorities and police constabularies. Within these years, the key debate questioned whether even referring to girls or young women as being in prostitution implied that the young women consented, and thereby stopped organisations and individuals from recognising the harm and abuse that the girls were experiencing. This provided a key ideological condition for the change in focus away from young women in prostitution to policing or regulating young women's sexual relationships, more generally.

The section above has demonstrated that, in the context of the UK, there has been a clear, almost unequivocal, trajectory in youth prostitution policy

reform. The aim is overtly abolitionist, where the UK Government has adopted a strategy of re-criminalisation and re-penalisation of youth prostitution and its associated activities. Paradoxically, this was achieved by literally denying the possibility of the existence of 'youth prostitution' in favour of a rhetoric of victimhood. Yet, when it comes to practice, this strategy has meant something slightly different.

Practice reconfigurations: from prostitution to sexual vulnerabilities

From 1990–2010, there has been a dramatic decline in the number of charges for prostitution-related offences (mainly soliciting and loitering) against those under the age of 18 years. The significant drop came some 10 years prior to policy change, as Table 10.1 indicates. This is not surprising as it coincided with growth and proliferation of sexual health outreach services across all of the UK's major conurbations. These sexual health outreach services were funded by the Department of Health, worked with anyone engaged in the exchange of sex for money and were based on a harm minimisation model of intervention. In practice, this meant that most of the UK cities had organisations working on the ground which provided condoms for working women and who provided help and information for anyone wanting to leave prostitution. Against this, police constabularies were scaling down their vice squads and were beginning to adopt quite different models of policing prostitution in which they worked in partnership with the sexual health outreach projects. This translated to a dramatic decline in the numbers of prosecutions for soliciting and loitering for the purposes of prostitution for all age groups from approximately 10,000 in 1990 to less than 3,000 in the year 2000. By the time Safeguarding Children Involved in Prostitution (Department of Health/Home Office, 2000) was published, there were less than 20 proceedings against those under the age of 18 years in the magistrates' courts and just over that number found guilty in all courts. Since then the numbers continued to drop into single figures, often with no proceedings or convictions in any courts in any year. What the general decline in prosecutions and convictions suggests is that during the first years of the twenty-first century in the UK, there was a gap opening up between the political rhetoric (of protection from criminalisation and protection against being victimised) and what was happening 'on the ground'.

By the middle of 2002, in most large cities in England and Wales, new specialist services were developed that catered for young people in prostitution. There were often multi-agency partnerships in which the major children's charities (such as Barnardo's, The Children Society, the National Society for the Prevention of Cruelty to Children (NSPCC)) worked with police, local statutory children's services and a host of other interested

Table 10.1 Number of defendants aged under 18 proceeded against at magistrates' courts and found guilty at all courts for the offence of persistently loitering or soliciting for the purposes of prostitution, 1990–2010

	Proceedings (magistrates' courts)	Found Guilty (all courts)
1990	402	376
1991	344	325
1992	287	251
1993	140	106
1994	147	141
1995	212	105
1996	188	179
1997	135	152
1998	61	111
1999	45	39
2000	14	23
2001	15	7
2002	4	6
2003	7	3
2004	1	3
2005	–	1
2006	3	–
2007	–	1
2008	1	1
2009	–	–
2010	1	1

Source: Home Office Freedom of Information Request (Freedom of Information Act, 2000). Ref: 74339–05912. Date Retrieved 2 February 2012.

organisations in order to develop services that worked exclusively with commercially sexually exploited young people; that is to say, those in prostitution. Barnardo's pioneered the development of organisations like SECOS (Sexual Exploitation of Children On the Streets) in Middlesbrough or BASE in Bristol. The NSPCC established a National Working Group of agencies and organisations working with or for young people who were involved in the commercial exchange of sex for money. Such developments had the effect of splitting support services for those in prostitution: today, sexual health and drugs outreach services remain cautious of working with young people if only because they can no longer guarantee anonymity and confidentiality, or a non-judgmental, supportive approach (Phoenix, 2002b). By redefining young people's involvement in prostitution as child sexual abuse – even those over the age of sexual consent (but not yet 18 years of age) – outreach services became subject to the statutory powers

(and responsibilities) of child protection legislation. In this context, many of these services opted simply to stop working with those under 18 years of age. Where specialist services were created, these services had to develop ways of working with young people that prioritised the child protection concerns of statutory social services and the police (including the desire to place young people in secure accommodation in the name of protection). One effect was that in prioritising child protection, the complex social and economic conditions and the ways in which young women made choices about their sexual relationships became a secondary concern in the face of agencies' assessments over potential risk and harm (see Phoenix (2002b) for a fuller discussion). The second was that the focus on the status of these young people as victims of child abuse, exploitation and coercion shaped a way of working in which assessments of these young people's motivations took on a new importance. Indeed, as the guidance offered by the Home Office and the Department of Health stated: young people should be treated as victims of child abuse unless they were 'voluntary, persistent returners', in which case it was recommended that these young people become subject to criminal justice enforcement procedures; that is, arrest, conviction and punishment.

By end the end of 2011, following the global economic crises and biting cuts to the public purse – the Coalition Governments austerity measures – the practice field had been largely reconfigured. Across England and Wales, there is now a proliferation of statutory specialist teams rather than services, each comprised of individuals working from a statutory agency within a local authority (social services, educational welfare, police and so on), which have come together specifically to work with girls and women in prostitution (or being sexually exploited). Today, every local authority is mandated by policy to have some type of such team – even if it is only one or two members of staff who have an interest or have been trained to work with these girls and young women. As of March 2012, there are now only 35 non-statutory specialist services left: 21 of these are Barnardo's projects and the other 14 connected with The Children Society, the NSPCC or independent organisations. These non-statutory specialist services vary greatly in terms of what they provide by way of training, multi-agency partnership, direct work with young women, and so on. For instance, Barnardo's Seraf service which covers all of Wales, offers intensive support to young people who are being sexually exploited and/or at risk of sexual exploitation, targets risk awareness raising, and offers prevention work in schools. They also offer a risk assessment framework resource pack and training for professionals working in multi-agency partnerships and consultations regarding specific cases. Barnardo's SECOS service which covers the north-east of England is a much larger organisation and provides a one-stop day support service, an outreach service, an arts and activities service, vulnerable adults case work, drop-in and drugs and alcohol service, a missing from

home service, a service for young men and boys, a policy and practice development service and a training service. Barnardo's Young Women's Project based in London covers four local authorities and offers a one-to-one service for young women up to the age of 18 years who are or risk being sexual exploited through offers of practical help, social care and health and educational services, as well as helping to raise awareness of sexual exploitation in its area. The key change is that these non-statutory and statutory agencies no longer just work with young people who are being sexually exploited but have broadened their remit to include those young people at risk of sexual exploitation. Barnardo's in particular has lead the way in developing risk assessment tools that can be used by other agencies in assessing any specific young woman's risk (or vulnerabilities) to sexual exploitation. These usually include questions about the nature and type of sexual relationships a young woman engages in, her motivations, the type of individual/s and her perceptions of sexual safety and security.

In a recent national survey of specialist services and teams, practitioners listed the key risk indicators that they used in making assessments about an individual's risk (or actuality) of sexual exploitation (Phoenix, 2012). They listed 'key indicators': going missing from home, truanting from school, being a victim of crime, committing public order offences, self-harm, drug and alcohol difficulties, excessive use of mobile phones, growing up in local authority care, and coming from an abusive background. It is important to note that these key indicators become the important symbolic and actual sites of service intervention. That is to say, when practitioners intervene, the interventions are often geared towards stopping the young person going missing from home, truanting from school, self-harming, reducing their drug and alcohol consumption, reducing their mobile phone use, and so on.

In in-depth interviews conducted with police and a variety of practitioners across three cities in England and Wales, police, social workers and specialist service providers confirmed that they now proactively police sexual exploitation because, quite simply, it is recognised as a form of child abuse and they are thereby obliged to proactively intervene. What this means in practice is relatively simple: an organisation, particularly the police, becomes concerned when they see girls and young women in places or doing things that they deem as inappropriate or dangerous and, therefore, they will intervene. Of particular note was the way in which they described policing young women 'hanging out' in public places such as parks and down backstreets (Phoenix, 2012). According to many of the practitioners and police interviewed, 'hanging out' made the girls and young women vulnerable to boys and men who would exploit them. In relation to parks, practitioners talked about the young men in parks that gave young women alcohol and drugs. This would be used to convince them to go to parties and get the young women in such a state that they did not realise, did not care or did

not know that one or many of the young men would use them for sex. Other practitioners and police described more organised forms of sexual exploitation in which older men would actively 'groom' the girls and young women by pretending to be their boyfriends before having sex with them and their friends (Phoenix, 2012). Key to this grooming process was that the process often takes place when the young women are 'hanging out' or while they go missing from home.

Over the last decade, practice has developed in ways that delineate and distinguish these 'new' subjects of intervention – not in relation to their involvement in prostitution but in relation to their sexual vulnerabilities. Yet at the same time, the object of regulation has been expanded to encompass not 'sexual exploitation' but those at risk of sexual exploitation. To put it another way, policy reforms demarcate in ever more granular detail an array of new categories of young women: victims of abuse, sexually exploited girls and young women, young women at risk of sexual exploitation, voluntary returners to prostitution, and trafficked children. The effect is a reordering of the social institution of youth prostitution by drawing lines of demarcation between individuals on the basis of their status as sexual victims (or not) and as sexual victims in waiting. For each new category, new interventions are crafted, new configurations of multi-agency partners are brought together, new training programmes for professionals and practitioners are rolled out and new risk assessment tools are developed and used.

The reorganisation of 'the erotic': sex-as-leisure, sex-as-pleasure and policing sexual vulnerabilities

Very few analyses of prostitution or sexual exploitation pay attention to the dramatic sociocultural changes that have occurred in regard to sex in the last five decades or so. Even less attempt to conceptualise the links between these sociocultural changes, policy reform and how these play out in materially unequal societies.

With the advent of moderately safe and reliable contraception, 'sex' (that is to say the social phenomenon rather than the corporeal experience) has come out. Sex has become so visible across so many western cultures that it has prompted some to speculate about the democratisation (or pornographification) of culture (Bernstein, 2001). Briefly, the argument runs like this: contemporary modern cultures are, much like their Victorian counterparts, preoccupied with sexual values, practices and identities and, unlike their Victorian counterparts, are marked by permissive sexual attitudes, new forms of sexual experiences and expressions. Observers have opined that twenty-first century Western societies have experienced a significant sociocultural shift in which there has been a 'breakdown' of the rules, regulations and rituals that have operated to exclude that which once was considered 'obscene' from everyday life (Attwood, 2006). Other observers

have noted the interconnections between a consumerism and sociocultural changes to sex. Plummer (2003) and Bauman (1998) have written about the way in which sex saturates consumer cultures, just as McNair (2002) has noted that there has been a significant expansion of sexual consumerism in which sexual products, such as sex toys, pornography and so on, are increasingly available to a wider and wider range of consumers (see also the growth of specialist sex shops such as Anne Summers and Sh! which cater specifically for women). Bernstein (2001: 84) suggests that these changes are so significant as to warrant the description of them as being a reconfiguration of erotic life 'from a relational model of sex to a recreational model of sex' in which the pursuit of the erotic, of sexual intimacy and enjoyment is facilitated by new opportunities to be a sexual consumer in ways that are not infused with ambiguity or hypocrisy (see also Prasad, 1999).

Although these observations and arguments provide, in the main, a broad brush description of sociocultural changes in the organisation of 'the erotic' or 'the sexual', they are helpful when thinking about sexual exploitation. Each of these observers assume that what we are witnessing is the birth, growth and expansion of a 'new' sexual marketplace in which sex and the sexual become 'just' another commodity to be exchanged. This new marketplace is not reducible to the institution of prostitution any more than it is reducible to what has often been called 'the sex industry'. It is a marketplace in which individuals construct for themselves leisure and pleasure.

If, as these authors suggest, there is a new sexual marketplace emerging in the early twenty-first century, it is a market shaped by and constituted within the same myths of 'the market' that shape the formal economy. Moreover, it is a marketplace based on the same profound material inequalities of age, class, gender and ethnicity that structure the formal economy. For it is predominantly young, social excluded and marginalised women that form the majority of those who are consumed in a marketplace that caters for the tastes and pleasures of, largely, men. The question this raises is an important one: what are the (non-economic) social or ideological factors at play that can account for women's engagement in a sexual consumer 'market' structured in such a way?

The question can be addressed by turning to Bauman's (1998) understanding of a 'consumer society'. Bauman (1998) used the term 'consumer society' to indicate a significant, if subtle, shift in the social processes that integrate individual motives and desires and the systematic reproduction of a particular formation of society. A consumer society is one in which consumption (rather than production) becomes a principle means of organising human behaviour and by which social actors are able to form and express their identities. Using industrial capitalism as a counterpoint, Bauman claimed that the work ethic – that is, the moral commitment to work – functioned to supply the new factories and industries with labour, in part by creating new social identities based on the individual's productive

role; that is, their job or career. The work ethic was the lynchpin to modern social organisation (and regulation). Within a consumer society, Bauman argued, there was a shift from the work ethic to an aesthetic of consumption in which human social actions are organised around consumption and in which individuals are trained and groomed into a constant state of desire in order to feed continuous consuming activities. Against this, the market produces an almost endless variety of new experiences, new pleasures, and new products to purchase. At the heart of being a consumer, Bauman argued, is not the consumption of a product but rather the compulsion to feed that desire, make choices between the objects to consume and have that consumption witnessed. As Bauman (1998) emphasised, the point is not that identities or items can be consumed but rather that the celebration of the continuously stoked, never quite satiated, desire underpinning the choices made in how we express our identities is fundamental to a consumer society.

Therefore, to recognise that sex is now part of our consumer society is to recognise that sexual activities and 'the sexual' become one of many (consumer) means by which individuals form and express their unique, transient identity in the face of the recognition (and desire) to engage with the 'immense matrix of possibilities, of intense and ever more intense sensations and experiences' (Bauman, 1998: 26). To put it another way, for modern social actors, our identities and subjectivities are constituted, at least in part, through the consumption of sex-as-pleasure and sex-as-leisure.

In relation to socially marginalised young women, there are clear implications: how they construct and express their own social and sexual identities is not just in relation to what 'sex' means to them but, importantly, in relation to the resources that they have. This means recognising that they are excluded from the consumer society by virtue of their educational, economic or social marginalisation (see also Hall, Winlow and Ancrum, 2008). It may be that entering a sexual marketplace is one way of economically resourcing themselves. Alternatively, it may be that for some of these young women, it is also one way of expressing their sexual identities – even if that is as the object to be consumed. This might at least begin to explain what some have called the 'raunch culture' that many young women celebrate.

Such changes to the way in which 'the sexual' is organised and experienced also help to explain some of the empirical observations made by sexual exploitation services working with girls and young women. They note that young women are far less present in established prostitution 'markets' now than they have been for a long time. They also note that there is a trend towards much less formalised prostitution and sexual exploitation in which girls and young women are exchanging sex for cigarettes, mobile phone, trainers, alcohol and drugs, and other consumer durables. Moreover, they

point to the fact that when young women do 'solicit', it often occurs outside taxi ranks and fast-food restaurants and what they are soliciting is not so much an exchange of sex for money (or other benefit) but soliciting for a boyfriend for a week or a few days.

Conclusion

The chapter describes the shifting landscape shaping the policing of sexual exploitation and in particular the emergence of the policing of 'wayward' young women who embody sexual vulnerability. As the discursive shifts continue to take place, in giving primacy to the rhetoric of sexual victimisation, practices on the ground continue to carve out particular (normative) conceptualisations of the behaviours and practices of those who are being exploited. As the youth prostitute is 'transposed' (Phoenix, 2002a) into the object of an increasingly paternalistic and Salvationist acuity; these conflationist pressures shape a 'social space' (Bourdieu, 1989). This social space occludes the material conditions shaping these young women's vulnerability or, indeed their precarity, that is to say, 'the politically induced condition of maximised vulnerability and exposure' (Butler, 2009: ii) that mark the lives of sexually exploited young women. To be particularly blunt, this chapter is not about net-widening or about regulating young women 'in the name of protection' (Phoenix, 2002b). It is about how discourses of sexual exploitation bracket off the changing or dialectical (Engels, 1883) nature that social actors have with sex and consumption and to what effect.

The aim of this chapter was to outline some of the political and practice changes that have shaped contemporary concerns and ways of governing youth prostitution. Key to understanding these changes, however, are the sociocultural changes that have occurred in relation to the links between sex-as-leisure, sex-as-pleasure and any emergent 'sexual marketplace'. For it is in the context of both the material conditions of social marginalisation and exclusion and the sociocultural conditions shaping young identities, that we can trace significant changes in the sexual practices that many young women contemporarily engage in. In particular, we can trace what Melrose (forthcoming) calls '24 hour party people' and which I interpret as being the emergence of a leisure lifestyle and set of young (working class) women's identities that are shaped by sociability and community (that is, 'hanging out'), drugs, alcohol and being objects of sexual consumption. Excluded from consumer society (by virtue of their material inequalities), young women are engaging in activities which continue to be moralised; that is, considered inappropriate or dangerous. As such, whether entering the sexual marketplace as a means of economically resourcing themselves or whether expressing their sexual identities, young women are being policed for what is considered their wayward behaviour.

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11

Tactics of Anti-feminist Backlash

Molly Dragiewicz

Introduction

In 1976, Del Martin published *Battered Wives*, the first book devoted to the subject of men's violence against female intimate partners in the United States. Martin observed that: 'The news media have often treated wife-abuse as a bizarre and relatively rare phenomenon – as occasional fodder for sensationalistic reporting – but rarely as a social issue worthy of thorough investigation' (1981: 15). While many of the underlying cultural issues Martin described in 1976 are still relevant, there has been a sea change in hegemonic discourses on men's violence against women. Opposition to men's violence against female intimate partners has become politically popular in the United States. One of the most visible symbols of this marked social change is the *Violence Against Women Act* (VAWA). VAWA is a federal law which has enjoyed broad-based support since its passage in 1994. VAWA has been refined and expanded with each subsequent reauthorisation. The United States Department of Justice website describes it this way:

> In 1994, the U.S. Congress enacted the Violence Against Women Act (VAWA), a comprehensive legislative package focused on violence against women. VAWA recognised the devastating consequences that violence has on women, families, and society as a whole. VAWA also acknowledged that violence against women requires specialised responses to address unique barriers that prevent victims from seeking assistance from the justice system. (United States Department of Justice, n.d.: para. 4)

This excerpt highlights the now-dominant conceptualisation of violence against women as an important and gendered social problem requiring collective action.

Resistance to the battered women's movement is often overlooked in the contemporary political context that produced and sustains VAWA. However, violence against women and state responses to it continue to be mired in

cultural tensions about crime, law, gender, economics, knowledge and the family. As I write this chapter in 2012, VAWA is due for reauthorisation. This time around there has been unprecedented resistance to the law from Republican lawmakers. Conservative commentators like Alana Goodman contend that rather than being about violence, VAWA is a 'smear tactic' created to make it look like Republicans support violence against women. Goodman claims that the revised bill is 'a transparent, politically-motivated attempt to provoke Republican opposition to VAWA and allow the left to claim the GOP supports violence against women' (Goodman, 2012: para. 2). Unfortunately, such expostulations are not limited to extremist blogs. *New York Times* reporter Jonathan Weisman quoted Republican senator Jeff Sessions saying:

> I favor the Violence Against Women Act and have supported it at various points over the years, but there are matters put on that bill that almost seem to invite opposition... You think that's possible? You think they might have put things in there we couldn't support that maybe then they could accuse you of not being supportive of fighting violence against women? (Sessions in Weisman, 2012: para. 7)

The public debate about the reauthorisation of VAWA is but one instance of efforts by anti-feminists to negotiate the relatively recent social norm condemning violence against women. This paper outlines key tactics of anti-feminist backlash against the battered women's movement as they affect the provision of support for abused women in real life, based on interviews with anti-violence advocates in the United States.

Backlash

Popularised by Susan Faludi (1991), the term backlash refers to 'efforts to contain, undermine, and reverse the gains made by women under feminism' (Dragiewicz, 2008: 127). Campaigns to transform men's violence against women from a private shame to a public political issue have been among the most popular and widely embraced projects of feminism. As is the case with other progressive social movements, the battered women's movement's successes were accompanied by 'criticism, cooptation, and silencing' (Collins, 2004: 3). Ultimately, while feminism has succeeded in substantially altering discourse and law on violence against women, many of the beliefs and practices conducive to this form of violence persist.

As feminist scholars and activists have noted, efforts to harness state power to address violence against women are ripe for unintended consequences (Chesney-Lind, 2006, DeKeseredy, 1999, DeKeseredy and Schwartz, 2005, Faludi 1991, INCITE!, 2003, Minaker and Snider, 2006). Feminists wary of neoliberal appeals to formal equality have documented the ways

in which gender-blind approaches to crime and violence have not only failed to ameliorate gender inequality but, in some cases, exacerbated it. Justice system responses to violence against women and race and gender-blind criminal justice policies have both been associated with disproportionate, unintended negative consequences for women, especially women of colour (Chesney-Lind 2006, INCITE! 2003, Schlesinger 2008). In the case of violence against women, resistance to state campaigns is convoluted as opponents of feminism seek to couch their objections to anti-violence efforts in ways that sidestep normative anti-violence positions (Collier and Sheldon, 2006, Dragiewicz, 2008, 2010, 2011, Kaye and Tolmie, 1998, Menzies, 2007). Attacks on feminism, both veiled and overt, are an important part of the backlash against the battered women's movement (Dragiewicz, 2008, 2010, 2011, 2012, Flood, 2010, Girard, 2009, Mann, 2008).

Methodology

The findings discussed in this paper are drawn from semi-structured interviews on support for and resistance to anti-violence work since the inception of the battered women's movement. The exploratory study utilised a convenience sample, with invitations to participate extended online via professional email discussion lists for anti-violence advocates, scholars and lawyers. Study participants were recruited and interviewed until responses reached thematic saturation. The sample consisted of 35 interviews which were conducted and transcribed between 2007 and 2009. Interviews ranged from fifty-two minutes to over two and a half hours, with an average of approximately an hour and a half. Transcribed interviews were coded using MAXQDA, a qualitative software analysis package.

The sample

The average age of respondents for this study was 59, and the age range was from 30 to 67. Thirty-one of the respondents were Caucasian and four identified as mixed race, including a mix of Caucasian, Asian, Native American heritages. Thirteen respondents had a Juris Doctor, 15 had Master's degrees, 5 had PhDs, two had some college, and one had a college degree and some graduate classes. Respondents were drawn from 20 different states. For respondents who reported salaries, the annual average was $49,000. Two respondents reported being retired and working on a volunteer basis. A few respondents noted that their income fluctuates from year to year due to consulting work. Thirty of the respondents were female and five were male. Seven respondents identified as lesbian or queer, and 28 identified as straight or heterosexual. Respondents averaged 22 years in the field, ranging from 9 years to more than 40 years. The sample included professors, practicing attorneys, battered women's shelter staff, state coalition staff, national advocacy organisations, university anti-violence programme staff, child

counsellors or therapists, and independent advocates. Most of the respondents had had more than one job working on anti-violence projects prior to their current position.

Findings

While the larger study looked at a range of issues related to support for and resistance to battered women's movement work, this paper is focused on the tactics of anti-feminist backlash against the battered women's movement. In what follows, I review several key tactics identified by the study participants. This review provides a general description of backlash tactics rather than a comprehensive list, and many specific tactics have been subsumed under the named categories. To protect the identities of the respondents, especially important given the nature of their work with violent men, I have not provided demographic information about the sources of individual quotations and have redacted location and organisation specific information where necessary. Each respondent has been assigned a unique number (for example, R1) for identification.

In response to a question about whether respondents experience resistance to their anti-violence work, the most common reply was 'absolutely'. While all respondents indicated experiencing or observing some forms of resistance to their work, the nature, level and impact of resistance varied widely according to respondents' specific professional locations. Six primary tactics emerged in descriptions of resistance to anti-violence work:

- resistance to acting on legal and policy changes;
- victim blaming;
- discrediting women/feminists;
- individualisation;
- changing the subject; and
- direct attacks and threats.

Resistance to acting on legal and policy changes

Respondents named 'Lack of implementation of the law, which comes from a variety of places: ignorance, lack of training, and just plain old fashioned misogyny' (R2) as a key form of resistance. This type of resistance was characterised as a way of pushing back against legal and policy changes imposed by authority figures. Respondents repeatedly described the failure to implement new policies in meaningful ways as manifestations of resistance to anti-violence efforts. For example:

> We also have a lot of people that don't do what they should do in the criminal justice system... Our problem is implementation of the law. A lot of cops don't arrest, or the cops will do dual arrest, or they won't do any

> arrest, or they arrest the wrong person. Judges or state's attorneys won't prosecute or they'll plea down to just simple battery. Judges won't do what they're supposed to do. In some communities, perpetrators come before the criminal justice system repeatedly. They go to batterers' intervention programs, they stop going to the batterers' intervention programs, and those programs are designed to, basically it's court supervision, and when they stop, when the perpetrators stop going to the batterers' intervention program, probation should turn them in to the court and they should go to jail. But the probation office lets the ball drop and doesn't turn them in. And so they know that they can get away with it, and so the perpetrators know that they can get away with abuse because someone turns a blind eye to them and there are very few counties where all the systems and all the players from criminal justice do what they are supposed to do. (R2)

This quotation describes a range of ways that local authorities fail to implement the laws that are in place in the state. Many respondents described the implementation of positive policy changes in ways that punish survivors of violence, such as responding to pro-arrest polices with harsher treatment of women who use violence in self-defence. For example:

> if you defend yourself you're probably twice as likely to be charged with something than a man doing the same thing in a similar situation, which is exactly the opposite of the way it should be but the sheer fact of the matter is in [my state]... The reality of that is District Attorneys will seek out and harass, well I call it harassment, and go after women who are using violence even in self-defence a lot harder than they did in the past. (R13)

Police officers who respond to pro-arrest policies by refusing to investigate the situation are another example the failure of policy implementation, as this respondent explains:

> We get dual arrests or we have law enforcement officers who don't necessarily understand the dynamics. Or they're left with finding a guy who's been... who has some kind of injury and the woman doesn't so they don't look at is this injury primary aggression? Or is this a defence injury, like the injuries that happen to men's faces or hands but men are strangling women, and they scratch the hands trying to get the hands off the throat? Yeah, there's been scratching, there's been damage, but it's not because the women is the primary aggressor. (R2)

As in the situation described above, some police officers fail to investigate the circumstances surrounding violence calls like they do other crimes, leaving it for the judge to sort out. If police officers do not investigate thoroughly,

there is no evidence collected to facilitate fact-finding in the court. This approach undermines the investigative role of police and creates a 'he said/she said' scenario that equally discredits both parties. Arrests of victims of abuse can have serious repercussions for survivors' ability to access services, willingness to call police for help in the future, and custody cases in the event of divorce.

Victim blaming

Another frequent theme in accounts of resistance to anti-violence work is victim blaming. Respondents identified two primary types of victim blaming. In the first type, friends and family members blame victims of woman abuse for their own victimisation. This type of victim blaming serves a defensive purpose that allows people to maintain their view of the world as safe. For example:

> I think it is really hard and we don't want it to happen to us and we don't want it to happen to our loved ones and we wish it didn't exist at all so we have to find somebody to blame. It's easier to blame the victim because they are the one who is carrying the story and they are the ones who are carrying the pain right to our doorstep. (R35)

Victim blaming displaces the pressure to solve the problem from the individual hearing the disclosure. Another frequently mentioned type of victim blaming is portraying woman abuse as mutual, reciprocal, bi-directional, or symmetrical. One advocate expressed it this way:

> I can quote verbatim from [a local shelter's] brochure which says domestic violence will not stop until people realise that it is the responsibility of all parties involved to end domestic violence. It is not an either/or proposition, it is a both/and proposition and both partners must recognise their responsibility. So it's a dance of mutual destruction. (R9)

According to this understanding of violence, violent men cannot stop being abusive until women change their behaviour. A closely related type of victim blaming is claiming that women are as violent as men. Respondents reported that this argument is used for several purposes: to attack existing services for abused women, to discredit women's reports of violence, and to dismiss gendered understandings of violence. For example, 'The biggest arguments we get are that they are saying that women are just as violent as men and when there is physical violence on a woman they are saying she is at fault because she attacked him first' (R30). As in this quotation, the argument that women are as violent as men is often raised when there is a record of physical violence by the male partner. In these cases, the argument is used to explain away reports and evidence of abuse.

Discrediting women/feminists

Discrediting women and feminists as sources of knowledge is another popular backlash tactic. It is used by individual abusers, individuals involved in state institutions such as the courts, and organised anti-feminist groups. One respondent described the way that abused women's accounts are dismissed as not credible if they fail to mesh with cultural stereotypes, 'So one of the implicit arguments is that we all know what battered women look like, and this isn't it' (R4). This respondent elaborated on the way that stereotypes continue in the face of evidence due to women's lesser authority as scholars and experts:

> One of the things about domestic violence is that most people have had some experience regarding domestic violence. They've committed it, they've been a victim of it, they've had a friend or someone that was involved and therefore they think they understand it. And often they don't have the full story or they can't be objective, but they think they know it. There's not an openness or a willingness to look for the real experts. And I think most of the time the experts are women and in this society we don't take women as seriously as men. And so I think that contributes to it. So you have people who think they know the issues who don't. And so they keep making mistakes and they're not open to being told they are making mistakes. (R4)

Another example of discrediting women is the application of a higher standard of proof to women than men in abuse cases. Another way of putting this is that: 'Women are given a higher standard of proof than their abusers, are given less credibility than the abusers, they face stereotypes and they are paying for their abusers' actions' (R4).

Many respondents reported that individual women's reports of violence are routinely dismissed as false allegations. For example: '... this is utterly pervasive throughout the court system and all areas of jurisprudence, is that she's making it up. She's just vindictive and she's using this to get back at me' (R13). Claims of false allegations appear to be especially common in custody proceedings where mothers raise the issue of abuse in court. One respondent said: 'So they are the big ones, that women lie, they make false accusations, and women are as violent as men, and there is bias in the family courts so the women always get custody' (R30). The claim that 'If women have a child custody case going on if they file for a protective order or make an accusation of domestic violence they are just lying to get a leg up in the divorce' (R30) serves to discredit all women's reports of violence.

In addition to discrediting individual women's reports of abuse, discrediting feminists and 'the domestic violence industry' (R14) were frequently

named by respondents as backlash tactics. Despite the popular belief that domestic violence awareness is a *fait accompli*, the idea that 'Domestic violence doesn't happen here' (R9) continues to be used against anti-violence advocates. This idea rests on the assumption that the battered women's movement exists not because violence against women is an actual problem, but because '...feminists have an evil agenda to take over the world and they must be stopped' (R15). As another respondent put it:

> I think one of the biggest arguments which is so ludicrous it's almost impossible to refute, the big one that we hear from the mad dads is that domestic violence is not actually a problem. And that it's something that is so exaggerated and that it's just sort of perpetuated by the domestic violence industry... It's not part of this scenario because domestic violence only happens in you know .0001% of all relationships. (R14)

Such claims are used to minimise the extent of men's violence against women and argue against the continued provision of resources for survivors.

Individualisation

As a backlash tactic, individualisation promotes popular understandings of violence and abuse as individual or interpersonal problems that do not merit a collective response. For example, respondents reported decontextualising the problem of violence by saying things like 'it's a people issue, not a gender issue' (R16). Individualising approaches to violence dismiss the cultural context in which it occurs as irrelevant. Sometimes, this involves dismissing the research on violence altogether, as in this example:

> Another thing that I've seen is when we talk about research and they'll say well just because most abusers do that it's unfair, you're dealing with an individual case. So we don't need that kind of research, we're dealing an individual case here. (R4)

This response effectively dismisses all of the extant research on the nature and dynamics of violence and abuse. Another example of individualisation involves looking at specific acts or behaviours through a narrow and decontextualised lens. One respondent put it this way:

> If a woman hits back in self-defense or to make him stop or whatever you'll get unqualified professionals to say well that's the same as what he did without an understanding of what was the purpose. Controlling behaviour patterns, all that. (R4)

Another respondent described the trend toward treating abuse as an individual psychological problem.

> Individuation is a really crucial piece of patriarchy and teaching patriarchy and power. It's to acknowledge, oh gee, isn't it interesting that ten thousand people in this country batter their partners. They all must have some psychological problem. It's all a bunch of individuals they must have these bitches for wives and they didn't want to say gee, maybe there's some connection here. (R16)

This quotation describes the resistance to seeing men's violence against women as a collective, social problem.

Changing the subject

Changing the subject away from woman abuse to some other problem was a backlash tactic named by many of the respondents in the study. One advocate described efforts to persistently change the subject during a training session.

> There were a couple of men from an anti-violence organisation in [our state] in that training and they argued, they argued with us about whether the problem of teen dating violence was more really more equal, that really, boys and girls were both being victimised at the same rate. And just keeping us stuck in that, stuck there and not being willing to get off of it and move on. It looks like men coming to workshops and participating and then having to be right... You know like, not being able to take coaching, not being able to move on after they've been asked to sit down... And just, what do you mean, what do you mean by that? you know and just... you know like, typical white male privileged bull, you know? (R20)

Similar experiences were recounted by a number of advocates who saw the insistence on changing the subject as a way of resisting the expertise of survivors, advocates and scholars who focus their energies on violence against women. The expectation appears to be that neither advocates nor scholars should be focused on women and girls' experiences if men and boys' needs and demands are not being met first.

Many respondents also reported abusers' use of frivolous complaints against their partner in order to retaliate for reporting abuse or to distract the courts from reports of abuse. For example:

> One of the early cases that I got into was a police officer who would throw everything he could throw at his former wife so and she was arrested I think eight times in the end. None of his charges ever stuck,

> but it made her lose a lot of jobs and so, in one case he would be accusing her of... the first way he got the baby was to accuse her of drug addiction. And she went through the hoops, jumped through the hoops, she went through 18 random drug tests, all of them came out clean. The head of the drug testing unit was there to testify that she was not a drug user and yet the courts favoured the father and the judge very clearly said that it was because he was a police officer and he trusted the police officer. So first it was drug abuse, then he came back later and charged her with parental abuse and then he charged her later with one thing after another and it was like throwing... it was like throwing wet toilet paper at the ceiling to see what can stick. It's a game, he charged her with a whole series of different things. And to see what could stick and now what they've come up with is parental alienation and that's the one that's sticking now. (R21)

When used as an individual tactic, changing the subject serves to distract the court or others from investigating the abuse at issue. It also serves to create an impression that the parties are engaged in a mutual fight since they are both making complaints. Often, this is used as an excuse to avoid fact-finding or investigation of the reported abuse.

Threats and attacks

Finally, direct attacks and threats continue to be used to resist the battered women's movement and support and services for abused women. Direct attacks and threats were used against advocates and anti-violence organisations. For example:

> I've had threats from individuals, right? Of personal violence against me... and I think about the individuals, abusers, everything from being in my face, sort of like physically threatening me in the courthouse... There was the guy who was threatening one time... left me phone threats against my family, they tracked me down right? Described where I lived. So there's that kind of level of threat stuff. Primarily from abusers. There's also periodically over the years the threat to contact funders has come up, either from individuals or from other programs or agencies who haven't liked a sort of stance. So that's a common one you know. (R3)

Other respondents described attacks related to their jobs, such as complaints to professional organisations, threats to sue, and frivolous lawsuits. Although the lawsuits mentioned were ultimately unsuccessful, they used time and money that could have been spent on providing services to survivors. Often, these attacks were instigated by individual abusers against an individual or organisation that had provided assistance to the woman or children they were abusing. However, a variety of allies assisted the abusers in carrying

out the attacks both directly, by facilitating particular cases, and indirectly, by legitimating abusers' claims and catering to their demands.

Conclusion

This paper has provided a brief introduction and overview of the tactics of anti-feminist backlash as reported by advocates who work with abused women. In sum, the study participants identified a staggering variety of tactics including: resistance to acting on legal and policy changes; victim blaming; discrediting women/feminists; individualisation; changing the subject; and direct attacks and threats. These tactics were deployed at multiple levels of the social ecology, from individual level intervention in specific cases to the promotion of understandings of violence and abuse that jibe with abusers' articulated beliefs at the cultural level. The tactics were often contradictory and inconsistent, drawing upon sexist stereotypes while simultaneously making demands for formal equality.

Like sexism and woman abuse, anti-feminist backlash is multivalent. As such, it requires a broad collection of responses. We need to strive to maintain the visibility of the larger gendered patterns in violence while maintaining the programmes and services that have been specifically created in response to overwhelming and disproportionate demand for assistance for abused women. As indicated by pervasive, persistent, and striking sex differences in violence perpetration, gender is pertinent to all forms of violence. Returning to gender-blind language or gender oblivious programmes will not solve the problems of inclusiveness, social inequality, or discriminatory justice practices. Instead, scholars can study multiple types of violence in specific communities, generating accurate information that can guide programme and policy formation for the communities where they are most needed.

There are several areas where further research is needed to understand and counter the backlash against the battered women's movement. As many of the interviewees noted, scholars need to continue to develop measures of violence that more accurately reflect its realities. They also need better measures of the social context of persistent inequality that continues to promote violence and abuse. Existing measures of social inequality are extremely crude and narrow. Many were developed in the 1960s and 1970s and are inadequate to identify much less assess contemporary manifestations of inequality-perpetuating beliefs, attitudes, practices, and structures.

Additional research is also required to investigate the outcomes of anti-feminist backlash. Contexts such as the family courts, which are central to abused women's safety, have barely been investigated in the United States. As the Australian experience with family law reform and its evaluation shows, this is one area in which the demand for future research is heightened due to the significant impact of family court proceedings on entire

families (Chisholm, 2009; Kaspiew, Gray, Weston, Moloney, Hand, Qu, and the Family Law Evaluation Team, 2009; Lodge and Alexander, 2010). Careful attention to the interaction of justice and other systems is of central importance to ongoing work to prevent and intervene in violence against women. The respondents' accounts reveal the interlocking dynamics of oppression of abused women that, viewed individually, do not tell the whole story. As Marilyn Frye argued:

> The experience of oppressed people is that the living of one's life is confined and shaped by forces and barriers which are not accidental or occasional and hence unavoidable, but are systematically related to each other in such a way as to catch one between and among them and restrict or penalise motion in any direction. (Frye, 1983: 4)

Abused women's experiences might be understood in a similar fashion. By definition, criminologists tend to focus on formal and informal justice systems. However, it is equally important to attend to the interplay of media, economics, academia and culture if we want to end violence and abuse.

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12

Understanding Woman Abuse in Canada

Walter S. DeKeseredy

Introduction

Canada is often defined as a low-violence or very safe country (Currie, 2009). There is much empirical support for this characterisation. However, some people and places in Canada are safer than are others. For example, while most men are immune from physical and sexual assaults in domestic/household settings, these contexts are extremely dangerous for an alarming number of women. Annually, at least 11 per cent of married/cohabiting women are physically abused by their male partners (DeKeseredy, 2011a). Additionally, ample evidence suggests that Canadian men are more physically violent to adult female intimates than are males in the United States (US) (DeKeseredy, 2011a). Further, approximately 25 per cent of women enrolled at post-secondary schools experience some variation of sexual assault (DeKeseredy and Flack, 2007). Many more statistics support the assertion that it often hurts to be a woman in Canada (DeKeseredy, 2011a) but it is beyond the scope of this chapter to present them. Instead, the main objective is to review Canadian sociological, empirical and theoretical work on woman abuse done so far and to suggest new directions in research and theorising.

The past

There was episodic concern with woman abuse in Canadian history but it was not of major interest until recently to social scientists, practitioners, politicians and the general public. It was, after all, only 40 years ago that an exhaustive bibliography on wife-beating could be written on an index card (DeKeseredy and Dragiewicz, 2009). As Denham and Gillespie (1999: 6) remind us: 'Prior to the 1970s, there was no name for violence against women by their husbands or partners'. Since then, mainly because of feminist efforts, many Canadians pay considerable attention to the various assaults women experience during and after intimate relationships. Feminists also

influenced the development of a spate of large- and small-scale studies, as well as the construction of several theories.

Research specifically designed to determine the extent of woman abuse in Canada began with MacLeod and Cadieux's (1980) examination of transition house and divorce-petition data. Their study was 'methodologically unsound' (Ellis, 1987: 17) but they concluded, 'every year, one in ten Canadian women who are married or in a relationship with a live-in lover are battered' (Ellis, 1987: 17). While not derived from a representative sample of the general population, this conclusion was not far off the mark as demonstrated by subsequent more sophisticated studies (DeKeseredy, 2011a).

From the mid-1980s to early 1990s, several Canadian researchers gathered more reliable quantitative data on woman abuse in intimate relationships.[1] Although these scholars used different sampling and interview techniques, almost all of them used some version of Straus's (1979) Conflict Tactics Scale to glean data on physical violence and Koss, Gidycz and Wisniewski's (1987) Sexual Experiences Survey to capture statistics on sexual assault. Except for Statistics Canada's Violence Against Women Survey (VAWS) (Johnson, 1996), most Canadian surveys showed that at least 11 per cent of women in marital/cohabiting relationships are physically abused by their partners each year. The rate of such violence in university/college dating was found to be twice as high and so was the incidence of sexual assault (DeKeseredy and Schwartz, 1998).

During the aforementioned time period, there were also studies of 'post-separation woman abuse' and 'intimate femicide',[2] which supported 'the widespread apprehension that wives often experience elevated risk when deserting a violently proprietary husband' (Wilson, Johnson and Daly, 1995: 340–1). This observation still holds true in Canada (Brownridge, 2009, DeKeseredy 2011a).

From 1980 until now, most woman abuse surveys were primarily concerned with answering two questions: (1) 'how many women are abused by their current or former male partners?'; and (2) 'what are the correlates of woman abuse?' (DeKeseredy and Hinch, 1991: 28) This is not to say that all of this work constituted abstracted empiricism (Mills, 1959). For example, using data from his Toronto woman abuse survey, Smith (1990) tested the feminist hypothesis that wife-beating results from men's adherence to the ideology of familial patriarchy. Further, Statistics Canada's VAWS was influenced by feminist thought (Johnson, 1996). Still, few original theories were crafted and tested by Canadian scholars.

Much of the Canadian theoretical work on woman abuse is guided by DeKeseredy's (1988) male peer support model which was revised and expanded over the past 25 years.[3] The late 1980s also witnessed the development of Ellis and DeKeseredy's (1989) Dependency, Availability, Deterrence (DAD) model, a perspective that attempts to explain why separated/divorced and cohabiting women are more likely than married women to be abused

by the men they live with or have lived with. As well, variations of feminist theory influence Canadian woman abuse research and still do today. Another perspective that garnered much attention in the late 1980s was evolutionary psychology. Canadian scholars working in this tradition (for example, Daly and Wilson, 1988) argue that male violence against women is the result of competition for sexual access to women. The concept of male proprietariness is emphasised in evolutionary thought and is defined as 'the tendency [of men] to think of women as sexual and reproductive "property" they can own and exchange' (Wilson and Daly, 1992: 85).

Ellis and DeKeseredy (1997) built on the concept of male proprietariness by integrating it with a theory of interventions to explain variations between estrangement and intimate femicide. Male proprietariness is also a major component of DeKeseredy, Rogness and Schwartz's (2004) feminist/male peer support model of separation/divorce sexual assault. Their offering moves well beyond answering the problematic question: 'Why doesn't she leave?'; to 'What happens when she leaves or tries to leave?'; and 'Why do men do it?' (DeKeseredy and Schwartz, 2009, Hardesty, 2002: 599). The first question blames females for the abuse they endure in intimate relationships. And, as Stark (2007: 130) notes: 'It is men who stay, not their partners'. Certainly, 'there is no greater challenge in the abuse field than getting [violent] men to exit from abusive relationships' (Stark, 2007: 130).

In sum, in approximately one decade, woman abuse emerged out of a vacuum of silence to become a major issue for Canadian researchers but it is no longer a priority for most politicians and the general public. Moreover, the progressive empirical and theoretical work done since the mid-1980s unintentionally contributed to an anti-feminist backlash (DeKeseredy and Schwartz, 2003). Patriarchy is now being reasserted by conservative fathers' rights groups and other anti-feminist organisations (Dragiewicz, 2008) and the Canadian federal government is supportive of these groups' initiatives.

Where we are today

The late 1990s marked the start of a major shift in Canadian federal government responses to woman abuse which, in turn, had a major impact on the research community. Statistics Canada is now influenced by political forces driven by fathers' rights groups and others intent on minimising the pain and suffering caused by male-to-female violence. Statistics Canada (2002, 2005, 2011) no longer focuses primarily on violence against women but rather conducts General Social Surveys (GSS) that produce equal rates of male and female intimate violence without carefully examining their differing contexts, meanings and motives (DeKeseredy, 2011a). As well, on 3 October 2006, Bev Oda, then federal minister for the Status of Women Canada (SWC), announced that women's organisations would no longer be eligible for funding for advocacy, government lobbying or research projects.

SWC was also required to remove the word 'equality' from its list of goals (Carastathis, 2006).

In early September 2007, Prime Minister Stephen Harper buttressed the anti-feminist agenda by eliminating funding to the National Association of Women and the Law, a non-profit women's group that tackles violence against women and other forms of female victimisation. Consequently, there will be more cases where women are twice victimised: first by violence and the men who abuse them, and then by the lack of social support provided by the Canadian federal government (DeKeseredy, 2009).

On top of these transitions, some prominent Canadian politicians, journalists, activists and researchers dismiss the alarming rates of woman abuse generated by progressive surveys and ferociously attack feminist interpretations of these figures. For example, well-known for his anti-feminist stance, psychologist Donald Dutton (2010: 8) states that only a 'minority of men are violent either outside or within relationships. There is no norm for wife assault – this is a sociological fiction and contradicted by surveys...'.

The Public Health Agency of Canada used to prioritise violence against women but now publishes Family Violence Prevention E-Bulletins such as its July 2011 version[4] that support the erroneous notion that women and girls are equally violent as males. What is more, gender-neutral terms such as 'intimate partner violence', and 'domestic violence' are replacing gender-specific ones (for example, woman abuse). Many people who use such language selectively cite research that incorrectly characterises violence as bi-directional, mutual or sex symmetrical (DeKeseredy and Dragiewicz, 2009).

In the current political atmosphere characterised by a counter-movement to degender the naming and framing of woman abuse (Bumiller, 2008, Johnson and Dawson, 2011), feminist inquiry is subject to vitriolic attacks but most, if not all, who launch them (for example, Dutton, 2006, 2011) do not understand feminism. And it is their voice – not those of feminists or abused women – that is the loudest. Ironically, this situation has a positive consequence for the social scientific community since feminists' studies are generally very rigorous because they know that they will be subjected to heightened scrutiny and criticism as being 'political' rather than scientific (Romito, 2008).

Though often criticised, ignored or even silenced, Canadian feminist academic work on woman abuse persists. Still, much of the recent research was done outside Canada. For example, University of Ottawa criminologist Holly Johnson helped conduct the International Violence Against Women Survey (Johnson, Ollus and Nevala, 2008) and I continue to do research with US colleagues on separation/divorce assault in urban and rural parts of their country (see DeKeseredy and Schwartz, 2009, Rennsion, DeKeseredy and Dragiewicz, forthcoming). It is also somewhat paradoxical that Molly Dragiewicz, a leading expert on Canadian fathers' rights groups,

the anti-feminist backlash and the experiences of abused Canadian women lacking legal representation in the family courts, recently came from the US to work in Canada.[5]

Again, Statistics Canada's recent renditions of the GSS are highly problematic. Brownridge (2009), however, examined only the woman abuse statistics in the 1999 and 2004 GSS and produced some valuable information on violence against women at the margins such as those who are immigrants or disabled and who are Aboriginal. Unfortunately, his analyses of GSS data receives much less public attention than GSS data showing sex symmetry.

Intersectional analyses of violence in the lives of girls is another issue that garners much attention in the Canadian feminist community (Berman and Jiwani, 2002, Jiwani, 2006, Pajot, 2009) and so are moral panics about girls' aggression (Barron and Lacombe, 2010, DeKeseredy, 2010). Intersectionality is also directly relevant to feminist interpretations of internet pornography which has become more violent and racist (Dines, 2010). DeKeseredy and Olsson (2011) show that it is also strongly associated with various types of woman abuse in intimate heterosexual relationships.

Other salient examples of recent Canadian feminist scholarship could be reviewed here including Du Mont, Macdonald, Rotbard, Asllani, Bainbridege and Cohen's (2009) research on drug-facilitated sexual assault. Undoubtedly, there are prolific feminist researchers scattered across Canada and they continue to do interesting and policy-relevant empirical and theoretical work. Nonetheless, they face numerous challenges over the next few years as Canada continues to move to the right of the political economic spectrum. It is to some of them that I turn to next.

Challenges ahead

At the end of the 1990s, Denham and Gillespie (1999: 47) declared: '[t]his is a critical point in the evolution of our understanding of woman abuse'. This statement holds true today but the circumstances are different. There was an anti-feminist backlash then, but it was more deeply entrenched and mainstreamed (DeKeseredy, 2011a, Dragiewicz, 2011). For example, Springer Publishing Company now produces the journal *Partner Abuse* and people seeking to gain a sophisticated understanding of current feminist contributions will learn little from reading it. As stated in the Guidelines for Authors: 'A basic premise of the journal is that partner abuse is a human problem, and that the particular role of gender in the etiology, perpetration, and consequences of emotional and physical partner abuse cannot be assumed...' (Malley-Morrison, Hamel and Langhinrichsen-Rohling, 2010: 1). Gender, however, matters and major steps need to be taken to resist the degendering of one of Canada's most compelling social problems (Dragiewicz, 2009).

Gender matters is a message that repeatedly needs to reach the general public and one effective way of doing so is through social media such as

Facebook (DeKeseredy, 2011b). Researchers should also target mainstream media and engage in newsmaking criminology (Barak, 2007). Since newspapers, television shows, web sites and magazines reach large audiences, newsmaking criminologists assert that progressive scholars should take every opportunity to offer their research and views to the media, creating a situation where they are 'seen and heard, not after the fact, but proactively' (Renzetti, 1999: 1236). That articles and letters written by feminists are periodically published by the mainstream press and that some feminist scholars have been on television serves as evidence that the mainstream media do not totally dismiss or ignore progressive interpretations of gender violence (Caringella-MacDonald and Humphries, 1998, DeKeseredy, 2011b).

Canadian funding for woman abuse research is at an all-time low and this situation will not improve under Prime Minister Stephen Harper's leadership. The only major national surveys likely to be administered during his tenure will be those crafted by Statistics Canada and the data will continually support the sexual symmetry of violence thesis. Feminist projects, though, funded by local community groups and provincial government agencies can be done. For example, since 2008, Molly Dragiewicz and I conducted local studies of abused women's experiences with the family court process funded by Ontario provincial grant money given to Luke's Place Support and Resource Centre based in Oshawa, Ontario.[6]

There will be even more intense competition for scarce grant money as governments at all levels downsize their budgets. It is thus time for researchers based at different institutions to think seriously about collaborating instead of competing with each other. Collaborations help 'spread the wealth' but also 'work to expand the collective understanding of woman abuse. They can create new opportunities for solutions that could not exist if groups worked in isolation' (Denham and Gillespie, 1999: 45).

Theoretical work is just as, if not more, important as empirical projects and there is a need for new perspectives. Yet the best efforts to explain woman abuse focus on men rather than women. Hotaling and Sugarman (1986) found only one variable out of 42 characteristics allegedly related to wife-victims that consistently discriminated between abused women and those who were not abused. This is still the case now and it is consistent with the argument that any woman is a possible object of violence. What differs is not the woman but the man (DeKeseredy, 2011a).

Equally important is constructing and testing theories that focus on the big picture as well as micro-level determinants (Rosenfeld, 2011). In other words, broader social, political, cultural and economic contexts in which woman abuse occurs need to be examined because this harm does not occur in a vacuum and is a widespread problem. Such work, however, will be met with acerbic criticism from conservative researchers and activists seeking to minimise the breadth of woman abuse and reduce it to a function of mental disorders (for example, Dutton, 2006, 2010, 2011).

Conclusion

This paper offers a brief history of Canadian empirical and theoretical work on woman abuse. An unknown number of readers will disagree with this historical account and assert that important contributions were neglected. As Michalowski (1996: 9) states in his story of critical criminology: 'This is all to the good. I increasingly suspect that we can best arrive at useful truth by telling and hearing multiple versions of the same story'. Included in another version will be contributions made by psychologists, anthropologists, social workers and other types of scholars. Obviously, the bulk of material cited here is sociological. This is not the result of selective inattention or paradigm hostility. Rather, it reflects the fact that sociologists did most of the Canadian theoretical and empirical work on woman abuse.

Woman abuse as a social issue compels us all to become sociologists and to look at our whole society through the lens of a critical analyst. The challenge for us as sociologists is to continue to question the meaning of changes in the story of woman abuse and their unanticipated consequences to uncover the real meaning of change and the social meaning of woman abuse prevention (DeKeseredy and MacLeod, 1997).

There is yet another story about woman abuse in Canada that needs to be told: one that focuses on the different approaches to preventing and ending beatings, sexual assaults, stalking and the like. Despite budget cuts, the anti-feminist backlash and a host of other obstacles, many achievements are attributed to the ongoing and ever-changing efforts of men and women involved in the violence against women movement (Johnson and Dawson, 2011). But have the rates of woman abuse decreased over the past 40 years? Abused women now have more resources to choose from but they are not markedly safer (Dragiewicz and DeKeseredy, 2008). Without doubt, separated/divorced women in Canada are still at a high risk of being killed (Cross, 2007, DeKeseredy, 2011a). Sadly, scores of women will continue to suffer in silence until the major causes of woman abuse are recognised, understood and addressed by policymakers and the general public (Johnson and Dawson, 2011, Wolfe and Jaffe, 2001).

Notes

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1. See DeKeseredy (2011a) and DeKeseredy and MacLeod (1997), and Johnson and Dawson (2011) for reviews of these studies.
2. See DeKeseredy, Rogness and Schwartz (2004), Brownridge (2009), and DeKeseredy and Schwartz (2009) for reviews of research on these harms.
3. See DeKeseredy (1990), DeKeseredy and Schwartz (1998, 2002, 2009, 2010) and Schwartz and DeKeseredy (1997) for in-depth reviews of the empirical and

theoretical literature on the relationship between male peer support and woman abuse in various intimate heterosexual relationships.

4. See http://www.phac-aspc.gc.ca/ncfv-cnivf/EB/2011/july-juillet/e-bulletin-eng.php, date accessed 11 July 2011.
5. For more information on her recent Canadian work on these issues, see Dragiewicz and DeKeseredy (2008, forthcoming) and DeKeseredy and Dragiewicz (2009).
6. See Dragiewicz and DeKeseredy (2008) and DeKeseredy, Dragiewicz and Demers (2011) for more information on this work.

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13

Heteronormativity, Homonormativity and Violence

Matthew Ball

Introduction

The existence of intimate partner violence within non-heterosexual and/or non-cisgendered relationships[1] is gaining greater recognition. There are a handful of community organisations that offer services and assistance to victims and perpetrators of this violence (particularly gay men and lesbians), and the body of research literature in this area is slowly growing. While some critiques warn of the dangers of applying the theoretical and conceptual tools developed to understand relationship violence among heterosexuals directly to queer relationships, the inclusion of queer relationships in these discourses has for the most part been celebrated as a positive step forward, addressing the historical invisibility of sexual minorities in these areas. Nevertheless, the debate about how best to understand and represent the experience of violence in these communities continues, with the focus being to determine whether it is better to expand the tools used to understand heterosexual intimate partner violence to include queer communities, or whether new tools are necessary in order to understand their experiences.

If we intend to reform criminal justice processes and institutions to ensure greater social inclusion, then incorporating the experiences of these communities into policies surrounding, and responses to, such violence seems necessary. This inclusion has a number of short-term gains – it ensures that a multitude of previously overlooked victims can access greater justice and that there is at least an attempt to offer them support in leaving violent relationships. However, it is important to reflect on *how* inclusion in this context is thought about and achieved, and the costs and unintended consequences of the current ways in which this occurs. These forms of inclusion may, in fact, perpetuate particular forms of exclusion and injustice in unexpected and unintended ways.

This chapter examines some recent studies into this violence and campaigns that seek to address it. In it, I argue that the way in which these

studies and campaigns attempt to ensure inclusivity at times perpetuate forms of *hetero*normativity and *homo*normativity. This means that they maintain exclusions, though in unacknowledged and not immediately apparent ways (see further Holmes, 2009). In particular, they reinforce appropriate ways of being 'gay subjects', suggest appropriate health interventions in queer lives, and are also connected to specific forms of sexuality politics not necessarily shared by all – particularly forms of sexuality politics that focus on the imperative to 'come out' and identify according to particular identity categories. Such exclusion is not necessarily intentional, but rather an artefact of the dominant discourses that surround sexuality in our society. To make these points, I draw from queer theorising, as it offers a useful perspective that allows for these exclusions to be identified, and is one that is not widely used in this particular context. It is with queer theory that I begin.

Queer theorising, heteronormativity and homonormativity

As queer theorising encompasses a variety of knowledge-objects, modes of theorising, and methods for knowledge production, it is necessary to explain how queer insights are used in this chapter. One common theme underpinning the diverse researches that fall under this ambit is an interest in destabilising our understandings of sexuality and gender, including our understandings of homosexualities. Queer theory moves past the identity politics that connect to traditional understandings of sex, gender and sexuality, which aim for the liberation of sexual minorities (particularly through 'coming out' of the 'closet'), the achievement of equality, and the normalisation of gay identity (Rosenfeld, 2009: 622, Seidman, 2001: 321). Queer theorists and activists focus less on such normalisation for gay identities and more on removing normalising forms of regulation experienced by *all* sexualities (Seidman, 2001: 321). They question normalcy and try to understand the regulation of non-normative identities, in the process disrupting our common ways of thinking and questioning, and the categories we use to understand the world. In many cases, they try to uncover the forms of heteronormativity – 'the taken-for-granted and institutionalised dominance of heterosexuality' (Sykes, 2011: 424) – that pervade our lives. Beyond this deconstructive and critical impulse, the term 'queer' is also used in some cases as an identity category to refer to those people that attempt to push past sex, gender and sexuality binaries (Manning, 2009).

The attention of queer theorists is also turned towards examining homonormativity, which refers to the ways that 'gay, lesbian and queer subjects or politics produce their own limited perceptions and normative exclusions' (Sykes, 2011: 429). It has been noted that some forms of sexuality politics normalise gay subjects, wherein they are included in social policies and legislation to the extent that every other aspect of their lives

accords with 'normal' practices surrounding gender, family, and work. Queer theorists are wary about politics shaped in this way because such politics often imply that there is only one way of 'doing' sexuality politics, and one way of 'being' gay. Moreover, forms of normalisation are also understood as neutralising the critical aspects of queer politics (Seidman, 2001: 324), allowing for socially advantaged white gay men and lesbians to position themselves as 'normal' in opposition to (the too radical and immoral) 'deviant' queers (Manning, 2009), thereby making 'queerness respectable and domestic' (Sykes, 2011: 425). In this way, queer theory seeks to 'deflate [the] emancipatory narrative [of identity politics] by exposing its exclusionary and disciplinary effects' (Seidman, 2001: 326), which is a task taken up here.

Thus, homonormativity refers to the ways that gay subjects become 'good citizens' of the neoliberal state, uncritically supporting ideals of respectability, productivity and nationalism, and perpetuating other forms of injustice (Sykes, 2011: 430, Seidman, 2001: 323). Duggan summarises this form of neoliberal homonormativity by stating that it is 'a politics that does not contest dominant heteronormative assumptions and institutions, but upholds and sustains them, while promising the possibility of a demobilised gay culture anchored in domesticity and consumption' (Duggan, 2002: 179).

These insights have not been widely applied to the issue of intimate partner violence in queer communities. The notion of 'queer' has really only been used in this body of research to denote an identity category among others (gay, lesbian, bisexual, and so on). In these cases, appending the 'Q' to an acronym such as GLBTIQ does not denote a queer lens being used in the research – one could say that the 'Q' does not carry much weight. This chapter intends to offer an initial consideration of these dynamics.

'Same...': inclusion and heteronormativity

A dominant way of ensuring that queer experiences of intimate partner violence are adequately addressed is for these experiences to be included in broad social and political campaigns to address violence, as well as support services. In many cases, this involves simply making sure that the social conversation about violence recognises violence occurring in these communities (such as by including same-sex couples in awareness campaigns), or by ensuring that service providers and police are adequately trained to deal with such perpetration and victimisation (Letellier, 1994).

Overwhelmingly, violence is understood here through a lens that treats violence in all relationships as relatively similar. Thus, information campaigns surrounding violence invariably present a list of the kinds of violence that exist (emotional, social, financial, sexual, and physical), and some of the behaviours that might constitute these forms of abuse. In all,

victims and perpetrators, the forms of violence perpetrated, and the experiences of victimisation, are understood in much the same way as they are in heterosexual relationships.

Information resources produced by community organisations relating to this violence reflect this form of inclusion. The Same-Sex Domestic Violence Interagency's 'Another Closet' booklet (SSDVI, 2009), the 'Safe Relationships Project' (SRP, n.d.), Greater Western Sydney's 'Speak Out About Abuse in Relationships' service (SOAAR, n.d.), and the ALSO Foundation's 'Abuse in Same Sex Relationships' (ALSO Foundation, n.d.), all offer lists of the kinds of violence that exist in intimate relationships so that members of GLBTIQ communities can name this violence in their lives. Some documents, such as the Queensland Government's 'Increasing your Safety' (Department of Communities, n.d.) booklet, do not explicitly address same-sex relationships, but nevertheless point out that violence can occur in any relationship. However, these approaches can reproduce heteronormativity (Ball, 2011, Ball and Hayes, 2010, Letellier, 1994). The identification of hetero-norms in these discourses (particularly some of the more radical feminist-informed discourses) is perhaps the most apparent form of critical analysis in this area.

One way this can become apparent is by considering the subject positions created by discourses on relationship violence that circulate in this field and are embedded in approaches to addressing violence, as well as the impacts of these discourses. Overwhelmingly, in these discourses, victims are positioned as innocent, with generally 'normal' personality characteristics. Often, they have low self-esteem, a desire to avoid conflict, and a reluctance to identify violence in their relationships. Further, they are thought to have adopted a position of learned helplessness by feeling that they cannot escape and that they are responsible for their own victimisation. In contrast, perpetrators are positioned as individuals focused on power and control. They are thought of as having little or no control over other aspects of their lives, which leads to their violence, as appearing gentle but actually manipulative, as harbouring feelings of self-hate due to internalised homophobia, heterosexism, and isolation, and, if men (as they invariably are in these discourses), as confused about their masculinity. They are also thought to lack genuine remorse, so they deny responsibility and do not think that violence is entirely their fault. In some cases, they are even thought to possess personality disorders such as a diagnosable psychopathology (Poon, 2011: 105–14).

These subject positions are clearly gendered and embedded in attempts to address such violence. They are also heteronormative when applied in the context of same-sex relationships. Victims, for example, appear as unable to protect themselves. For male victims of violence from male partners, this status can potentially contrast with their own experience of masculinity (Ball, 2011, Poon, 2011: 121). Only gay men that conform to victim

ideals are seen as victims. If they fight back, or feel they were not powerless, then they are not understood as 'real' victims or that they are 'in denial'. Furthermore, perpetrators are thought of as trying to avoid responsibility if they try to explain their violence and its context when seeking treatment (Poon, 2011: 119–20). For some perpetrators, being able to tell their story is essential, particularly if they feel a contextual factor such as societal discrimination has impacted on their use of violence. The way that these dichotomies close down the possible stories that people can tell about their experience of violence, and the multiple, possibly contradictory, forms of subjectivity that they experience, means that members of queer communities are treated as though they are perpetrators or victims of heterosexual violence as understood through a primarily feminist lens.

Building 'safe' or 'healthy' relationships constitutes one particular approach to preventing intimate partner violence in queer communities. Such discourses and programmes (like workshops in this area or counselling approaches adopting these notions) encourage individuals to adopt psychological techniques of the self, particularly focused on improving self-esteem, self-knowledge and self-discipline, in the process prescribing what is emotionally 'right' or healthy, and providing a picture of how healthy relationships should be conducted. These discourses, however, can also perpetuate heteronormativity as they explicitly define the normal and abnormal within family, intimate life, sexual acts and desires, and subjectivities. As such, they promote a narrow sexual subjectivity – one which obscures pleasure and desire, pathologises queer sexuality, promotes heterosexual sex within the confines of marriage, and desexualises queer identity to produce a responsibilised and respectable homosexual citizen (Holmes, 2011: 214, 223–4).

The heteronormative governmental impact of these discourses is further emphasised by the fact that such programmes accord with neoliberal ideals of health promotion, which rely on a normalising model of autonomous, rational, self-regulated and individualised subjectivity that accords with neoliberal ideals. Moreover, they are based on discourses of psychology and health which are not neutral and objective but already reflect raced, classed and gendered norms (Holmes, 2011: 212, 221–2). As such, these discourses open up further possibilities for the normalising governmental regulation of queer lives.

There have been some attempts to avoid the heteronormativity produced through these commonly used tools and understandings of violence. For example, there have been moves to reform these tools and understandings. Thus, Lesbian Partner Abuse Scales have been developed, the power and control wheel has been altered, and specific risk-based analyses for queer relationships have been suggested (Davis and Glass, 2011, McClennen, Summers and Daley, 2002). However, some of these attempts do not necessarily move away from hetero-norms.

For example, Donovan and Hester (2011) convincingly argue that one fruitful way of understanding this violence is to investigate the *similarities* between heterosexual and non-heterosexual relationships which, they contend, includes the notion of romantic love that underpins many relationships (where it is held that there is a 'right' person for you, and that strong and fulfilling relationships are characterised by fidelity, monogamy, privacy and loyalty). They suggest that most violent relationships are based on notions of love and consent, and that it is those that are willing to do the 'emotion work' in the relationship that are vulnerable to violence, as declarations of love can be made so as to keep partners in abusive relationships, or emotional disclosures made by one partner can be exploited as vulnerabilities by the other (Donovan and Hester, 2011: 81, 83, 91–5).

They contend that examining the role that love plays in the dynamics of violence allows us to identify violence in a greater range of relationships, helping us to break away from gendered assumptions that might otherwise prevent us from identifying violent relationships. However, while this shift in perspective is useful, these understandings still bring gender binaries into play. Donovan and Hester (2011) still argue that romantic emotion work is feminised and what are seen as more practical aspects of emotion work (such as providing financially) are masculinised (Donovan and Hester, 2011: 85, 98). In fact, Hester (2010: 99–100) argues that gender remains important in understanding abuse and how it works in same-sex relationships because gendered norms still impact on the outcome and effects of violence. Thus, despite an attempt to move away somewhat from a focus on gender and power in the examination of violence, this view still utilises gender binaries to some extent. Furthermore, by focusing on romantic love and its role in relationships, this potentially closes down a focus on other ways of 'doing' relationships. The lens that is used here to identify violence is still therefore implicitly binarist and heteronormative.

The forms of inclusion discussed in this section generally imply that the same conceptual tools, definitions of violence, and counselling approaches can be used to understand and address violence in this context. After all, it is assumed that many queer relationships are similar to heterosexual relationships (except in terms of who the partners are) and these relationships are likely to experience similar relationship pressures that produce violence. However, it is clear that these approaches effectively authorise particular discourses to speak for violence, and represent the experiences of victims and perpetrators, allowing these to be imported into the responses of service providers. To put it simply, in this process, queer relationships become versions of heterosexual relationships, and victims become simply same-sex attracted versions of heterosexual victims of violence. Furthermore, they often become feminised, given that the dominant discourses in this area position women as the victims of intimate partner violence, and men as the

perpetrators. (Note the general exclusion of those that actively challenge such gender binaries in these understandings too.)

In addition, heterosexual relationships are implicitly held up as the ideal model of what relationships ought to look like. Healthy relationship discourses set the standard against which gay relationships are to be normalised. While it is certainly the case that many gay relationships resemble such ideals – monogamous, communicative, committed, emotionally satisfying and so on – it is not the case that *all* relationships fit this model. In fact, a variety of different relationship types (including among heterosexual relationships) are not considered here. Thus, being subsumed into these discourses desexualises queer communities and attempts to normalise relationships (such as including queer relationships) that might actively seek to challenge the heteronormative notions of relationships and family. These relationships become non-threatening through their desexualisation, and are subsequently used to reinforce neoliberal (and homonormative) ideals, to which I now turn.

'...But different': recognising difference and homonormativity

To counter some of the more apparent problems of heteronormativity in violence prevention measures and research in this area, it has been recognised that there are unique factors that characterise intimate partner violence in queer communities that must be taken into account in order to provide an effective understanding of this violence (see, for example, Chan, 2005, Ristock, 2011). While this violence is not necessarily treated as an entirely different phenomenon, it is nevertheless understood as something that has its own unique dynamics, causes and impacts.

At first glance, recognising these unique elements appears to be an effective way of addressing heteronormativity. Creating new frameworks of understanding based on unique experiences appears to be the necessary response to heteronormative discourses that exclude queer communities from these knowledges. However, these discourses tend to draw from the dominant discourses that circulate about sexuality in our society, and these generally require people to understand their sexuality and identity in particular ways. It is in this sense that they can be understood as homonormative. This homonormativity subsequently appears to legitimise the development of particular forms of violence prevention connected to specific kinds of sexuality politics – notably the push to 'come out' and identify which particular category (gay, lesbian, transgender) one belongs to.

Research that is undertaken with the intention of understanding the unique factors that exist here primarily focuses on two issues. It either points to the unique forms of violence that might exist within queer relationships, or it points out the unique social (and to some extent, psychological) contexts

within which queer lives are situated, as these affect the perpetration of violence as well as the help-seeking behaviour of victims. It is important to discuss these in a little more detail before pointing out the impacts of these views, and the methods for addressing violence they legitimise.

First, with regard to the dynamics of violence, it is argued that it is important to understand how particular experiences impact on the shape that violence takes in queer relationships. For many such relationships, the use of 'outing' and HIV status as tools of violence is particularly important. Briefly, a person can threaten to 'out' their partner's sexuality or trans-status, or even their HIV status, to family, friends or co-workers (Craft and Serovich, 2005). This operates as a unique tool of control in these relationships and, particularly for the threat of 'outing', this has no equivalent in heterosexual relationships. Additionally, and again perhaps more likely in queer relationships as opposed to heterosexual ones, a partner that is HIV-positive can use their serostatus as a tool of control through the threat to 'infect' their partner or by suggesting that their health will deteriorate if their partner left them. Alternatively, a perpetrator whose partner is HIV-positive can foster dependence by withholding medication or claiming that, if they left the relationship, their serostatus would prevent them finding another partner (Craft and Serovich, 2005). Moreover, intimate partner violence is often a risk factor for HIV infection, and it is argued that HIV-positive men often have stronger negative self-perceptions and are more willing to tolerate violent relationships (Pantalone *et al.*, 2011: 183).

The other focus of this research considers the social and psychological context within which queer lives are situated and which, it is argued, must be considered if these lives are to be understood. It is suggested that these lives are invariably characterised by homophobia, heterosexism and heteronormativity, and that these have an impact on both perpetrators and victims of violence. For instance, the lives of those who experience or perpetrate abuse are characterised by troubled childhoods of abuse, violence and instability; bad experiences of coming out; difficulties in their intimate relations such as isolation, stigma, mental illnesses, and internalised homophobia; marginalisation on the basis of multiple minority statuses; and substance abuse (Cruz and Firestone, 1998, Pantalone *et al.*, 2011: 188–97, Smith, 2011: 135–41). Thus, it is thought that people with lives characterised by such disadvantage understandably have maladaptive coping strategies, which include a normative sense of violence (Pantalone *et al.*, 2011: 204).

Some research in this context has thereby sought to understand the direct impact that these experiences have on violence. It has been argued that minority stress – the psychological and social stresses that result from a minority status (Mendoza, 2011: 170) – becomes a way of entitling oneself to use violence. A person's inner conflict is thus resolved through externalisation – that is, their internalised homophobia is directed towards others, such as their partner, who represents what they dislike about themselves.

Additionally, the stresses of heterosexism and homophobia are argued to lead to particular forms of coping behaviours, which often involve the concealment of one's sexual identity and self-repression (Mendoza, 2011: 178–9).

Research of this kind mirrors research into heterosexual intimate partner violence, where the family environment, childhood and adolescent experiences of violence, and the lack of non-violent role models are used to explain how people have normalised the perpetration or experience of violence in their lives (see further Itzin, Taket and Barter-Godfrey, 2010). However, in the context of queer violence, these experiences (or what could be understood to be 'deficiencies' in peoples' lives) focus primarily on one specific element – sexuality. It is the negative experiences surrounding sexuality that are to be addressed in order for violence to be reduced. To some extent, sexuality becomes a target for interventions to address intimate partner violence.

For violence to be reduced, then, these understandings of violence suggest that social intolerance must be overcome. It is also implied that a victim's own personal resilience towards these forms of discrimination must be built up so as to reduce ongoing victimisation and the impact of violence. This is clear in some suggested interventions. For example, Pantalone *et al.* (2011: 202) suggest that interventions to prevent violence ought to start early, through the identification of co-morbidities (such as the life experiences mentioned above). The intention of this is to ensure that interventions operate at a variety of levels to address larger structural inequalities that perpetuate violence. Furthermore, one such approach that they suggest is to facilitate the 'coming out' process which, they argue, would help increase the social support from a peer network and instil healthy norms (like minimising risky behaviour and modelling alternatives to violence) (Pantalone *et al.*, 2011: 203).

Hence, addressing violence is not only tied to the removal of sexuality based discrimination, but this is also to be achieved through personal projects relating to pride in one's sexuality and coming out. While this sounds like a positive thing, I would suggest that this perpetuates homonormativity and one particular form of sexuality politics. The focus on facilitating the 'coming out' process is important. On the one hand, it can allow for greater access to social services, and is understandable as a dominant approach to sexuality politics. On the other, however, it pushes people toward this particular view of identity and sexuality politics, which they may be uncomfortable with or seek to subvert. Here, coming out is the price one pays for seeking help on violence.

This focus provides some of the conditions under which awareness campaigns instituted by a variety of support organisations and invoking notions of pride and particular sexuality politics become intelligible. Perhaps the clearest is the campaign whose tagline was 'There's no pride

in domestic violence' (ACON, n.d.). The poster for this campaign included a number of rainbow-coloured hearts. With the above catchphrase prominently displayed across the top of the poster, this poster ties two messages together – an anti-violence message, and the message that 'good' gay subjects are not violent and should, instead, engage with such pride discourses. While it may be seen to be a catchy phrase, drawing from the existing discourses which are limited and intended to raise awareness, it also normalises this particular approach to sexuality politics. The material produced by the Safe Relationships Project which offers assistance for court appearances for victims of domestic violence, has a similar focus. Their catchphrase, 'Protect your pride – stay safe' (SRP, n.d.), also links their anti-violence project to pride discourses. SOAAR also uses the image of a broken heart in rainbow colours as a symbol (SOAAR, n.d.), again invoking a particular notion of pride, identity and community. Furthermore, perhaps the most widely distributed resource in this area is the 'Another Closet' document. This plays on the notion that coming forward about violence is similar to coming out and involves the same resilience, and has the image of a partially opened closet door on its cover, with light streaming through from the other side of the closet door, again bringing to mind particular images of appropriate and expected sexuality politics (SSDVI, 2009).

Thus, not only do these discourses become the point of reference through which queer victims and perpetrators are interpellated into these programmes, but they also imply a method through which this violence can be addressed – by 'coming out' about it (as opposed to, or as a precondition to, simply reporting it), by developing a stronger sense of pride, and so on. This is not to suggest that these discourses are always problematic – after all, there can be a certain amount of pride in stepping outside of heteronormative constructions of sexuality and gender. However, in many cases, these notions link pride to being true to oneself, and connecting with a particular identity category. Again, while this sounds positive, this can perpetuate forms of homonormativity. Here, in the attempt to understand their perpetration or victimisation by considering their history and these experiences in their lives, victims and perpetrators become tied to their sexuality, and drawn into the particular forms of normalising politics surrounding this. Furthermore, these approaches extend the potential forms of government in the lives of members of queer communities – it is notable that campaigns to prevent intimate partner violence in heterosexual relationships do not explicitly attempt to tie those involved to sexual subjectivities in order to achieve their goals.

Conclusion

Davis and Glass (2011: 14) suggest that it is important to reflect on the dominant epistemic voice that constructs our understandings of violence

and our responses to it. Ristock, in her introduction to a recent book titled *Intimate Partner Violence in LGBTQ Lives* (2011: 8), also suggests in this vein that we ask questions like: who benefits from the current way we speak of relationship violence, and what difference does this make?; whose voices are heard when we use the categories that we use?; and whose realities are blurred or erased? This is certainly an important goal, and answering these questions may seem quite straightforward. However, too often these questions are focused on destabilising the dominant *heterosexual* voice in order to increase gay and lesbian voices in such discussions.

This brief chapter, however, has asked these questions about what could be understood as the dominant *homosexual* voice, turning the attention towards apparently inclusive approaches that take account of the experiences of queer communities. While this discussion may be somewhat schematic, my intention has been to simply draw attention to the potentially heteronormative and homonormative currents within recent research literature and campaigns surrounding this violence. In particular, I point to the lack of space within which it is possible to think outside of these dominant perspectives.

Of course, one can argue that the studies, resources and discourses discussed above at the very least draw attention to the existence of this violence – and their existence is certainly better than having no discourse at all aimed at helping queer communities identify and stop violence. And, certainly, not all who experience violence identify as queer – in fact, many feel just as included when the terms gay and lesbian are used. However, it is important to reflect on the exclusions and unintended consequences, including, with regard to, sexuality politics, which would otherwise go unconsidered if we did not critically reflect on our taken-for-granted methods for creating more inclusive ways of dealing with violence in queer relationships.

While 'Q' appended to the ever-expanding acronym GLBTIQ is used in this context so as to ensure inclusion and diversity, as this discussion has shown, this inclusion is primarily only to the extent that it represents queer as an identity category, allowing people who identify in this way to feature within these attempts to address violence, to be known in the same ways, and to be governed with the same tools. Queer does not get used for its more deconstructive potential and its ability to question dominant paradigms. In contrast, this chapter has sought to serve as the basis for new uses of queer theorising in the context of intimate partner violence in queer communities. To some extent, for those engaged in the projects of queering discourses here, it addresses Carlen's question (originally posed in the context of women's imprisonment) 'of how (excluded and oppressed people) can best penetrate an exclusionary and oppressive structure without their revolutionary objectives being nullified through incorporation into the (thereby strengthened) oppressive structure in operation' (Carlen, 2003: 117).

In this particular instance, the danger is that, for many people, the potentially 'repressive structure' does not appear all that repressive. To allow for a new politics around this issue, we must constantly think about the way queer subjects have become sites of normalisation, and to push against 'the centrifugal pull towards normalcy, complicity and dominance even in our critical, democratic and queer projects' (Sykes, 2011: 431).

Note

1. The term 'queer relationships' will be used throughout the rest of this chapter to refer to non-heterosexual and/or non-cisgendered relationships, which can include those that identify as gay, lesbian, bisexual, transgender, intersex, queer, as well as those that choose not to so identify. While not all of those in the relationships referred to may identify as queer, I use this term as an alternative to the unwieldy 'non-heterosexual and non-cisgendered', and to also avoid the identity politics reinforced by the more common acronym GLBTIQ.

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14

Social Change in the Australian Judiciary

Sharyn Roach Anleu and Kathy Mack

Introduction

Social science research has documented widespread social, economic, cultural and policy changes since the last quarter of the twentieth century (Roach Anleu, 2010). Such changes include labour market transformations, increasing employment insecurity, declining real wages, financial crises and ageing populations as well as reductions in public welfare provision and privatisation. There is also greater geographic mobility and rapid advances in electronic communications. A major change is the wider range of roles for women in many occupations and professions and in public life generally. Women have entered traditionally male, higher level occupations and professions, particularly academia, law, management, medicine and more recently engineering (Crompton and Sanderson, 1990).

Courts and the judiciary[1] have themselves undergone a number of changes, in part related to developments and innovations in their broader environments (Roach Anleu and Mack, 2007). Changes affecting courts as institutions include greater managerial accountability, the rise of informal and non-adversarial processes and increased expectations of addressing social problems (Alford, Gustavson and Williams, 2004, Freiberg, 2001, Parker, 1998, Travers, 2007). Changes to judging include reduced emphasis on passive adjudication, more active case management (Heydebrand and Seron, 1990, Resnik, 1982), greater emphasis on professional development, and the deployment of newer forms of judging (Bartels, 2009, King *et al.*, 2009). Recently, some formalisation of judicial appointments processes has occurred; for example the Judicial Appointments Board (Scotland, established in 2002), the Judicial Appointments Commission (England and Wales, established in 2003) and Advisory Panels in Australia set up in 2010 (Australian Government Attorney-General's Department, 2010). The magistracy in Australia has become professionalised (Roach Anleu and Mack, 2008). There is more concern about public confidence regarding courts and

judges, especially public attitudes towards sentencing decisions (Gelb, 2008, Warner and Davis, 2012).

There is growing international interest in 'the comparatively recent socio-legal terrain of empirical research into judges and judging' (Moorhead and Cowan, 2007: 315). New developments emphasise empirical social research focusing on judicial officers themselves, as distinct from the courts as institutions, and rely on data directly collected from judicial officers rather than on products of court activity such as reported judgments or quantitative data on decision-making patterns. This new sociolegal scholarship provides important examples of 'studying up', to generate knowledge and information about the ways in which key institutions of authority and power operate in a social democracy.

One of the most visible and perhaps significant changes in the judiciary is the increasing numbers of women as judicial officers in all levels of the court hierarchy. Judicial appointment has followed women's entry to the legal profession, though the 'trickle-up' effect is limited (Malleson, 2006). While there are exceptions for individual courts, the proportions of women judges typically remain less than one-third, especially in the superior courts. Although the judiciary remains a male-dominated institution – numerically, symbolically and in occupational culture and practices – there are some signs of change. The direct association of masculinity, or specific types of masculinity, with judicial office and judging is no longer taken for granted (Collier, 2010). It is timely to ask:

- What has actually changed?
- What are some of the meanings of greater gender diversity for the courts and the public they serve?
- How does a more gender diverse judiciary relate to social, political and cultural contexts?

A substantial body of research and commentary considers whether women judges will make a difference to decision-making, bring different styles of judging and reasoning and how this might affect judicial culture (Schultz and Shaw, 2008). Initial expectations that women would make a difference to the judiciary (and other male-dominated occupations) have been criticised for being essentialist and ignoring the diversity of women (and men), for equating female with feminist and for not being empirically supported (Malleson, 2003).

This chapter addresses these three questions by drawing on data from the Judicial Research Project which has conducted extensive empirical research into the attitudes, perceptions and everyday work of the Australian judiciary over the past ten years, using a mix of quantitative and qualitative research strategies. The Project empirically investigates the ways in which women's and men's entry into the judiciary and their

experiences of judging and judicial work might differ. Here judging and judicial office are conceptualised as a form of employment, not a mystical status, albeit different from most other salaried occupations, due to guaranteed security and judicial independence (Mack and Roach Anleu, 2006). Data from two surveys (one of judges, one of magistrates)[2] in 2007 provides information on the extent to which the increasing numbers and proportions of women judicial officers might impact on the relationship between evolving juristic institutions and changing social, political and cultural worldviews.

What has actually changed?

Courts and governments have been criticised widely for their roles in the exclusion of women from public office and the casting of judging as an essentially male capacity (Schultz and Shaw, 2003, Thornton, 2007). Judicial diversity 'is necessary in order to maintain public confidence and trust, that is, to ensure the legitimacy of the judiciary as a whole' (Rackley, 2002: 609). Courts as a gendered institution can undermine values of neutrality and impartiality (Malleson, 2003). Discourse about appointment to judicial office also relies on arguments about fairness and equal employment opportunity (Kenney, 2004).

Generally, in Australia there is no legally required process of seeking application for judicial office or assessing candidates against formal criteria, though merit is a key expectation (Mack and Roach Anleu, 2012). The judicial selection process resulting in an invitation to an individual to join a particular court is often informal and not publicly visible. Empirical research suggests that a process involving information via personal, 'old-boy' networks and secrecy tends to privilege (some) men and disadvantage (many) women and result in what are sometimes seen as political, not necessarily strictly meritorious, appointments (Feenan, 2007).

In recent years, policies have been put in place to increase judicial diversity, usually along gender, race, and class lines. The numbers and proportions of women in the Australian judiciary have grown over the past decade. In 2000, women constituted 17 per cent of all judicial officers, by 2011 this proportion had almost doubled to 33 per cent. However, the increase is not the same at all levels of court (Australasian Institute of Judicial Administration, 2011, Mack and Roach Anleu, 2010a). Current data show that there are just over 1,000 judicial officers in Australia. Although three of the seven High Court justices are women, only 24 per cent of Supreme Court justices are women, compared with 29 per cent of District/County Court judges and 38 per cent of magistrates. There is some clustering in certain kinds of jurisdictions; for example, 13 of the 39 Family Court judges are women compared with only eight of the 45 Federal Court judges (Australasian Institute of Judicial Administration, 2011). This pattern of

greater proportions of women appointed to lower rather than higher courts, and sometimes concentrated in courts that deal with gender specific areas of law such as family, occurs across the judicial world and is similar to women's entry into other male-dominated occupations and professions, including law (Center for Women in Government and Civil Society, 2011, Schultz and Shaw, 2003, Thomas, 2005, Williams and Thames, 2008).

This increase in gender diversity does not necessarily entail diversity in other demographic or social characteristics. More women in the judiciary may not increase diversity in social class, ethnicity, religion or regional background. The personal and social differences between men and women lie within a narrow band, and should not be exaggerated (Rhode, 2003: 5). Indeed, gender and age are the most salient differences between men and women judicial officers in Australia. Most men and women in the Australian judiciary describe themselves as of Australian or British ancestry. Nearly all spent their childhoods in Australia, mostly in urban centres, and had fathers in full-time paid work when they were growing up. Educational background is similar for men and women though there are some differences between magistrates and judges. Approximately one-third of judges – male and female – attended a private non-Catholic school for the majority of their secondary schooling, compared with less than one in five of the magistrates, though similar proportions of judges and magistrates attended Catholic schools.

One notable difference in the social backgrounds of these Australian judicial officers is that the women have had greater experience of mothers in paid work than their male counterparts. Over a quarter of women magistrates (28 per cent) and judges (29 per cent) report that their mother was always or almost always in paid work when they were growing up, compared with less than a fifth of the men (18 per cent male magistrates, 13 per cent of male judges). Over half of the women whose mothers were in paid work indicate that this was in white-collar occupations, followed by pink or blue-collar work. This might suggest that the women had more role models of women participating in the labour market than their male colleagues and recognised the importance of economic independence. Since the 1970s educational opportunities expanded for women, though their numbers in professional courses grew slowly until parity between male and female students in law schools in recent years, and in some places female law students are now the majority (Hunter 2003, McLeod 2008).

Another significant difference is that, on average, women are younger (52 years) than the men (59 years). The largest difference is between female magistrates (mean = 50 years) and male judges (mean = 61 years). Proportionately more women are at earlier stages of the lifecycle than their male colleagues and likely have different non-work related obligations and commitments. Overall, most judicial officers are married or partnered with at least one child; however, men and women appear to have different family structures and household responsibilities. A lower proportion of women are

married or partnered (80 per cent of women compared with 93 per cent men) and two-thirds of these women judicial officers report that their spouse/partner is currently in paid, full-time work, often white-collar work, compared with only one-fifth (20 per cent) of their male counterparts. On average, men have more children than women and their children are older. Three-fifths (62 per cent) of the men with children report that all their children are aged 18 years or over, compared with around a quarter (27 per cent) of their female colleagues.

What are some of the meanings of greater gender diversity for the courts and the public they serve?

This section considers two possible implications of the increased proportions of women in the judiciary. First, it investigates whether men and women value different skills and qualities and therefore might approach the performance of their daily work differently. Second, it examines women's and men's experiences of work/non-work time pressures which can impact on the organisation of courts as a workplace.

Skills for daily work

The surveys asked respondents to indicate the importance of a list of skills and qualities for a judge or magistrate in the performance of their daily tasks. These skills clustered into four groups: legal/judicial values, legal skills, interpersonal skills and general skills. Overwhelmingly, judges and magistrates (no gender difference) agree that legal/judicial values – impartiality, integrity and a sense of fairness – are essential for the performance of daily tasks. Skills in this category were rated most highly, followed by legal skills, then interpersonal values (Mack and Roach Anleu, 2011).

In recent years, there has been much discussion about new approaches to judging that depart from the traditional conception of the passive, detached judge in the adversary system (King *et al.*, 2009, Moorhead and Cowan, 2007). These changes are most prominent in the lower courts and may be regarded as acknowledging the importance of elements of procedural justice (Tyler, 2003). Developments in the criminal jurisdiction include problem oriented courts, restorative justice and therapeutic jurisprudence. These developments usually entail an active role for the judge which includes direct engagement with participants, notably individuals facing criminal charges. On the civil side, there is greater emphasis on judicial case management and other forms of dispute resolution, even including judicial mediation, notably in the higher courts.

Newer forms of judging may involve greater reliance on qualities such as communication, listening, empathy and an awareness of the defendant's personal/social needs, rather than relying solely on the conventional legal (or judicial) skills of legal reasoning and legal knowledge. Judges and

magistrates – men and women – place high importance on communication, being a good listener, courtesy and patience, though women are somewhat more emphatic in their assessments than their male counterparts. Larger proportions of women assess these skills as essential while larger proportions of men consider them very important (Mack and Roach Anleu, 2011: 195–202).

Differences exist between men and women, judges and magistrates with regard to managing the emotions of court users, compassion and empathy. Women magistrates, more than any other cohort, value managing the emotions of court users as a valuable skill in their daily work. For two-fifths of women magistrates (41 per cent), managing these emotions is an essential skill, compared with less than one-fifth of their male colleagues (17 per cent) and less than judges in the higher courts (men-16 per cent and women-20 per cent alike). A similar pattern emerges in relation to compassion and empathy, with greater proportions of women magistrates valuing these qualities as essential than their male counterparts. These qualities are valued somewhat less by judges than by magistrates with no differences between men and women judges. It might be expected that daily life in the magistrates' court entails more emotional expression or management than in higher courts, especially if defendants or litigants do not have legal representation. Some women magistrates may bring greater awareness of emotional labour to their work (Roach Anleu and Mack, 2005).

Work/non-work time pressures

Long working hours, limited workplace flexibility and conflict with domestic demands constrain women's careers in the legal profession (Edwards, 2011, Epstein *et al.*, 1999, Seron, 2007, Sommerlad, 1994, Webley and Duff, 2007). Judicial appointment may be an attractive career option or possibility for women. Judicial officers have security of tenure, guaranteed salary and benefits, including leave, and do not have to recruit or serve individual or corporate clients. There is no formal promotion structure; competition for career advancement does not exist in the same way as in corporate firms or other bureaucratic organisations.

Around half of the men (48 per cent) and women (52 per cent) identify compatibility with family responsibilities as important or very important in their reasons for entering the judiciary. Hours was an important (including very important) factor for half (50 per cent) of women judicial officers in becoming a judge/magistrate, compared with just over a third of the men (36 per cent).

The following judge indicates that hours and compatibility with family responsibilities were both very important in her consideration to become a judge, and comments:

> I enjoyed the first 6 or so years very much, and it is MUCH more child-friendly than any other legal career. After 10 years it palls a bit, unless you can specialise/change direction [emphasis in original].

While most judicial officers – women and men – report satisfaction with their hours and the compatibility of their jobs with family responsibilities, the proportions of women are smaller than those of the men. Two-thirds (65 per cent) of women compared with four-fifths (79 per cent) of the men are satisfied with hours. Similarly, 64 per cent of women and 79 per cent of men are satisfied regarding the compatibility of work with family responsibilities.

A female magistrate, previously a solicitor in private practice, for whom hours was not a very important consideration in her initial decision to become a magistrate, is dissatisfied with those hours and very dissatisfied with the compatibility between work and family responsibilities. She observes:

> The most difficult aspect of the job is the lack of flexibility, and too few holidays (4 weeks annual leave). The inflexible approach of the Chief Magistrate's office makes life very difficult especially having children. Women are being encouraged into judicial positions but there is a lag in understanding that requires a different approach to the previously typical man with wife at home. Also, greater no. [number] of holidays is required given the stresses of the job.

Similarly, a female judge for whom hours and compatibility with family responsibilities were important considerations in her decision to become a judge and is dissatisfied with both, concludes: 'The work/life balance is seriously out of kilter with reasonable expectations. It takes a great toll on family life'.

While work in court, particularly presiding at trial, is the most publicly visible part of a judicial officer's work and often a proxy for time at work, many tasks and activities related to core judicial work take place outside of the courtroom. The demands of judicial work mean that some tasks, such as keeping up with the law and judgment writing, seep into non-work time. Half of all judicial officers, men and women, report working outside regular work-hours every day (before 9 am and after 5 pm Monday to Friday), around a quarter do so a few times a week, and the other quarter do so once a week or less. Court hierarchy makes a difference to the frequency of out-of-court work: almost two-thirds of judges (male and female) report after-hours work every day, compared with about one-third of magistrates, male or female. For their level of court, the extent of women and men judicial officers' work outside regular hours is the same.

However, women judges and magistrates appear to experience more time pressure than their male colleagues. Women report feeling rushed far more often than men. Figure 14.1 shows that almost half of women judicial officers (47 per cent) report always feeling rushed, compared with less than one-fifth of the men (17 per cent). Very few women report rarely feeling

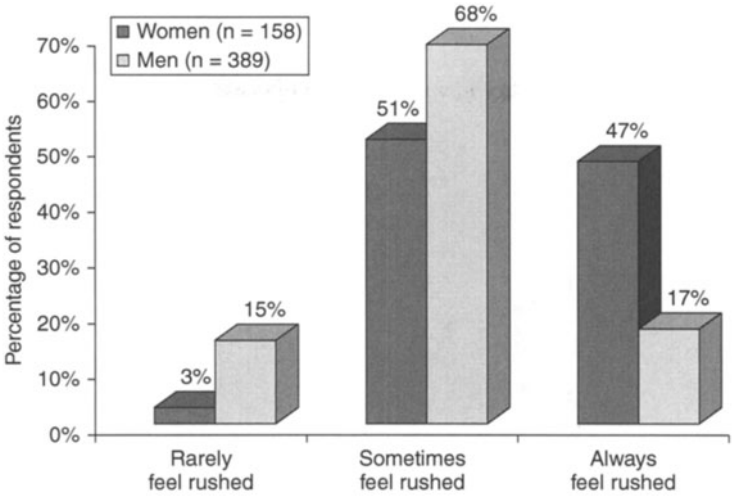

Figure 14.1 Feeling rushed by gender: Australian judiciary

rushed: only one female magistrate and three female judges indicate this experience, whereas one in seven men (15 per cent) report rarely feeling rushed. Two-thirds of the men (67 per cent) and half of the women (51 per cent) report sometimes feeling rushed.

As is the case with many professions, women in the judiciary retain more household and family responsibilities than do their partners or their colleagues (Schneider, 2012). Figure 14.2 indicates that a third of the women judicial officers (32 per cent), but fewer than one in ten (8 per cent) of their male counterparts, reports spending more than 15 hours per week on unpaid domestic work. In contrast, over one-third (36 per cent) of the men, compared with only one in five (20 per cent) of the women, report undertaking less than five hours per week on unpaid domestic work. Approximately half of the women (49 per cent) and the men (54 per cent) report spending between five and 14 hours on domestic work.

The traditional view of the judge as male with few family obligations persists in aspects of court organisation and culture, despite the increasing numbers of women judges (cf. Thornton, 1996). One female judge describes her experience of the culture and norms regarding judicial work within her court:

> A very strong male work culture continues to operate within courts. This contributes to inflexibility in work practices. It also creates an environment in which judges seeking different listing arrangements to allow time to write judgments and sentences (other than at night or

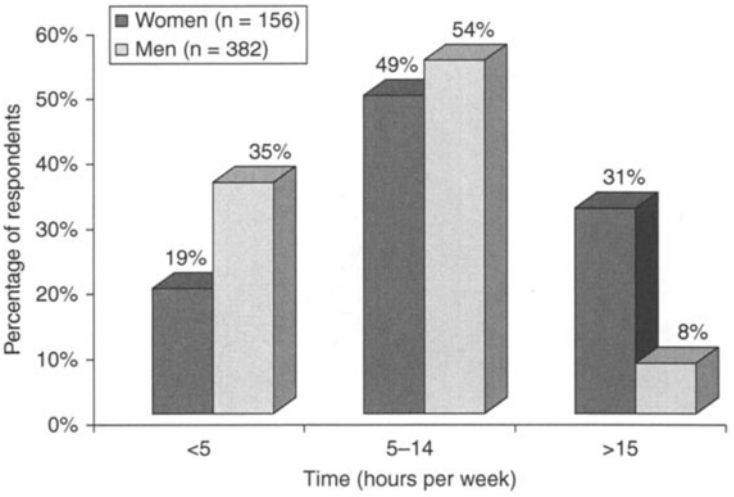

Figure 14.2 Hours spent on domestic work by gender: Australian judiciary

> weekends or during leave) are viewed as less capable and inefficient. This, and the requirement that a judge directly apply for time out-of-court to perform these important judicial functions during court hours, forces many judges to work extraordinary hours and adopt unhealthy work regimes.

Another female judge dissatisfied with her hours and the compatibility of work with family responsibilities suggests the intransigence of male workplace cultures, observing:

> There needs to be a critical mass of women judges on any court before there is any real prospect of women judges being treated equally. There may be women on the bench but the male dominated culture remains. The newly appointed younger male judges quickly assimilate into the existing culture rather than change it.

However, there are some signs of change. One female judge concludes:

> I love the collegiate atmosphere in my court. I am surrounded by a wonderful group of people from very diverse backgrounds. Coincidentally, a lot of my peer support is from other women and some men mostly who are recent appointments (that is, last 10 years or so). This is the best job I have had in the law and the most rewarding.

Another female judge describes recent changes and anticipates continuing change:

> 10 years ago there were very few female Judges in our crt [court] (2–3). We now number approx 25. This is a big change and it is an exciting time to be on the bench. It is difficult to find a balance with family life as the system has largely been run by men whose wifes [sic] played a traditional role. Hopefully as the number of females on the Bench increases it will become a more 'family friendly' working environment.

While women's work/life balance as judicial officers may be better than for women in other occupations, it is still experienced as more demanding than for their male colleagues. The power of gendered domestic roles persists even for women in an elite, prestigious, highly paid occupation. In this respect, women judicial officers are not (entirely) out of touch with community concerns, at least regarding the work/life tensions shared with many other women.

How does a more gender diverse judiciary relate to different social, political and cultural contexts?

An innovative way of considering courts and the possible implications of greater gender diversity is to investigate male and female judicial officers' orientation to change in the courts' external environments. This might indicate awareness of or commitment to understanding different social, political and cultural contexts. It also might suggest different motivations for becoming a judicial officer and perhaps differences in approach to their role as judicial officers.

The surveys asked respondents to indicate the importance of a variety of occupational qualities in their initial decision to become a judge or magistrate. These included intrinsic qualities such as the kind of work, extrinsic qualities such as salary, as well as altruistic considerations such as value to society and desire to improve the court system (Mack and Roach Anleu, 2012).

Regardless of level of court, higher proportions of women (80 per cent) than men (63 per cent) identify *value to society* as important or very important to their decision to take on judicial office. This finding might suggest that these women adopt a wide view of the relationship of law, courts and society and of their role as judicial officers. The following comment by a female magistrate indicates that value to society and the potential to make some positive changes outweigh the challenges and difficulties of the work:

> The career extracts its pound/kilos of flesh. There is very little positive feedback. There is hardly ever any opportunity to debrief. I wake in fright

> at some of the things I hear and see. Why do I do it? Because I know I make a difference in some small way. Because I believe I am privileged. The people in my court are not.

A male judge also points to the importance of the courts as a social as well as legal institution:

> It is a privilege to have the responsibility for keeping in working order the intellectual system that is so important to the peaceful and orderly operation of the community. As a trial judge it was gratifying to run a court in a way that so far as possible helped people get through litigation, that was a major turning-point in their lives, with a feeling of having been listened to, & with their dignity & self-respect intact, regardless of the outcome.

The pattern for *desire to improve the court system* is similar: almost half of the women (49 per cent) compared with a third of the men (36 per cent) indicate this was a very important or important consideration in their decision to become a judicial officer. For example, a female judge for whom both value to society and desire to improve the court system were very important in her decision to become a judge states:

> I knew what I was getting into and believe there is a duty to give something back to the system after being a barrister and loving that for 25 years.

Another (male) judge comments:

> The hours are long and the work constant but it is an interesting, challenging and rewarding career. I enjoy the independence and the ability/opportunity to positively impact on the lives of many individuals and to perform an important community service.

Overall, men and women, judges and magistrates express high levels of job satisfaction and consider their work important to the community, though slightly more women, especially in the magistracy, are disappointed with the scope for improving the court system, compared with their male colleagues. One male judge observes:

> It is harder to change the law, or make a difference, than I had realized when I first became an appeal court judge. To be a judge requires a good deal of arrogance and self-confidence.

Courts are a vital institution where social issues and legal authority intersect and where judicial officers have the capacity and opportunity to 'contribute

to progressive social change in a local, personal, and incremental way' (Roach Anleu and Mack, 2007: 184, also see Cowan *et al.*, 2006). These findings suggest that women, especially in the magistracy, may have a stronger orientation to change or concern to make a difference than do most of their male counterparts. This should not be overstated, as women's commitment to the impartiality of the judicial role remains paramount, as does their male colleagues, at both levels of court (Mack and Roach Anleu, 2010b). Greater desire to improve the court system or to do work that is valuable to society does not displace adherence to the judicial value of impartiality.

Conclusion

Courts and judges are essential for the administration and symbolisation of justice in developed, developing and transition countries (Messick, 1999, Rock, 1998). Social change and public expectations have led to a more diverse judiciary, especially increasing proportions of women. However, the extent and impact of this change on the numbers of women in courts and on judicial attitudes is limited.

In most Australian courts, less than one-third of judicial officers are women and there are few gender specific experiences or attitudes. The social background of men and women judicial officers is similar and all are committed to core legal values and legal skills in their daily work. While all judicial officers value communication skills and the importance to society of their work, women express these views more emphatically. More than any other cohort, women magistrates assess managing the emotions of court users as an essential skill. A salient difference between women and men is in the greater time pressure experienced by women in the judiciary.

Future research will investigate how judicial officers mobilise their identities as men and women and their gender awareness in understandings of justice. The next phase of the Judicial Research Project will entail in-depth, qualitative interviews with judicial officers nationally. These interviews will provide a nuanced account of how judicial officers understand courts as institutions that can contribute to or resist social change and their role within that process, as well as revealing the ways in which gender might infuse judicial practice. Continued progress towards gender diversity in the courts is essential to the legitimacy of this key public institution in a democracy.

Notes

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1. In this chapter, the terms 'judiciary' and 'judicial officer' are used generically to refer to all members of the judiciary, without distinction regarding type or level of court. The terms 'magistrate' and 'judge' are used to distinguish those judicial officers in Australia who preside in the first instance, or lower courts from those who preside in the higher courts. Unlike lay magistrates in England and Wales, Australian magistrates are paid, nearly always full-time, with legal qualifications and appointed until a fixed retirement age (Mack and Roach Anleu, 2004).
2. The surveys were sent to all (just over 1,000) judicial officers in Australia, with a response rate of 54 per cent. Separate, though largely similar, surveys were sent to magistrates and to judges to allow questions specific to each level of court. Of the 552 respondents, 29 per cent are women. Women comprise 25 per cent of respondents to the National Survey of Australian Judges and 34 per cent to the National Survey of Australian Magistrates. These percentages very closely track those of the population of women judges and magistrates at the time of the surveys (2007). The surveys cover current position, career background and education, everyday work, job satisfaction and demographic details. They include both closed and open-ended questions and provide opportunities for additional comments. Direct quotations or excerpts from the comments used here are provided verbatim as written in the survey booklets by the respondents and edited to preserve anonymity.

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Part V
Indigenous Justice

15

Indigenous Critique of Authoritarian Criminology

Juan Marcellus Tauri

Introduction

Biko Agozino (2010: i) has described the discipline of criminology as a 'control-freak'; one whose 'imperialist reasoning' is most evident when supporting 'the [contemporary states] exercise of internal colonialism and neo-colonialism' within settler societies. In recent times the development of supposed evidence-based crime control policy throughout Western jurisdictions appears to have reinvigorated administrative criminological formations to the extent that they once again dominate policy discourse relating to the issues of Indigenous over-representation and critique of the operations of criminal justice. This chapter seeks to explore this state of affairs by firstly, providing a critical examination of the role criminology plays in the continued neocolonial subjugation of First Nations and secondly, the role that myth construction and maintenance plays in the hegemonic activities of a particularly authoritarian form of the discipline. A critical analysis of two articles from a recent *Australian and New Zealand Journal of Criminology* special edition on Aboriginal violence (late 2010) highlights the core features and, arguably, the key failings of this authoritarian criminology in relation to its response to Indigenous justice issues: namely a preference for undertaking research *on* instead of *with* Indigenous peoples, the privileging of non-engaging research methodologies and the potent use of myth to promote practitioners' views of the world and silence the Indigenous voice.

A brief outline of Australasian criminology

The assumption that those who read this chapter will be familiar with the broad history of the discipline of criminology is no doubt justified. Therefore, this allows me to make a sweeping glance over this history as it pertains to the formation of the discipline in Australasia.[1] Of course we all know that the power of positivistic, administrative or Eurocentric criminology, call it what you will, was seriously challenged from the 1960s onwards by the

advent of various critical criminologies. These critical perspectives shared in common a rejection of (amongst other things) servicing the needs of the state and the overwhelming focus on 'individual antecedents' of criminality. What distinguished these approaches from administrative formulations was their focused, critical gaze on the institutions of social control, and the impact of divisive, disempowering social structures (Scraton and Chadwick, 1991, see also Carrington and Hogg, 2012: 47–8).

Muncie (2000) argues that the radical critique was so vociferous that some on 'the left' anticipated the demise of criminology itself or at the very least a retrenchment of the administrative and positivistic varieties. This supposition seriously overestimated the power of the radical perspective while underestimating the resilience of positivist, Eurocentric forms of criminology. It ignored the fact that even if the individualised, Eurocentric focus of administrative criminology for a time lost its shine in terms of dominating journal and book publications, academic awards and the like (a highly debatable supposition), its tendency for theoretical imperialism and its sycophantic relationship with the state ensured it continued to receive the attentions of policymakers (Kitossa, 2012).

By the end of the 1980s the rejuvenation of law and order politics in the United States under Reagan, and Great Britain under Thatcher, brought with it the resurrection of an administrative criminology revived after the suffocation of the nothing-works paradigm of the 1970s. Once again, positivistic criminologies were invited back into the governmental fold as Western jurisdictions turned increasingly to tough-on-crime approaches to social harm (Shichor, 2000). The resurrection of administrative, embedded criminologies entered its end game in the mid-1990s when policy industries in various Western jurisdictions implemented so-called evidence-based policy (EBP) processes that the likes of Tony Blair and his New Labour government predicted would bring about the end of *ideological policy making* (Marston and Watts, 2003). Instead, we had entered a new world in which evidence derived from scientific research, would dominate policy development (Walters, 2009). The rise of EBP meant that that once again, positivistic, administrative criminological approaches became the acceptable face of the academy for policymakers. The situation was the same in various neocolonial contexts, with the exception of New Zealand and Australian administrative criminology practitioners and policymakers who preferred to look to Europe and North America for theoretical and empirical inspiration (Carrington and Hogg, 2012: 48, Webb, 2003).

To infer that criminology, or at least particular derivatives of the discipline are Eurocentric is not to ignore variations in epistemological, methodological preference and theoretical nuances that exist in our eclectic discipline. However, from an Indigenous standpoint the term encapsulates the cultural, social and economic roots of the European academy's intellectual evolution.[2] As Agozino (2010) and Cohen (1988) contend, the colonial

enterprise that took place from the sixteenth to the nineteenth and early twentieth centuries[3] was central to the theoretical and empirical evolution of the discipline of criminology. The imperialist underpinnings of contemporary criminology are eloquently captured in Agozino's observation that:

> It was at the height of the slave trade that classicism emerged to challenge the arbitrary nature of punishment in medieval Europe but this insight was not extended to enslaved Africans who were arbitrarily victimised even when they did nothing wrong. However, it was not until the height of colonialism in African and Asia that Europe discovered the new 'science' of criminology as a tool to aid the control of the other – a supposed advancement on classical philosophies of justice. (Agozino, 2010: vii)

The hegemony of authoritarian criminology in Australasia

The issue of Indigenous over-representation in the criminal justice system has been a significant focus of criminological work in Australasia for the past quarter century. Until the advent of the golden age of Indigenous-informed, Australian criminology in the 1980s and 1990s, much of the initial academic material was generated by those working within the administrative criminological vein. During this period a group of mainly European criminologists published extensive material that privileged the Aboriginal experience of crime control policy and gave voice to *their* issues, much of it without the requisite filtering processes of the policy industry[4] (for example see Blagg, 1997, Clifford, 1982, Cunneen, 1994, 1997, 2000 and Dodson, 1994). This body of work represented a significant change from the diet of government funded material that masqueraded for objective, value-free research we had been subjected to in the past (one exception being the Royal Commission of Inquiry into Aboriginal Deaths in Custody, 1991). The period from the late 1990s onwards has seen a re-empowerment of neoconservative, state-centred criminological perspectives on the Blackfella/Maori problem. Unfortunately, as will be discussed later in this chapter, much of the material emanating from this perspective adds to the discipline's sad history of abetting the subjugation of First Nations, proving that the Eurocentric, embedded components of the discipline are failing to learn from the discipline's abusive past.

Contrary to the claims of adherents such as Weatherburn (2010), the majority of criminological material that is influencing public policy and media discourse on the Indigenous question, emanates from approaches that are predominantly quantitative in method, and largely 'Aboriginal free' in terms of data gathering and engagement with the research population. The body of work that is considered of value to the policy sector and mainstream media, is predominantly statistically-focused and government funded

(for example but not exclusively, see Bond and Jeffries, 2010, Jeffries and Bond, 2010, Marie, 2010, Newbold and Jeffries, 2010, Snowball and Weatherburn, 2006 and 2007, Weatherburn, Fitzgerald and Hua, 2003, and Weatherburn, Snowball and Hunter, 2006 for exemplars of the type of material produced by embedded Australasian criminologists).

There are a number of reasons why the material produced by embedded criminological approaches is proving popular with both policymakers and mainstream media. One forceful explanation is that the body of work this paradigm produces largely avoids critical analysis of the policymaking process. It avoids or sidelines complicated, messy structural determinants such as racist policing, racist court processes, racist Government policy and legislation (most recently demonstrated in the Australasian context by the introduction of the Federal Government's Northern Territory Emergency Response in 2006: see Altman, 2007). These supposedly difficult-to-measure determinants of Indigenous marginalisation are often dismissed through flippant and empirically weak contentions that institutional bias and structural determination have dominated (and negatively impacted) Aboriginal policymaking (see Marie, 2010, Weatherburn, 2010 and discussion below). This argument and many others form the great myths through which administrative, embedded criminologies seek to maintain hegemony in the race to be of utility to the state (see below for in-depth discussion of the importance of myth for administrative, embedded criminologies).

I argue that the resurrection of administrative criminologies has seen the development of a form that is particular to settler societies, including Australasia. To this peculiar form I give the name *Authoritarian Criminology*. This new form of criminological formulation appears to serve the interests of the neocolonial state, Eurocentric academic institutions, and the career aspirations of practitioners. Of lesser concern are the needs of Indigenous peoples who serve simply as the providers of empirical data for analysis. As such the practice of Authoritarian Criminology represents a contemporary exemplar of Agozino's control-freak discipline. It is *the* contemporary form of embedded criminology that continues the discipline's history of collusion with the state and the continued, neocolonial subjugation of Indigenous populations (as illustrated in the work of Agozino, 2003 and Cohen, 1988).

The pursuit of Authoritarian Criminology is readily identified by the following core practices of its exponents, including that they:

- focus their research and social inquiry on the definition and conceptualisation of crime as defined by the state;
- confine their critical criminological gaze to issues relating to state-defined problem populations, more often than not people of colour and working

class youth, without significant engagement with individuals or communities from these populations;
- confine their uncritical criminological gaze to state-run justice processes, policies, legislation and problems and questions that the state deems important for which they receive remuneration via the establishment of contractual relations;
- limit their critical analysis of state systems and policies on programme effectiveness and evaluation largely devoid of historical context and wider political economy of the state's dominance of justice in the neoliberal moment;
- empower themselves through the *veil of scientism*, an ideological construct that privileges their approach to measuring the Indigenous life-world, whilst denigrating Indigenous (and other) forms of knowledge that seek to explain the social world from the perspective of the Other (see, for example, Marie, 2010); and
- utilise the process of myth construction and maintenance in a hegemonic exercise aimed at privileging its 'way of knowing' in the policymaking process, over that of potential competitors.

The mythological foundations of authoritarian criminology

> The critique of postmodern thought notwithstanding, it is a fact that many criminological theorists make extensive use of analogy, *myths* [emphasis added] and literary allusions in their construction of reality. (Agozino, 2003: 110–11)

As Agozino observes, myth construction and maintenance is an essential element in the development of the discipline of criminology, and its construction of reality. I argue that as Authoritarian Criminology is geared toward supporting the neocolonial state and, either by osmosis or intent, a significant player in the continued subjugation of Indigenous peoples, its myth construction and maintenance activities warrant closer consideration (Tauri, 2004).

Myth, criminology and policymaking

For a discipline that is populated by empiricists driven to identify the causal laws of crime through scientific investigation, the claim that it relies on myth for its legitimacy might appear strange. To understand this claim we need to push aside the veil of scientism that practitioners surround their practice with and accept that ideological artefacts such as these are central to the business of 'doing Authoritarian Criminology' (or, indeed, any form of the discipline). I accept that exponents of Authoritarian Criminology are genuinely committed to producing scientific data on the social world

in order to inform an evidence-based, politically neutral, policymaking process. Unfortunately, those aims are difficult to achieve when policymaking and academic social inquiry are both highly ideological and political activities. And as they are ideologically and politically driven, they are by their very nature highly dependent on an 'alternative dimension of myth' (Herzog and Abel, 2009: 4) to support their hegemonic activities; hence the parasitic relationship between the two entities (see Tauri, forthcoming). I argue that the myth-making of Authoritarian Criminology is reflective of the gap and tension between the 'ought' and 'is' characteristic of institutional, knowledge development practices in the academy and the public service. Accordingly, the academy's knowledge construction and policy development are duplicitous activities where '...the *ought* [emphasis added] provides a fantasised or glamorised ideal that the *is* [emphasis added] of practices should be achieving' (Tauri, forthcoming: 4).

The creation and maintenance of myth is fundamental to Authoritarian Criminology's hegemonic endeavours because of the important part it plays in mediating opposition and 'justifying decisions regarding major issues' such as policy, legislation and funding of both research and interventions (Tauri, forthcoming: 5). Myth construction and maintenance is particularly helpful for taming internal coordination problems (that is, competition within and between various criminologies and, in particular the lived experience of problem populations, for the attention of the policymakers and their finite resources) and external one's (that is, nullifying the potentially politically damaging impact of independent scrutiny by Indigenous commentators and more critically inclined criminologists) 'because myths, by their very nature, disguise and manage the emotional impact of the stories they tell' (Tauri, forthcoming: 5). Therefore, myths play a useful role in hiding the real story behind the intent and likely impact of Eurocentric knowledge construction.

Myth creation and substantiation run deep through Authoritarian Criminology, and two recent papers (one substantive and one, while comparatively short, nonetheless instructive for this discussion) appeared in the *Australian and New Zealand Journal of Criminology* (2010, vol. 43(2)) that provide contemporary exemplars of this process. These are Danette Marie's *Maori and Offending: A Critical Appraisal*, and Don Weatherburn's *Guest Editorial: Indigenous Violence*.

The myths that underpin Authoritarian Criminology are clearly identifiable in the work of Weatherburn and Marie in particular. Analysis of this body of work identifies four key myths central to the hegemonic activities of Authoritarian Criminology:

- the myth of Eurocentric objectivity and the veil of scientism;
- the myth of the dominance of Indigenous/communitarian perspectives;

- the myth of the Indigenous dominance of evaluation and research on Indigenous policies; and
- the myth of the Indigenous dominance of policymaking, intervention design and research is the primary reason for the failure to reduce over-representation.

For the purposes of this chapter, the rest of this section will analyse the use of the first two myths as exemplified in the Marie and Weatherburn articles.

The myth of objectivity and the veil of scientism

The key to this myth is their presentation of Authoritarian criminological knowledge as the valid form for informing policymaking because it is derived from scientific observation of the social context, and its practitioners are both objective and value-neutral. In contrast, other forms of knowledge construction are unscientific, ideological, value-laden and therefore biased. And in this category practitioners place Indigenous techniques for knowledge construction and dissemination.

Marie's paper provides a solid example of a type of mythology-driven knowledge destruction at work. For example, in her paper she makes two significant, albeit poorly evidenced claims common to the practice of Authoritarian Criminology: first, Maori formulations of knowledge are unscientific and should therefore play no part in crime-control policy development. The equation of non-European knowledge construction as both non-scientific and 'science destructing' is highlighted in statements such as '[t]he rationale of FReMO [a guide for assisting Department of Corrections official to develop "effective" Maori policy] involves *heightening the significance of culture for Maori and diminishing the history and integrity of science* [emphasis added]' (Marie, 2010: 290). In addition, the contested claim that Maori policies and interventions are unscientific because there is no evidence to prove either the theories upon which they are based or the efficacy of the programmes that emanate from them is deeply problematic. Hence Marie's claim that '[i]t might seem incongruous that an entire state services sector has committed to an approach that was not wrought from empirical evidence' (Marie, 2010: 294) either misconstrues or ignores a range of evaluative documentation and Maori-generated theoretical materials.

Marie's point about the lack of evidence for Indigenous theories and interventions has some validity. However, these claims appear to be unaware of the politics of crime control policy in the New Zealand context, especially as it relates to the development of Maori-specific policy. Any balanced and informed critique would acknowledge the following, fundamental truth about the criminal justice sector in New Zealand: that it has an extremely

poor history of carrying out (or contracting) scientific, outcome-focused research/evaluation into the efficacy of it policies and interventions. This lack of empirical analysis of the crime control in New Zealand pertains to the entire suite of policies and interventions whether they are informed by Tikanga Maori, or Crime Prevention Through Environmental Design (CPTED) or some other theory (see Tauri, 2011).

The mythological construction of Maori represented in Marie's paper, is based on a lack of sustained, critical analysis of the efficacy of scientifically-derived interventions. Nowhere in this paper does Marie provide significant evidence that these category of programmes (for example, Multi-Systemic Therapy, corrections-delivered criminogenic programs, CPTED, and so on) are working in any substantial (or empirically verifiable) way to reduce Maori offending/reoffending. And yet, as will be discussed later, New Zealand offenders are far more likely to receive the kind of scientifically-derived treatment. In comparison, they are much less likely to take part in Tikanga-inspired interventions that Marie contends are having a negative effect on Indigenous recidivism rates (see offenders' comments in Te Puni Kokiri, 2007 and especially Department of Corrections, 2009b).

The myth of the dominance of Indigenous/communitarian perspectives

The purpose of this mythical construct would have us believe that the development of effective solutions to the Indigenous problem has been hampered in neocolonial jurisdictions by a) the rise of Indigenous cultural theory, b) the biculturalisation of state policy, which led to c) the policy sector in Australasia turning away from science and embracing cultural perspectives on crime control for First Nations. For the likes of Weatherburn (2010) this explains the predominance of policies and interventions geared to conferencing processes, circle sentencing and enhancing the cultural practice of agents and agencies, and a focus on bias and structure rather than individual antecedents of crime. Marie (2010) makes a similar claim when she writes that Maori theory dominates crime control policy development in the New Zealand context. She goes on to present a misleading summation of Maori theory by erroneously presenting it as primarily focused on cultural loss as the key determinant of Maori offending and over-representation:

> A major assumption of this theory is that the contemporary overrepresentation of Maori... is best understood as the outcome of Maori experiencing impairments to cultural identity resulting from colonisation. Central to this theory... is also the assumption that ethnicity is a reliable construct by which distinctions can be made between offenders regarding what factors precipitated their offending, as well as best practices for their

> rehabilitation ... rehabilitation efforts largely pivot on the idea that restoring cultural identity will lead to a subsequent number of Maori in prison. (Marie, 2010: 283)

To support her argument Marie cites Newbold's (2007) summary of the types of programmes currently in vogue in corrections. Yet inexplicably, Marie overlooks preceding chapters of Newbold's book which demonstrate that within the Department's theoretical paradigm, culture and cultural identity are not given causal power: in other words, culture neither causes crime, nor is a significant player in reducing it. In fact, culture (specifically Maori culture) is confined to the responsivity trance of the Department's theoretical and practice framework, where restoring cultural awareness is viewed as a helpful process for preparing individual Maori offenders for treatment (see Coebergh et al., 2001, especially pages 15–16 and Webb, 2012).

Marie appears be to unaware of the fact that the so-called Maori theory she is critiquing, is in fact a construct of government officials and contractors; a governmental interpretation of Maori knowledge and cultural practice. What she presents as Maori theory is in fact a policy framework employed by state institutions to indigenise (and colour) the programmatic requirements of the institutions (see Tauri, 2011 and Webb, 2012). It is difficult to comprehend how Marie could miss this situation given the documentation she cites are entirely constructed by crime control agencies and not from external, independent Maori (or indeed, non-Maori) sources. Marie fails to contemplate that she is not dealing with Maori theory, or Tikanga-based interventions, but neocolonial artefacts of government officials, criminologists and psychologists 'jobbing' for the Crown's coin and utilised to satisfy the needs of agencies (see McIntosh (forthcoming) and Tauri (2009) regarding the duplicitous nature of government institutions use of Maori symbols, Tikanga (theory) and responses to social harm). The dominance of positivistic theory in Corrections policy programme, and the subjugation of Indigenous perspectives are evident in all relevant departmental documents, as demonstrated in the following text from a Department of Corrections (2009b) review of the effectiveness of rehabilitation programmes:

> It is now generally accepted that treatment programmes should be adapted to cater for the cultural needs of offenders who participate. As such, *culture represents an important responsivity issue within offender rehabilitation. Incorporating culturally-based concepts, imagery and activities into programme content* is regarded as a way of both *attracting minority-group participants into programmes,* and *ensuring that the programme engages and retains them* [emphasis added]. (Department of Corrections, 2009b: 42)

Weatherburn (2010) accentuates this particular myth of the dominance of Indigenous perspectives and a focus on structure (that is, bias) in policy responses when he argues that:

> debate about how to respond to Indigenous violence have focussed less on the question of how to reduce it than how to reduce the effect of Indigenous violence on Indigenous contact with the criminal justice system. The general consensus on this issue seems to be that the best way to reduce Indigenous contact with the criminal justice system is to create some tribunal or process that gives Indigenous community members a voice in how to respond to crime by Indigenous defendants. (Weatherburn, 2010: 198)

Both Marie and Weatherburn's positions can be described as *mythological constructs*. Neither author appears to have engaged thoroughly with the vast amount of material generated by administrative criminological and government institutions that demonstrate the wide array of official responses to Indigenous crime, of which conferencing processes, liaison officers, and so on, form only a small component of an extensive intervention strategy. Nor have they engaged with the sophisticated material Indigenous and non-Indigenous have produced examining Indigenous over-representation in Australasia or any of settler society jurisdictions. If they had they would find that Indigenous and critical scholars in New Zealand (including Jackson, 1988, Tauri, 2009, Webb, 2003), Australia (Blagg 2000, Cunneen, 2008 and Dodson, 1994), and Canada (Gosse, Henderson and Carter, 1994, Monture, 1999 and Victor, 2007) provide sophisticated, multifaceted explanations of the Indigenous experience. This material also reveals the wide range of interventions, such as habilitation centres, and culturally and socially specific therapeutic approaches to a wide range of risk factors, to use the preferred terminology of Authoritarian Criminology, that Indigenous scholars and practitioners have designed.

It is accurate to state that issues like bias, institutional racism, colonisation, and militaristic-style policing strategies are key foci of counter-colonial, Indigenous criminologies. However, it is duplicitous to argue that they are the only explanatory factors that Indigenous (and non-Indigenous), critical scholars identify as key explanations for Indigenous over-representation. The key issue that Marie and Weatherburn miss is that it is the state that has demonstrated a preference for culturally sensitive processing of Indigenous crime, exemplified by agency controlled programmes such as group conferences, sentencing circles, Indigenous sentencing courts, Indigenous liaison officers, Memorandum of Understanding, Aboriginal Justice Strategies and such like (Tauri, 2011). These types of state-centred responses invariably lack jurisdictional autonomy (for First Nations), legislative weight and receive significantly less funding in comparison to

mainstream policies and interventions. In reality, a significant proportion of settler state responses to the Indigenous problem are simply orientalised artefacts that enable the state to be seen as doing something while avoiding independent (Indigenous) analysis of the failure of its crime control processes to provide meaningful justice outcomes for subjugated populations (Tauri, 2011).

A thorough engagement with crime control texts produced by government agents (such as Cabinet papers, key strategies, research documents, and so on) demonstrates that the overarching theoretical paradigms that dominate the sector derive from Eurocentric theories. Furthermore, the vast majority of interventions that Indigenous offenders receive emanate from positivistic criminological and psychological paradigms. The predominant forms of therapeutic and preventative programmes Maori offenders participate in are not based on Tikanga Maori, as Marie claims. The literature shows that Marie's argument that Maori dominate the design of correctional interventions and the evaluation and research process is nothing more than a mythological construct. For example, a review of key documents demonstrates that the dominant theory of the Department of Corrections is the *Psychology of Criminal Conduct* imported wholesale in the mid-1990s from Canada[5] and life course/developmental theory (see Department of Corrections, 2007). Likewise, the Ministry of Justice (2005, 2007) policy programme is dominated by CPTED and Rationale Choice Theory in relation to its crime prevention work programme and life-course and other developmental approaches that inform youth justice (McLaren, 2000 and Ministry of Justice, 2002).

Contrary to the mythic claims of Authoritarian Criminologists such as Marie and Weatherburn, a thorough review of available research and government texts demonstrates that:

1. Maori theory (Tikanga, kaupapa) does not dominate policymaking in any of New Zealand's crime control agencies (see Waitangi Tribunal (2005) for outline of the dominance of Eurocentric theory);
2. the vast majority of policy, legislation, intervention design and funding decisions are informed by Eurocentric, imported theories and interventions (for example, see the Ministry of Justice (2009a, 2009b) generated material on the recent Drivers of Crime project in New Zealand); and
3. the vast majority of government spend in New Zealand's criminal justice system goes to imported, Western crime control programmes[6].

Conclusion

I have no doubt that some criminologists working in Australasia and within the identified Authoritarian criminological paradigm, will find this chapter challenging. I am just as certain that my text will be dismissed by some

as aggressive and emotional. These are terms that Indigenous scholars hear too often when members of the academy chose to avoid engaging with the Indigenous critique. Soynika (1994, in Agozino, 2007) aptly justifies the decision to speak to power in such uncompromising terms when he states that:

> [w]hen power is placed in the service of vicious reaction, a language must be called into being which does its best to appropriate such obscenity of power and fling its excesses back in its face, [and that]... language must communicate its illegitimacy in a forceful, uncompromising language of rejection, seeking always to make it ridiculous and contemptible, deflating its pretensions to the core. (Soynika, 1994: xiii–xiv, quoted in Agozino, 2007: 2)

Given the mythological nature of so much of Authoritarian Criminology's work and the influence it has on policy, the time clearly has come for Indigenous scholars to challenge the hegemony of criminological practitioners who empower themselves to speak for us, while employing mythological constructs to silence our voices. This call to arms can be justified through a number of rationales, although just two will suffice here. The first is that we have the right to speak for ourselves, which involves critical scrutiny of what others say and write about us. The second rationale comes in the form of an empirical question: for all its science, objectivity and generous government support, what tangible outcomes has Authoritarian Criminology (or more widely, Positivistic Criminology) delivered to Indigenous peoples? An empirically informed answer to the question must surely be 'not much'. Unless of course we measure effectiveness in terms of more Indigenous peoples in prison, ever increasing police resources employed to target Indigenous communities, more orientalised, state-centred conferencing models and more meaningless Indigenous justice strategies.

A peculiar irony of Western criminology is that its administrative formulations and so much of its theories of crime and interventions are constructed in high crime societies (Agozino, 2010). A further irony is that many Western criminologists seem to believe it is their duty to 'teach the coloured folk' about how to solve their crime problems by exporting failed policies and theories to Third World nations (Agozino, 2003). Worse still is the fact that Authoritarian Criminologists residing in the Third World and settler societies (such as Australia and New Zealand) continuously support the importation of failed, scientific interventions, whilst utilising the veil of scientism to shield their activities from the critical gaze of the Indigenous Other. When challenged for foisting alien processes on our communities, criminological experts respond by regurgitating ideological statements about evidence-based policy, international best practice and the efficacy

of acultural interventions (Tauri, 2011). Like so many First Nation scholars and justice practitioners I have heard this self-serving rhetoric time and again. And yet I never fail to be surprised by the silence that emanates from Authoritarian Criminology to our simple refrain: 'why is so much of this criminological work carried out on our behalf, but without the necessary engagement with our communities'?

Notes

1. The term Australasia is used as a collective term for the separate, neocolonial jurisdictions of Australasia and New Zealand.
2. Carlen (2010) and Carrington and Hogg (2012) have advised against imagining criminologies to the point of creating monolithic constructs and intellectual dichotomies such critical versus administrative approaches and such like. Carrington and Hogg (2012: 46–7) argue that '[s]uch exercises in distancing ... have borne little intellectual fruit over the years, let alone in the present when critical work in criminology has become unmistakably "mainstream" in Australia ... as elsewhere'. While acknowledging the validity of this critique in terms of the eclectic nature of the discipline, the historical and contemporary role of the discipline in subjugating Indigenes is readily identifiable via critical analysis via an Indigenous standpoint.
3. Agozino (2010: i) positions criminology firmly as a key technology of social control in the colonial era when he writes that 'Control-freak criminology was there from the beginning of imperialism when the attempt to pacify the rebellious natives and stabilise foreign domination of finance capital was politely referred to as the "native question" ... to which the answer was a pattern of pacification that has been identified as gun-boat criminology'.
4. During the same period New Zealand produced little material that privileged the Maori experience of criminal justice. Instead, criminologists and policy-makers offered a diet of Eurocentric, uncritical policy statements, exemplified by the Reoffending by Maori (RoBM) project (see Williams, 2001). Exceptions are Moana Jackson's (1988) groundbreaking report He Whaaipanga Hou (Maori and the Criminal Justice System) and Jackson (1990, 1995); in terms of historical work, chapter two of John Pratt's (1992) *Punishment in a Perfect Society* and Alan Ward's (1995) *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand.*
5. See Newbold (2007), Webb (2003) and the majority of the department's policy documents since 1996 including the Department of Corrections (2001 and 2009b). See also the Department's (2009a) evaluation of Maori Focus Units and therapeutic programmes for evidence that standard, western evaluation methods dominate the agency's research process, even when initiatives are supposedly Tikanga-based. All this material is available either online or through an Official Information Act request.
6. During the now defunct Effective Interventions initiative (2006–07), Te Puni Kokiri officials were informed by crime control agencies that Maori initiatives (which are likely to include programmes, such as 'counselling' that derive from non-Maori theoretical sources) received less than 10 per cent of the sectors spend on 'therapy' and other forms of intervention (Tauri, 2011).

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16

Reproducing Criminality: How Cure Enhances Cause

Gillian Cowlishaw

Introduction

> She's not Aboriginal; she's rich. (Murri Aboriginal woman in Bourke, 1980s[1])

The extraordinarily high rates of Aboriginal imprisonment have received much if somewhat baffled attention from criminologists motivated by the desire to solve this social problem. But solutions should be preceded by analysis and analysis should begin with scepticism; we must always ask how a 'social problem' has been constructed. [2] A simple example is the fact that Indigenous Australians automatically became vagrants when European law was declared sovereign in Australia.[3] While the imported law created the crime of vagrancy, the vagrants were identified as the social problem. If we fail to understand the source and the nature of what are defined as social problems, the remedies we devise are likely to exacerbate them. Thus, the advice, 'don't just do something; stand there' could be translated as 'analysis should precede action', recognising that the conventional definition of a social problem may conveniently conceal its social causes.[4]

The inspiration for taking up this subject comes from the voices of some interesting Aboriginal friends who are known as criminals. The way they conceptualise their own social circumstances in poor Aboriginal communities provides a challenge to conventional thinking. Their shared awareness of what life is about has emerged in conditions that are characterised by dense family connections across a whole community and by poverty and some degree of marginalisation from mainstream social institutions. The principle I am following and an alternative title for this paper would be 'Taking People Seriously'; that is, people whose values and voices are seldom taken seriously, despite the fact that they are the focus of a lot of anxious attention. I should emphasise here that there are many Aboriginal people who do not dwell in the conditions I am discussing.

Criminologists may want to use ethnographic material like mine to discuss 'labelling theory' or 'cultural criminology' with the aim of developing a more coherent criminology (Spencer, 2010).[5] My aim is quite different. I want to use my grounded ethnographic work to discuss what is wrong with common conceptions about crime and criminality including assumptions that slip unnoticed into criminological theorising. I begin by sketching a picture of a community where criminality is not a quality of individuals but a feature of shared social life, involving normality and identity. This suggests that, while there is a state welfare apparatus that claims to 'alleviate inequalities' in order to create a 'more socially just and inclusive society' – words used in the aims of this Crime, Justice and Democracy conference – there are conditions where 'inequalities' are valued positively by community members because they index difference. Here, inclusiveness in mainstream society threatens community cohesion because it contradicts one of the characteristics around which people identify their own social belonging. The Aboriginal woman who said of another, 'She's not Aboriginal; she's rich', was enunciating this view. Poverty, being 'down there on the mission eating bread and dripping', became a source of pride and self-assertion at a certain point in historical experience of many NSW Aborigines, challenging the pitying or contemptuous gaze of others. In these conditions, 'crime' can be a form of positive politics, partly because some forms of normal behaviour are criminalised and thus become forms of dissent, as vagrancy once was and as challenging police commands is now (Cowlishaw, 2004). As a consequence, in many such communities, association with the criminal justice system has become an accepted element of group identity affecting many members who have not themselves 'offended', as the terminology has it.

This is evident in the lively community discourses that arise from regular engagement with police, the courts and the 'correctional' establishments. Besides complaints and anger about police and the injustices of fines and detention, everyday conversations are enlivened by joking and boasting about these experiences. Most striking is the fact that these conditions are not only taken for granted but have also become a positive way to distinguish oneself from others. This is especially true of young Aboriginal men and, to some extent, young women in rural and suburban Australia. Here the police are familiar; arrest, detention, relations disappearing into detention or jail, and 'seven day warnings'[6] are part of everyday life from a young age.

Here are some brief illustrations from ethnographic work in western NSW and western Sydney as recorded in fieldwork diary entries A:[7]

> Driving to the shopping centre in Mt. Druitt, Donny, a young Koori man, tells us of the detention centres he'd been in, reeling off the names with a note of defiant pride. Someone points out a really nice dark green BMW in the street and Donny says, 'Six seconds', and the others laugh.

> He means that's how long it would take to steal it. He explains that pinching cars and the police chase is a game. It's not seen as stealing because, he admits with a touch of chagrin, they don't ever think of the owner.
>
> It is becoming clear to me that the fun around here stems from practices that are criminal and that the criminalisation of fun involves extended families and relationships that become enmeshed in the 'correction' system. Being locked up, going into and getting out of jail are common refrains in everyday conversation across the whole community.

Norrie tells me:

> Me and Helen used to watch videos at TAFE. They had one on Bathurst jail and I hadn't seen my cousin for a long time but I seen him on there. I seen a lot of the boys on there.

This local talk reveals the normality of crime and punishment in this life world. Behaviour that gets people into trouble is not the focus of moralising; rather there is a combination of resignation, anger, joking and boasting. Being caught is bad luck. Sometimes there is reprimand or regret but more often complaints about the police, and evidence is amassed that police are trying to get you. One woman described an event during an ordinary night out:

> My mate got locked up the other night for using language. I read the police statement and it said that the coppers said, 'Excuse me love, can yous wait a minute? I'm talking to this young bloke. Can you hold on a second?' Can you see a police officer saying that!? He said, 'Listen here you little black slut, shut up. I'm talkin' to him.' They locked her up till the morning. She's gotta go to court. They'll slap anything on you if they can: Foul language, offensive language, threatening the police.

This woman laughed when telling me what her friend said when she swore back at the police. This scene also illustrates the double bind: cursing the police affirms the contempt one is subjected to and can exacerbate police hostility. But black, subversive humour and satirical comments about one's predicament are often the only defences against the destructive forces in this social world.

Frank Doolan tells me about a young relation of his, a boy he calls 'Flash Ash':

> I call him President of the local Commodore Club. Ashley's biggest claim to fame is that he can black box a five litre. That is, he can trick the ignition of the most powerful Commodore the gubs (whites) make. At 15

> he is already a father twice over. He lives with his teenaged girlfriend in between stints in Cobham and so on. Eventually he'll get too old and they'll truck him off to gaol. That's if he doesn't kill himself first. Life's cheap in the Druitt.

Frank told this bleak story in a bid for understanding of the social world this adventurous, assertive teenager inhabits which dooms him to a painful and probably short life.

Experiences of 'crime' and its 'punishment' could be said to be valued in the sense of being a defining part of one's own social realm.[8] Social identity, like national identity, is built out of distinctions between one's own people and others (Balibar, 1990) and it is clear that one distinctive feature of this social world is its engagement with the criminal justice system. There is an element of pride in being tough enough to live with these conditions which also has a certain historical familiarity (Cowlishaw, 2004, Morris, 2001).

There are other distinctive features of poor Aboriginal community life of course, particularly the dense and complex sociality. As one Bourke resident said: 'What you call extended family, we call family'. Cousins and aunts and uncles tend to be as important as brothers, sisters and parents. Large families with relationships extending across the community and beyond are central to community life. Personal histories are familiar and shared. Scarce resources, limited education, and even certain chronic illnesses have become part of the social identity that many poorer Aboriginal community members inhabit and take for granted.

It is important to recognise that what are commonly known as alienated communities – because they are alienated from the mainstream – are also 'havens in a heartless world' (Lasch, 1977). It is among one's family and familiars that one's being is affirmed and social life makes sense. Thus being 'alienated' outside the mainstream is, from the community perspective, the definition of insider status. Wealthier, more educated, more employed people are somewhat foreign, with posh habits, not ordinary people like us who are the not-rich (Cowlishaw, 2004). It is 'others' who live in an ordered, law-abiding world, a world where you trust police to be respectful and where the social dramas described here are absent. This mainstream, to use a short-hand term, where most of the rest of us feel at home is not a comfortable place for all.

Like Frank, I am describing these conditions in the spirit of understanding what is happening. I do not argue that clinging to a marginalised identity is 'good politics'. However, it must be recognised as a form of politics; that is, a systematic orientation to the power of the state[9] that has emerged in specific conditions. This outsiders' politics requires recognition as a real social force rather than merely a barrier to normalisation to be overcome at any cost. I am also arguing that a crucial and unacknowledged basis of the continued criminalisation of Aboriginal people is their habitual flouting

of the values of the mainstream society in which they are encapsulated, importantly, for instance, in everyday demeanour and manners. This is a particular form of resisting erasure, a response to long-standing oppressive social conditions, including the experience of being actively rejected by the mainstream. Rather than simply a desire to remain on the margins, it is a defiant response to being marginalised. This feedback loop could be called a 'vicious cycle' or a 'double bind', handy terms that seem to explain but actually divert attention from how these conditions are reproduced. There are economic, political forces that need to be understood but here I am concentrating on the local cultural dynamics and interactions between local Aborigines and the institutions bent on normalisation.

Habitus

It may appear scandalous to some (although not perhaps to sophisticated criminologists) to suggest that alienated Aboriginal people take an active role in reproducing their own alienation rather than being passive and virtuous victims of a legacy of racism.[10] But it is not at all surprising that people value and defend what Pierre Bourdieu (1993) calls their *habitus*, the familiar cultural practices or 'dispositions' that are characterestics of a social arena. The pleasures of cultural homeliness are well recognised in most contexts but when a people or an ethnic group is at odds with, or contesting, the norms of the mainstream, they become the target of moralising discourses that ostensibly seek a reason for their alienation in their living style and everyday habits.

I now want to make a different point about the regular efforts made to pry Aboriginal people away from their *habitus*. Let me take a moment to outline, in elementary terms, what Bourdieu meant by this term. *Habitus* can be used to mean culture, or social milieu, or the social circumstances where a person feels at home. But the term has a more complex and dynamic meaning. The *habitus*, a product of all 'biographical experience', needs to be distinguished from the 'field' or social circumstances in which it is generated (Bourdieu, 1993: 46, 87).[11] Thus a social field *generates* structures of thought and action, shared values, and social dispositions that become established and accepted in a particular social world. These subjective structures shape social interaction and thought and the forms of intimate expression that are taken for granted, identified with, and thus nurtured within dynamic social conditions. We can think of this 'subjective' *habitus* with its distinctive forms of sociality as being shaped by 'objective' structures, features of the world that are prior to, and independent of, the *habitus* of the subjects. Thus, the *habitus* of one group of people can comprise the 'objective conditions' or 'field' of another group of people.

We see then that the *habitus* of Aboriginal communities does not exist in a vacuum. These are governed spaces, produced in the context of ongoing

and intricate relationships with mainstream society and the state apparatus. Research has documented the particular economic history, employment conditions, experiences of schools, and of police and law courts that have shaped the *habitus* of New South Wales Aboriginal communities (Beckett, 2004, Beckett, 2012, Morris, 1989, Morris, 1990). A specific *habitus* exemplifies an active and unique set of responses to conditions in the world. One's *habitus* is not created or reproduced merely through wilful or conscious choices but reflects a dynamic body of values nurtured in shared social conditions. Detailing particular qualities of a *habitus* requires thorough and detailed long-term research which provides a challenge to stereotyped common knowledge (Cowlishaw, 2004, Gibson, 2010).

The *habitus* of another group of people is relevant to my general argument – that of those whose job it is to pry Aboriginal people away from their *habitus*. There are extensive institutions staffed by people (Aboriginal and non-Aboriginal) who are employed to explain to these marginalised Aboriginal communities that their lives could be different, better, more satisfying. I am speaking of the educational, welfare and social service institutions that are also part of the governing structures that oversee and try to reshape the subjectivities and the behaviour of the people they aim to help. Since the 1970s, the state has established numerous remedial programmes and policies intended to overcome what are designated as *their* (Aboriginal) problems.[12] These programmes include legal services to ensure proper court hearings, educational programmes to improve opportunities, and diversionary programmes and training courses to try to shift the habits and values of members of these alienated communities towards those of the mainstream. The fact that the Aboriginal crime statistics have become worse rather than better during the years these programmes have developed[13] indicates that the issue is not just a matter of tweaking them into better shape. Something more fundamental needs recognition.

There are several conditions that are regularly ignored or erased when considering the plight of the alienated, poor Aboriginal communities and the attendant high levels of incarceration. Perhaps the most important are the economic and industrial conditions that lead to little demand for unskilled or semi-skilled labour, especially in rural and remote areas. Another is the revealing fact that educated and skilled Aboriginal people tend to be over-employed – I will come back to this point.

One fundamental proposition for which I have laid the ground-work here is that the values underlying the numerous training and remedial programmes, and embodied in those who implement them, can be in stark and discomforting opposition to the social world of the Aboriginal communities they are supposed to be assisting. Lorraine Gibson's research in Wilcannia provides an apt illustration. She describes how the supervisor of a building work-training programme complained about the workers arriving late and then proceeding to make tea and have a smoke and a yarn.

They would stop working to talk with people they knew passing by. When the supervisor objected to one of the workers going off to a doctor's appointment, without warning or apology when some planned work needed completion, the worker got angry, asking the supervisor if he wanted him 'to work like a white cunt... twenty-four hours a day'(Gibson, 2010: 155). This worker saw white people as slaves to their work. For them, work always took priority over family and freedom. Gibson concluded: 'For many Aboriginal people work and its rewards... sit uneasily with the demands of everyday sociality' (Gibson, 2010: 154). Or, as Bourdieu puts it: 'When the objective conditions of fulfilment are not present, the *habitus,* continually thwarted by the situation, may be the site of explosive forces (resentment) which may await (and even look for) the opportunity to break out...' (Bourdieu, 1993: 87).

I want to emphasise the ordinary assumption that we can presume is made by this supervisor in Wilcannia: that the people he is training are eager for the opportunity to abandon their life world and that they share his low opinion of it. Here I follow Paul Willis's finding that the teachers of working class kids in London schools wrongly assumed that the pupils all want to discard their working class *habitus* (Willis, 1977). I am arguing that an embedded assumption that is part of the trainers' and teachers' *habitus* – that to be poor is to inhabit a space characterised mainly by suffering and shame – can lead to rejection of what is being offered. The targets of these remedial programmes do not accept the belittling, the implied contempt for their way of life, that is an unstated foundation of state-sponsored efforts to alter their behaviour or their conditions. Such efforts come in many guises and the implied contempt is disguised because the disdain for the Aboriginal ways of living cannot be admitted. If we add to this the recognition that marginalisation has become a shared form of distinction for many Aboriginal people, we can begin to understand the logic of refusal. To abandon one's *habitus* can be an act of gross disloyalty.[14]

Government funded training programmes directed at alienated communities force young men and women to attend the courses, take the jobs, work consistently, and obey the clock, all of which mean the individual must break from his or her community, give up accepted habits, and adopt the ambitions offered by institutions such as Centre Link – or Twiggy Forrest's mining company.[15]

There is a history of mainstream blindness to the binding force of others' cultural realm. Western society was once blind to children's emotional attachment to their poor or impecunious parents and readily removed them to better physical conditions (Swain, 2002). It is still blind to equivalent attachments to an insalubrious *habitus*. We can assume that the Wilcannia manager takes for granted a regular income and secure residence, a car and a computer, conditions which confer an assured personal autonomy. To be unemployed would be for him a mark of social inferiority and shame. From inside this secure *habitus*, it is easy to forget that crucial elements of the

sociality of Aborigines in Wilcannia entail communal methods of dealing with meagre incomes, reliance on public housing and a lack of resources. In these conditions, it is relatives and familiars that are the source of personal affirmation and social meaning – even if their demands create problems.

To abandon demanding and difficult relatives, to adopt more individualistic values, and to aspire to autonomous material conditions, would not only entail a change of personal habits but would also betray ones familiars. It would be discomforting and wrong to undermine affirmed social practices in order to 'better oneself'. Gibson (2010) discusses the suspicion and punishments for what is perceived as desertion (see also Cowlishaw, 2004). This perspective, while not unknown to those devising these remedial programmes, is usually regarded as simply a hurdle, an irritating barrier to improving Aboriginal conditions. People in such communities are assumed to misperceive their own objective social conditions and their own longer-term interests. They are not respected and moreover, they know it, an example of what Axel Honneth calls 'evaluative disrespect' that leads to 'negative emotional reactions' (Honneth, 1995: 134).

It is also important to recognise that the relationship between these two social worlds – of those who minister to the marginalised, and the Aboriginal communities they minister to – is one of codependency. As Tess Lea spells out, codependency is a structural condition evident where governmental ministering institutions rely on their clients whose conditions they are ostensibly trying to change (Lea, 2008). Thus, poor Aboriginal communities are part of the objective conditions that create elements of the *habitus* of many other Australian citizens whose work is related to them, such as schoolteachers, police officers, health workers and legal service lawyers in certain areas. That is, the work of one segment of society in these cases depends on the 'problems' of another.[16]

A linked condition that clinches the argument for a structural basis of criminality and poverty relates to the many Aboriginal people who are no longer members of the poor communities I have been discussing. The concerted push from governments since at least 1980, with special funding, scholarships, and other enticements, successfully created a substantial class of tertiary educated Aboriginal people who occupy many of the service positions designed to further Aboriginal progress. As noted above, these educated Aboriginal people are over-employed. That is, employers compete for their services, sometimes offering rewards well above those of equivalent employees. They are snapped up to be cultural representatives, to take part in service provision, to act as social interpreters, or to take the jobs of people like that supervisor in Wilcannia. Some experience discomfort due to the expectation that they share the *habitus* – the values, habits and judgements, of what I am calling the mainstream – at the same time as they are expected to represent and embody Aboriginality. I will leave it to others to explore the significance of this condition more fully.

Sex and law in Arnhem land

The perception that life in Aboriginal communities consists of unrelieved suffering and shame has been so strongly established that you might wonder if I am crazy to argue that these places are highly valued. But, even if there is *more* suffering in many Aboriginal communities than elsewhere in Australia, it is simple-minded to assume that suffering is all that exists or that suffering precludes loyalty, love or identification with one's home space. The negative imagery of miserable victims of their own violence has been pumped up a hundred-fold in what Marcia Langton, following Baudrillard (2005), called an 'obscene and pornographic spectacle' that became a 'national reality show'(Langton, 2008: 145). Rumours of widespread sexual violence and pedophilia in remote communities enabled the Commonwealth government to exert unprecedented direct intervention, ostensibly in order to 'save the children'. Where increased resources were provided in the wake of the intervention, they were welcomed but the whole ideological basis of the policy illustrates my argument – Aboriginal social life was rendered in entirely negative terms and there has been little analysis of the structural conditions that reproduces what is asserted to be merely disordered behaviour. It was implied, even explicitly stated, that Aborigines themselves had allowed their dire conditions to emerge so they simply had to be saved from themselves.

My final vignette from Arnhem Land is intended to illustrate the barrenness of this thinking. I believe an ideological incoherence has invaded public discourses about Indigenous policy – mediated by a fervent moralism. That is, the current practice of governing Aboriginal people is based on contradictory principles that moral fervour tends to obscure. First, as I have discussed, there is the pervasive sense that Aboriginal communities are places no-one values, places of self-inflicted violence and disorder from which people must be rescued. But this imagery is contradicted by an officially endorsed veneration of 'Aboriginal Culture', evident in the language of love for Indigeneity that suffuses public discourses across the nation; for instance, in the mandated teaching of Aboriginal culture in schools, Welcome to Country rituals, and many other signs and symbols of recognition and reconciliation. I have observed elsewhere that the admirable intention of 'cultural recognition' has a sting in its tail as it is seldom premised on the recognition of Aboriginal authority over the symbols and the practice of culture (Cowlishaw, 2010). The proclaimed respect for Aboriginal culture is thus easily abandoned.[17]

Sexual activity in children and adolescents is no doubt universal; what varies is whether and how it is recognised and its (non)acceptability among older people. There is extensive evidence that Aborigines generally do not practice the forceful suppression of sexual expression that is common in the west (Morton, 2011). Before the 1960s, patrol and police officers in

the Northern Territory were told to ignore matters to do with 'tribal law' (Cowlishaw, 1999: 146). Then the Native Affairs Branch began to monitor marriages and tried to stop young girls being married to older men. The choosing of partners by teenaged boys and girls has been increasingly accepted by Dalabon, Rembarrnga and other Arnhem Land people and has largely replaced the promise marriage system, although acceptable partnerships are those that follow kinship rules about 'right skin'. Fuelled by sexual scandals focused on pedophilia, the Intervention introduced more aggressive policing of 'underage' sexual activity. Specific behaviour – sexual relations between young couples that had become accepted and controlled within Aboriginal communities – has been *re*-criminalised by mainstream law if either partner is under 16.[18]

The following account of a tragic love affair between a 17-year-old boy and his 14-year-old girlfriend in southern Arnhem Land illustrates the incoherence and ignorance of the Northern Territory Emergency Intervention when faced with the social realities on the ground that it aims to change. It also exemplifies the helplessness that I have observed to be this Aboriginal community's experience over a century of being governed by foreigners; that is, white people whose practices and values were shaped elsewhere and often clash with those nurtured in Rembarrnga country (Cowlishaw, 1999).

In the early months of the implementation of the Intervention, the boy C was arrested by police for unlawful sexual relations with his young girlfriend L and held in detention in Darwin for a few weeks. Others in the community understood the pair to be in love and, as they were 'right skin', the relationship had been largely accepted as legitimate. Thus, when released from detention with an order to stay away from L, the boy returned home to his mother's place, a remote community that was adjacent to where L lived.

The girl's mother, recognising that C might be breaching the court order and that her daughter might also get into trouble, phoned the resident male nurse who reported C's presence in the locality to the police, as he was legally obliged to do. The two resident police officers found the boy and detained him in a temporary police lock-up that evening. However, he escaped and disappeared into the bush. The police gave up looking for him when night fell. He ran several kilometres to his mother's community and then to a bush camp where a gun was easily available. At about 3 am, he stole the gun and shot himself. His body was found in the morning.

The grief and horror of these events in this local community are difficult to describe. Anger, blame and wild rumours abounded, including that the police had shot the boy. There were complex and far reaching repercussions that are still having their effects on relatives. There was a formal enquiry which found that C's death was an unfortunate tragedy, for which nobody was held responsible. The nurse and the police officers were moved to other posts and the community coped as best it could.

The tragic absurd[19]

I cannot do justice to the origins, causes and repercussions of this complex tragedy here but the events illustrate the absurdity of the discourse of care and concern that fuelled the Intervention and also the clumsiness of the rule being exercised. Neither the young police officers nor the resident nurse could have appreciated local people's awareness of a precise history of attempts to deal with their contrasting sexual mores. Half a century ago, in the 1960s, a 12-year-old girl was pregnant to her considerably older promise husband. The station owners were concerned and alerted the authorities in Darwin with the result that the man was investigated and threatened with jail. However, Harry Giese, the then head of the Native Affairs Branch – a man later excoriated as the epitome of old school conservatism – visited the station and, after speaking with the women, decided that the promise system was legitimate and that he should not interfere with this particular marriage. As the man involved explained to me: 'They tried whitefella law but blackfella law beat it' (Cowlishaw, 1999: 146, 148). This man of great moral fortitude would today be deemed a pedophile and jailed, and his wife would be seen as a victim of sexual abuse. There is fine irony in the fact that their lifelong marriage was characterised by stability and shared commitment to precisely the kind of serious ambition for the education and employment of their five children that governments now so vociferously advocate. Thus, official responses to 'unacceptable' practices seem less intelligent and less effective today than 50 years ago.

The tragic absurdity stems from the fact that crude and destructive attempts to prize Aboriginal people from their nationally embarrassing *habitus* continue alongside the promotion of what is officially conceived of as Aboriginal Culture. The Intervention thus illustrates my earlier argument: that the logic of refusal is an outcome of the contempt shown, whether direct, disguised or by implication, towards Aboriginal life-worlds. The old colonial project, a one-way system of teaching others how to live, continues in the form of concerned attempts to 'protect the children' from those who love them.

My argument illustrates what Balibar says succinctly: 'The universalism of bourgeois ideology (and therefore also its humanism) is not incompatible with the system of hierarchies and exclusions which, above all, takes the form of racism and sexism' (Balibar, 1990: 9). My limited knowledge of the criminology literature tells me that it largely shares this humanistic bourgeois ideology and finds satisfaction in either showing how the criminal justice system can be improved or how we should think differently about criminality. Both efforts of course have considerable value but I have tried to expose a more fundamental contradiction that is difficult to face. The more sophisticated criminological literature is certainly capable of *recognising* the condition I have outlined but usually in general terms that present a paralysing truth. That is, if we are to provide 'criminal *justice*' we may have to change our own ideas of what is just.

Let me conclude by forestalling predictable misunderstandings of my argument.[20] Inevitably, in this kind of arena, the question emerges: 'What are we to do?'. The little pronoun 'we' has the effect of sweeping us all into a governmental project of finding, or rather conceiving, overarching solutions to what some segment of the nation takes to be a problem. We should recall the responses of the tenement dwellers who, rather than have their buildings demolished, wanted the landlord to get rid of the rats and fix the leaking roofs. My essay does not valorise community conditions in poor and alienated social spaces. The argument that many are blind to the binding nature of others' *habitus* does not assume that this is merely a problem of sightedness, to be cured by donning an ethnographer's spectacles. On the contrary, many ethnographers share the intellectual, if not the emotional, judgement of those who see no value in the style of life in Aboriginal communities (Sutton, 2009). Far from recommending that readers become enamoured of the *habitus* of poor Aboriginal communities, I am suggesting a clearer understanding of our own anxieties and reasoning. I suggest we lift our accusing gaze from the Aboriginal communities where crime is an everyday matter and turn the analysis elsewhere. We should consider the ways power over others is exercised, 'power to cripple and rot certain worlds while over-investing others with wealth and hope' (Povinelli, 2006: 10). The knowledge that poverty is *produced* by structural processes that affect ethno-racial minorities more than others may seem familiar but the truth that 'we' who want to solve the problems are embedded in these structures is one we often prefer to forget.

Notes

1. From author's fieldwork during the 1980s; quotation used with permission.
2. Bourdieu (1993:14): 'To ask sociology to be useful for something is always a way of asking it to be useful to those in power – whereas the scientific function of sociology is to understand the social world, starting with the structures of power... all power owes part of its efficacy... to misrecognition of the mechanisms on which it is based'.
3. A vagrant is 'a person without a settled home or regular work who wanders from place to place and lives by begging' (Oxford Dictionary, online). Laws against vagrancy have focused variously on conditions of homelessness, idleness and pennilessness.
4. I attribute the sentiment to Slavo Zizek (2008: 6).
5. Spencer (2010) discusses the inability of 'cultural criminology' to transcend 'labelling theory'. This 'failing' is apparently to be overcome by thinking, with no reference to the nature or practice of criminality.
6. When a fine is overdue for payment, police are obliged to warn a person seven days in advance that they will be locked up.
7. These are edited notes; a slightly different version of the following material was published in *The City's Outback*, UNSW Press, 2009.
8. Zizek, speaking of the Paris Riots in 2006, says that among the young rioters in the poorer suburbs, there is a lack of 'cognitive mapping...' '...an inability to locate the experience of their situation within a meaningful whole' (2008: 65). I am suggesting that Aboriginal people do not accept the place they are assigned

in the nation's 'meaningful whole'. In that hegemonic framework, Aborigines' most familiar place is merely as the nation's favourite victims.

9. By 'the state', here I refer to the institutions of government, including the police and the law as well as to the mainstream acceptance of these institutions as the necessary framework for social life.
10. A further common assumption is that the victims of structural injustice are themselves strongly wedded to justice and other virtues. However, any necessary causal connection between bad experiences and greater virtue or wisdom seems unlikely.
11. 'The *habitus* is something powerfully generative...a product of conditionings which tends to reproduce the objective logic of those conditionings while transforming it' (Bourdieu, 1993: 87).
12. Poor and alienated communities with quite different ethnic characteristics are also targets of similar programmes. What they share is the characteristic of being poor.
13. http://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates.html
14. Resistance to retraining is also fuelled by the perception that the jobs are not available to their community or are not real jobs but a matter of deception, 'gammon jobs' (Gibson, 2010: 158).
15. Andrew 'Twiggy' Forrest, a billionaire mining magnate who claims a deep and abiding love for Aboriginal people, has a programme that aims to provide 50,000 jobs for indigenous Australians. While seriously behind the promised schedule, 1,900 jobs had been provided in 2011. But Mr Forrest is in dispute with some traditional owners of land he wants to mine because he is offering them tied monies rather than a share of future profits because he also claims to know where their best interests lie.
16. The co-dependency of, for instance, the Aboriginal legal services and Aboriginal offenders is not a causal link but a structural condition shaped by bureaucratic processes of funding and accountability.
17. This is clear from the sudden abandoning of 'two way education' and language programmes in Northern Territory. They were discontinued in the name of more effective English teaching, with no consultation or respect for the Aboriginal participants who had been trained and assured of the value of the programmes. The best advice of education experts and linguists was also ignored (Waller, 2012).
18. Sexual relation with a person under 16 years of age is a crime in Australian law, with some slight variations across state and territory jurisdictions.
19. For the development of this idea, see my article 'Culture and the absurd: the means and meanings of Aboriginal identity in the time of cultural revivalism' (forthcoming) in the *Journal of the Royal Anthropological Institute*.
20. The notion of taking 'bad behaviour' as the focus of serious social analysis often gets mistaken for endorsement of it, as Alan Feldman has shown in relation to violence and as Ghassan Hage, in analysing suicide bombing, has dubbed 'exighophobia' (Hage, 2003).

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17
Indigenous Women and Penal Politics

Julie Stubbs

Introduction

Since the Royal Commission into Aboriginal Deaths in Custody reported in 1991 (RCADIC, 1991), rates of incarceration of Indigenous women have grown substantially, to a greater extent than for Indigenous men. However, despite their substantial over-representation in prisons, Indigenous women too rarely feature as subjects of penal discourse or penal politics. RCADIC was of enormous significance in providing detailed analysis of the underlying factors that contributed to the over-representation of Indigenous people in custody and to deaths in custody (RCADIC, 1991). However, the official reports 'lacked a gender-specific analysis' (Marchetti, 2007: 8) and the experiences of Indigenous *women* were largely overlooked and subsumed in a generalised understanding of Indigenous experience, based on the experiences of men (Marchetti, 2008). The failure to examine the criminalisation and incarceration of Indigenous women[1] continues today in research, policy and criminal justice practices.

This chapter examines how the reach of criminal justice interventions has extended further into the lives of Indigenous people, driving up prison rates, while at the same time the gendered *and* racialising effects of those developments have often gone unremarked. Part 1 draws on the limited available data concerning Indigenous women in the criminal justice system. While this picture is partial, it is clear that the situation has deteriorated since RCADIC (Steering Committee for the Review of Government Service Provision (SCRGSP), 2011). Part 2 reviews two recent NSW initiatives that operate at different stages of the criminal justice process – pre-trial diversion and sentencing – that are intended to reduce offending rates and to make the criminal justice system more responsive to Indigenous people. Part 3 documents the use of anti-discrimination processes domestically and in international fora to bring attention to Indigenous women within the criminal justice system, and highlights the need to address systemic discrimination.

Part 1 – the criminalisation and incarceration of Indigenous women

Administrative data alone provide an insufficient basis for the investigation of practices of criminalisation and patterns of incarceration, but they are a necessary starting point. However, there is a paucity of data concerning Indigenous women notwithstanding that many reports have criticised this omission (NSWLRC, 2000, para. 6.11). Criminal justice agencies commonly report with respect to women *or* Indigenous people but rarely Indigenous women. Data is particularly poor concerning police and prosecutorial practices.

Policing and Indigenous women

Arrest

One indication of the reach of criminal justice intervention into the lives of Indigenous people is from arrest data. The most recent (2008) National Aboriginal and Torres Strait Islander Social Survey found that more than one-third of Indigenous women (35.2 per cent) and men (40.7 per cent) had been arrested in the past five years (Australian Bureau of Statistics (ABS), 2009, tables 4a, 8a). The figures were even higher in Western Australia (WA) (45.6 per cent of women, 44.1 per cent of men).

Police data indicate markedly different levels of policing of Indigenous women compared to non-Indigenous women. Bartels (2010a) reports that offence rates for Indigenous women in New South Wales (NSW), South Australia (SA) and Northern Territory (NT) were 9.3, 16.3 and 11.2 times higher, respectively, than for non-Indigenous women and, in each state, the disparity between Indigenous and non-Indigenous rates was greater for women than for men (Bartels, 2010a, table 1). In WA, police arrests of Indigenous women have *increased* while the arrests of non-Indigenous women *declined* (Fernandez *et al.*, 2009) and, by 2006, Indigenous women made up 44.5 per cent of women arrested in WA, up from 29.4 per cent in 1996. Over the same period, the proportion of Indigenous men arrested increased from 8.0 per cent to 26.0 per cent. Researchers noted substantial increases in Indigenous arrests in 'offences against the person' and 'justice and good order offences', 'especially since 1999' (Fernandez *et al.*, 2009) which may suggest that policing practices have changed. Indigenous women in WA were most likely to be arrested for disorderly conduct (19 per cent), breach of a justice order (14 per cent) or assault (19 per cent) (Fernandez *et al.*, 2009).

Changing police practices can have a substantial impact on the custodial system. A NSW study found that a 10 per cent increase in police arrests results in an estimated 4.6 per cent increase in the full-time prison numbers for women one month later, with ongoing effects at a cost of $2.2 million (Wan, 2011: 5). And of course, this does not begin to account for the human costs to the individuals involved, or their families and communities.

Police custody

At the time of RCADIC, Aboriginal women were 'massively disproportionately detained by police compared to non-Aboriginal women' (Hogg, 1991: 3). A decade later, the Social Justice Commissioner (SJC) (2003) raised concerns that Indigenous women comprised nearly 80 per cent of all cases where women were detained in police custody for public drunkenness. However, it is not possible to determine whether this pattern has continued.

The last police custody survey in 2002 found that Indigenous over-representation had declined somewhat but remained high. Nationally, women accounted for 23 per cent of Indigenous people in police custody but no details were provided of the reasons they were in custody (Taylor and Bareja, 2005: 26). The authors reported that the success of strategies to reduce Indigenous incidents of police custody varied by jurisdiction (Taylor and Bareja, 2005: 25). It is notable that, in NSW, a reduction in over-representation rates resulted from *the increased use of custody for non-Indigenous people* – Indigenous custody levels had not decreased (Taylor and Bareja, 2005).

Courts

Indigenous people constitute one in eight of the defendants in NSW magistrates courts, one in five in Queensland (Qld) and more than seven out of ten in the NT (ABS, 2012; data are not available for other states or territories). The proportion of women is higher among Indigenous defendants (NSW 27 per cent, Qld 31 per cent, NT 17 per cent) than non-Indigenous defendants (NSW 17 per cent, Qld 20 per cent, NT 14 per cent, (ABS, 2012: 55–6)). However, there are scant data on the offences that bring Indigenous women before the courts.

Studies based on NSW and WA indicated that Indigenous women were particularly over-represented in the categories 'acts intended to cause injury', 'public order', and 'offences against justice procedures' (Bartels, 2010a: 21–2). A more recent NSW study (Beranger, Weatherburn and Moffatt, 2010: 3–4) found that more than a third of Indigenous appearances in the Local Courts were for road traffic and motor vehicle regulatory offences (25 per cent) and breaches of justice orders (bail, apprehended violence order, parole: 11 per cent) but provided no data specific to Indigenous women. The factors underpinning rates of breach of order are not well understood but these offences are markedly shaped by police enforcement practices.

Patterns in women's incarceration

The number of Indigenous women in prison has grown substantially since RCADIC, from 104 in 1991 (SJC, 2003, chapter 5), to an average daily number of 643 in 2010 (ABS, 2011a). The Indigenous women's imprisonment rate

has increased more than for other groups.[2] From 2000–10 imprisonment rates increased by:

- 58.6 per cent for Indigenous women
- 35.2 per cent for Indigenous men,
- 3.6 per cent for non-Indigenous men
- 22.4 per cent for non-Indigenous women (SCRGSP, 2011: 4.130 and table 4 A12.7).

By 2010, Indigenous women were 21.5 times more likely to be imprisoned than non-Indigenous women, while Indigenous men were 17.7 times more likely to be imprisoned than non-Indigenous men (SCRGSP, 2011: 4.133).

There are very marked differences in rates of imprisonment between Indigenous and non-Indigenous women in each jurisdiction (Figure 17.1 and Table 17.1), with WA demonstrating the greatest disparity. Most Indigenous women prisoners are held in NSW, Qld and WA. Indigenous women make up 6.3 per cent of the women prisoners in Victoria, but 82 per cent in NT; for NSW it is 28.8 per cent, Qld 27.1 per cent, and WA 51.5 per cent (at 2007–08; Bartels, 2010a, table 4).

The substantial variation in incarceration rates across Australia (Table 17.1) indicates the need for specific attention to jurisdictional differences and localised practises (Hogg, 2001: 370). NSW and WA rates have been consistently above the national rate, even with the decline in the NSW rate between 2009 and 2010. Data for NSW are considered in more detail below.

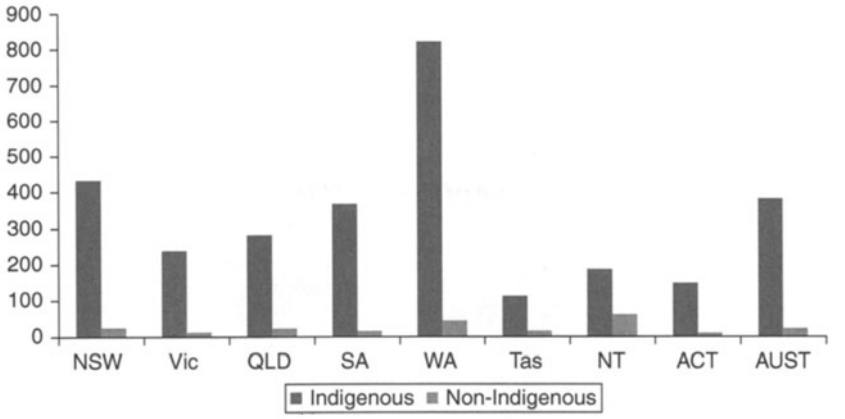

Figure 17.1 Full-time custody rates 2010: Indigenous and non-Indigenous women (rates per 100,000)

Source: Adapted from Bartels (2010a) and ABS (2011a).

Table 17.1 Indigenous women in full-time custody, 2006–2010 (rate per 100,000 adult Indigenous population)

Year	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Aust
2006	463.9	145.0	270.8	291.3	628.1	149.4	124.9	78.3	346.2
2007	473.2	150.1	265.9	343.9	836.9	137.9	159.1	71.4	380.1
2008	466.9	163.1	254.6	316.1	666.7	137.1	177.8	235.4	354.8
2009	492.1	186.9	266.2	343.5	731.4	121.2	189.4	198.2	379.2
2010	434.1	239.4	281.9	366.0	821.7	112.8	191.1	148.8	381.6
Non-Indigenous rate:									
2010	27.0	14.5	24.7	19.2	45.4	61.1	62.4	10.5	24.4

Source: Adapted from Bartels (2010a) and ABS (2011a); 2007 and 2008 data were updated by ABS in this publication to take the 2006 census into account.

Characteristics of Indigenous women in custody

Women prisoners in general have been described as 'victims as well as offenders', who 'pose little risk to public safety' (ADCQ, 2006: 5). Indigenous women are more likely than other women prisoners to have been victims of violent crime (Lawrie, 2003), to have poor physical and mental health and to be considered 'at risk' (SJC, 2003, WA Department of Corrective Services (WADCS), 2009). They 'almost universally have been subjected to social and economic hardship' (ADCQ, 2006: 32). Most are mothers (SJC, 2003).

The offence profile for Aboriginal women in prison differs from that for non-Aboriginal women. For instance, a WA study found that Aboriginal women were serving sentences for *less* serious offences than non-Aboriginal women and non-Aboriginal women were over-represented in the *more* serious offence categories (WADCS, 2009: 31–2). Indigenous women are also substantially over-represented for offences related to 'acts intended to cause injury' in WA and elsewhere (Bartels, 2010a, table 13), often linked to alcohol (SJC, 2003) or in response to family violence (ADCQ, 2006: 108, 134). In WA approximately 60 per cent of assaults for which Aboriginal women were in custody involved partners, family, friends or acquaintances as victims and most were committed while intoxicated (WADCS, 2009: 36, 38). Given evidence suggesting that increasing Indigenous imprisonment levels in part reflect greater law enforcement activity (Fitzgerald, 2009), it is possible that some of these remaining matters relate to charges of assault police.[3]

Indigenous women typically serve much *shorter* sentences than non-Indigenous women. Nationally, median sentences for Indigenous women were around half that for non-Indigenous women, and as little as one-third in NSW, SA and NT (Bartels, 2010a, figure 4). Bartels (2010a) suggests this may indicate that they are being incarcerated for 'more trivial' offences.

Most Indigenous women prisoners have been imprisoned previously (65 per cent as compared with 35 per cent for non-Indigenous women) (SCRGSP, 2011: 10.A 6.1). One WA study found that a staggering 91 per cent of all Aboriginal women in prison had served a prior sentence and 48 per cent had served more than five previous terms of imprisonment (WADCS, 2009: 30). Over two-thirds of Aboriginal women prisoners had breached an order, most commonly bail, and typically by re-offending rather than non-compliance (WADCS, 2009: 39–40). These findings indicate the urgent need to examine whether the orders made are appropriate to the women's circumstances and to find strategies to improve compliance with orders and to reduce recidivism.

Bond and Jeffries (2010) have analysed sentencing patterns to determine whether the increasing over-representation of Indigenous people within prison is attributable to discrimination in sentencing, with mixed results. They found that in the WA higher courts, after controlling for other factors, Indigenous *women* were *less* likely than other women to be sentenced to imprisonment (2010). However, in Qld, they found no differences in the higher courts in the likelihood of a prison sentence for Indigenous and non-Indigenous *people*, but in the lower courts Indigenous people were *more* likely to be sentenced to imprisonment; no data were reported specifically for women (Bond and Jeffries, 2012). They suggest that because time-poor magistrates in the lower courts are 'required to make sentencing decisions quickly with minimal information about defendants ... there may be greater judicial reliance on stereotypical attributions about offenders' (Bond and Jeffries, 2012). In both higher and lower courts, being on remand and having a prior record increased the likelihood of imprisonment. Thus a shift to harsher bail decisions and tougher penalties produce ongoing escalating effects.

These findings together with the different offence profiles of Aboriginal and non-Aboriginal women suggests that, in addition to sentencing, we need more analysis of policing practices and bail decision-making that bring Indigenous women before the courts and into custody.

Indigenous women remanded in custody

Harsher bail decisions and an associated growth in the number of unsentenced people in custody have been documented in several jurisdictions in the last decade (Hucklesby and Sarre, 2009, NSW Parliament Legislative Council, 2001: xv). In Australia, the number of Indigenous people remanded in custody increased by 27 per cent between 2006 and 2010 (Weatherburn and Snowball, 2012: 50) and by 2011, 24 per cent of Indigenous inmates were unsentenced; data were not reported by sex (ABS, 2011b). While there has been little specific attention to Indigenous women, Fitzgerald (2009) notes that in NSW the growth in the number of Indigenous women remanded in custody has been greater than that for those who are sentenced.

Indigenous women in custody in NSW

NSW research provides compelling evidence of the impact of changing criminal justice practices on Indigenous people. Figure 17.2 shows the very substantial increase in the Indigenous women's imprisonment rate since RCADIC (from 161.6 in 1991 to 428.3 in 2010), which exceeded that of non-Indigenous women (13.1 in 1991 to 19.8 in 2010). In 1998, the Indigenous women's imprisonment rate surpassed that for non-Indigenous men and by 2010 was more than one and a half times higher.[4]

Given the trend shown in Figure 17.2, it is extraordinary to note that in fact *fewer* Indigenous people appeared in NSW courts in 2007 than in 2001. However, the percentage found guilty increased, as did the percentage sentenced to prison. This was especially so for 'offences against justice procedures' which had a 33 per cent increase in convictions, and an increase in custodial sentences from 17.7 per cent to 27.6 per cent. Sentence length increased for some offences but decreased for 'offences against justice procedures' (Fitzgerald, 2009: 5) suggesting that more offences of lesser seriousness were resulting in incarceration. Fitzgerald concluded that 'the substantial increase in the number of Indigenous people in prison is largely due to changes in the criminal justice system's response to offending rather than changes in offending itself' (Fitzgerald, 2009: 6).

Fitzgerald (2009) also examined the growth in the remand population and found that it was due to *an increase in the proportion of people remanded in custody* (from 12.3 per cent in 2001 to 15.4 per cent in 2007). It was not due to more serious offences but rather to *harsher bail decisions*. Weatherburn

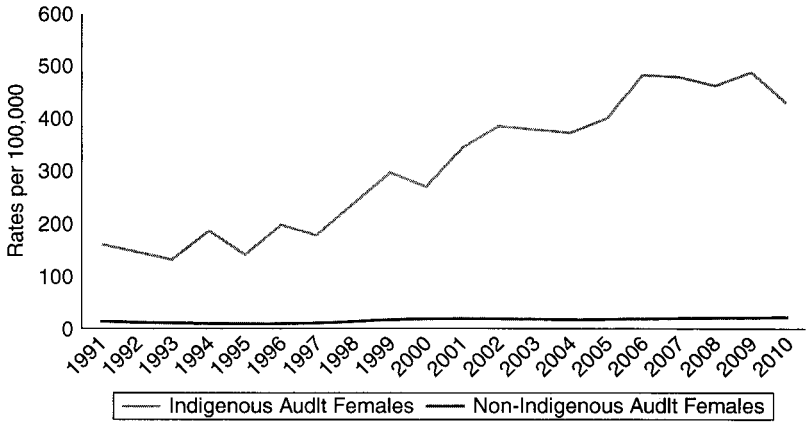

Figure 17.2 NSW women's crude full-time custody rates, 1991–2010 (per 100,000 adults)

Source: Corrective Services NSW, data provided to the author.

and Snowball (2012) found some evidence that Indigenous status *per se* was associated with the refusal of bail, suggesting the possibility of a racial bias, although the effect was small.

NSW has tightened bail laws substantially over the last two decades, to a greater extent than in any other Australian jurisdiction (Steel, 2009). This is clearly at odds with the recommendations of the RCADIC and other strategies intended to reduce Indigenous incarceration. Data also suggests that bail decision-makers are imposing harsher bail conditions and that police have begun targeting people on bail for compliance checking resulting in more breaches (Stubbs, 2010).

Deaths in custody

The last comprehensive analysis of the deaths in custody of women was undertaken for the period 1980–2000 (Collins and Mouzos, 2002). The deaths of Indigenous women were distinctive in several respects. Indigenous deaths accounted for 32 per cent of female deaths but only 18 per cent of male deaths in custody (Collins and Mouzos, 2002: 2). Half of Indigenous women were found to have died of natural causes as compared with 20 per cent of non-Indigenous women and 38 per cent of Indigenous men (Collins and Mouzos, 2002: 3) for whom the most common cause of death was self-inflicted injury. Indigenous women were much more likely to be in custody for 'good order offences' as their most serious offence (54 per cent) than non- Indigenous women (28 per cent) or Indigenous men (19 per cent) (Collins and Mouzos, 2002). Most Indigenous women died in police custody (79 per cent) but the majority of deaths of non- Indigenous women and Indigenous men occurred in prisons. RCADIC had also found 'a high incidence of good order offences' in the criminal histories of the women whose deaths it investigated (Collins and Mouzos, 2002: 5).

Indigenous deaths in custody have decreased over time and, despite increases recorded in the last five years, remain lower than they were in the mid-1990s (Lyneham, Larsen and Beacroft, 2010: 11–12). However, Inga Tinge (2011a) has documented increases of about 50 per cent in deaths in prisons in NSW and Queensland over the past decade. Tinge also notes ongoing concerns about failures by correctional authorities to implement recommendations from the RCADIC and from subsequent coronial inquiries (Tinge, 2011a). As Chris Cunneen has noted, '[t]he current tragedy is that so many of the circumstances leading to deaths in custody, and identified by the RCADIC, are still routine occurrences' (2008: 144).

Part 2 – redressing over-representation?

The data reviewed above indicate that there are notable differences in trends in the criminalisation and incarceration of Indigenous women between jurisdictions, and point to the role of harsher laws, policies and practices

as exacerbating the levels of over-representation of Indigenous women in custody. Fitzgerald (2009) identified harsher bail decisions, higher conviction rates and longer sentences as driving trends in NSW. In this part, I examine two initiatives in NSW intended to reduce incarceration rates. The first, Magistrates Early Referral into Treatment (MERIT), is a mainstream programme operating at Local Courts to divert offenders into treatment programmes. The second, the 'Fernando principles', is an Indigenous specific set of principles intended to assist judges in sentencing relevant cases.

Bail based diversion: the MERIT programme

MERIT is a diversionary programme that operates across NSW and offers eligible adults access to drug treatment prior to entering a plea and while on bail. A report on the defendant's participation may be taken into account by magistrates at sentencing. It has been found to result in 'improvements in dependence and psychological distress as well as general and mental health' (Matire and Larney, 2009: 1). MERIT is said to be a 'highly appropriate intervention program for Aboriginal defendants' (Audit Office of NSW, 2009: 2).

A review of MERIT examined whether Aboriginal people had access to the programme and whether their needs were met but did not specifically consider Aboriginal women. It found that referrals of Aboriginal people to MERIT had increased over time but remained low; in 2007–08, only 427 of an estimated 19,000 Aboriginal defendants were referred and 273 participated (Audit Office of NSW, 2009: 28). The rate of Aboriginal people being *accepted* into the programme had decreased, while the rate for non-Aboriginal people remained the same. This decrease coincided with a change to the *Bail Act* which made it harder for repeat offenders or those who had breached bail to be released to bail. Also some Aboriginal people charged with assault were not accepted into the programme because the criteria exclude those who have committed serious violent offences (Cain, 2006).

The Audit Office of NSW found that that eligibility criteria and location of the courts 'disproportionately affected Aboriginal defendants' (2009: 36). Barriers to the programme for Aboriginal defendants included: few alcohol specific programmes (Audit Office of NSW, 2009: 34); solicitors were a key point of referral but many defendants were unrepresented (Audit Office of NSW, 2009: 30); and 'the generally poor level of engagement and communication with Aboriginal defendants' (Audit Office of NSW, 2009: 6). For instance, '[a] standard, case plan approach is used ... [that] did not recognise any special needs Aboriginal participants may have or recognise alternative treatment models that may be more suitable for Aboriginal clients' (Audit Office of NSW, 2009: 41). These issues may underlie the finding that one in three Aboriginal people referred to the programme did not accept (Audit Office of NSW, 2009: 37). Completion rates for Aboriginal people (50 per cent) were less than for non-Aboriginal people (60 per cent) and, for both groups, non-completion commonly occurred following a breach by staff for

non-compliance (Cain, 2006: 4). Outcome data was not reported by sex.[5] One hopeful finding was that, after an 'Aboriginal Practice Checklist' was trialled, completion rates for Aboriginal clients increased to approximately 64 per cent (Audit Office of NSW, 2009: 44).

A further evaluation which focused on women, found that at entry to, and exit from, MERIT 'women had significantly poorer general and mental health scores than men' (Matire and Larney, 2009: 7). The proportion of Aboriginal participants was higher for women (22 per cent) than men (13 per cent) but the findings did not distinguish further between Aboriginal women and other women (Matire and Larney, 2009: 4). Women were found to be less willing than men to participate due to family responsibilities and concerns about 'the mandatory child protection obligations' of staff, and less likely to complete the programme often due to a failure to attend. Women had more complex commitments and higher rates of 'co-morbid chronic mental health disorders and trauma' than men, which was 'a significant barrier to female participation' (Matire and Larney, 2009: 3).

The results demonstrate that the potential benefits of MERIT are not available to many Aboriginal women due to the failure to recognise their more complex needs, the additional barriers they face in accessing and completing the programme, (see also Cunneen and Allison, 2009) and the use of a standardised, mainstream programme. The development of the Aboriginal Practice Checklist seems promising, but may prove inadequate if it does not explicitly consider their needs. For instance, high levels of victimisation experienced by Aboriginal women may affect women's capacity to participate and require attention to their safety. The competing demands of child care and other familial responsibilities may make regular attendance difficult and mean that location and transport are very significant considerations. Together with the fear of mandatory child protection reporting, these are formidable obstacles to Aboriginal women's participation. Further, a checklist is not an adequate substitute for the involvement of Aboriginal women in developing and delivering appropriate programmes and services.

Sentencing – the Fernando principles

Several reports in NSW have recommended the trial of the abolition of short-term sentences, especially for Indigenous women, in recognition of the damaging effects of imprisonment, evidence that Indigenous women commonly serve shorter sentences, lack of access to programmes for short-term inmates and the likelihood that short sentences serve little rehabilitative purpose, and the need to overcome Indigenous over-representation (NSW Parliament Legislative Council, 2001, NSW Sentencing Council, 2004). However, these recommendations have not been acted on. The sole Indigenous specific sentencing initiative has been the development of common law principles guiding the sentencing of Indigenous offenders.[6]

In *R v Fernando* (NSW Supreme Court, 1992), Justice Wood set out sentencing principles that may be relevant to Aboriginal offenders in certain circumstances, with particular reference to alcohol abuse and violence, but did not establish Aboriginality *per se* as mitigating.

In a review undertaken for the NSW Sentencing Council, Manuell (2009) found that the Fernando principles were not always applied and were seen as applicable in only a very narrow range of circumstances. The potential ambit of the principles has been read down in subsequent appellate decisions. Commentary points to decisions which seem to turn narrowly on questions of whether a person is 'Aboriginal enough' and whether the principles might apply to Aboriginal people in urban settings (Edney, 2006, Flynn, 2005). Research undertaken for this chapter found six cases in which the Fernando principles had been considered or applied to women defendants, but no elaboration of how the principles might relate to women.[7]

By contrast Canada has a statutory provision, *Criminal Code* s. 718.2, which provides that 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with *particular attention to the circumstances of aboriginal offenders*' [emphasis added]. This was considered by the Supreme Court of Canada in *R v Gladue*.[8] The Supreme Court of Canada described the over-representation of Indigenous people in Canada as a crisis, and recognised systemic discrimination in the criminal justice system. The court found that:

> [t]he remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing Aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. (*R v Gladue*, [1999] 1SCR 688: para. 25)

The provision 'amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders'(*R v Gladue*, [1999] 1 SCR 688: para. 38). Canadian governments have subsequently developed a system of community based justice programmes including the Aboriginal Justice Strategy.

Consistent with the approach adopted in RCADIC, Aboriginal over-representation in Canadian criminal justice is understood to have complex roots arising from the legacy of colonisation, factors that are relevant in sentencing (Rudin and Roach (2002: 19ff). However, these developments have been controversial. For instance, Stenning and Roberts (2001: 168) criticise the approach on several grounds including because: they find no evidence of discrimination in sentencing; and, as 'violat[ing] a cardinal principle of sentencing (equity) relevant to all...'. In reply Rudin and Roach (2002) argue, *inter alia*, that: the intent of the provision is to reduce

over-representation in prison and is not limited to redressing any discrimination in sentencing; that Aboriginal defendants are distinguishable from other disadvantaged defendants by reference to the impact of colonisation; and that Stenning and Roberts mistakenly adhere to formal equality when Canadian law favours substantive equality.

A substantive equality approach has not been endorsed in NSW where the clear preference lies with formal equality (Edney, 2006: 23). By contrast with the approach of the Canadian Supreme Court in recognising systemic discrimination in the criminal justice system, the NSW Law Reform Commission (NSWLRC) noted only that 'the *potential* for discrimination against Aboriginal offenders still exists, but [NSWLRC] rejects the notion that this would be overcome by a legislative statement of sentencing principles' [emphasis added] (2000: para. 2.47). The NSW Sentencing Council (2004: fn49) dismissed the Canadian approach preferring the present Australian position 'that the same sentencing principle apply irrespective of the offender's identity or membership of an ethnic or racial group'. The rejection of an approach founded on substantive equality by two eminent NSW bodies is regrettable since there are clear policy reasons for endorsing such an approach.[9] However, as in Canada, it may require legislative action to bring it about, an unlikely outcome in an era of punitive populism.

The explicit adoption of a substantive equality approach has the potential to bring a more contextual understanding to the experiences of Indigenous women as both Indigenous *and* as women. In 1994 the Australian Law Reform Commission (ALRC) promoted reforms based on substantive equality but these have not been adopted (ALRC, 1994: chapters 3 and 4).

However, while there are compelling reasons to prefer a substantive equality approach to justice, Canadian experience indicates that this is unlikely to be a sufficient means of redressing Indigenous women's over-representation within the criminal justice system. Ten years after *Gladue,* the capacity of Canadian courts to reduce the over-representation of Aboriginal people in prison has been described as 'dismal' (Martel, Brassard and Jaccoud, 2011: 251). The percentage of Aboriginal women in Canadian prisons has grown more than that for men and, by 2008–09, Aboriginal women represented 28 per cent of all remanded women and 37 per cent of sentenced women (Calverley, 2010: 11–12).

Toni Williams has questioned the apparent assumption behind *Gladue,* that requiring judges to consider the social context of an Aboriginal defendant will reduce the likelihood of a prison sentence (Williams, 2007: 278). She argues that consideration of 'an individual's experience of hardship or needs' does not necessarily produce lesser sentences since those factors can be interpreted in different ways, including as indicators of risk or dangerousness (Williams, 2007: 274). She sees a danger that a contextual analysis may portray Aboriginal women 'as over-determined by ancestry, identity and circumstances, thereby feeding stereotypes about criminality

that render the stereotyped group more vulnerable to criminalisation' (Williams, 2007: 286).

One possible implication of William's research is that justice practices that have Indigenous legal actors, including Circling Sentencing and specialist Indigenous courts, may be better placed to undertake such contextual analysis and sentencing. Indigenous justice practices are now well established in some settings in Australia, and have even been endorsed by the Productivity Commission (for example, Aboriginal sentencing within the SA magistrates courts, the Port Lincoln Aboriginal conferencing initiative, the Murri court in Qld and the Koori court in Victoria (SCRGSP, 2009: 28)). However, these, too, need to give explicit recognition to Indigenous women's needs and interests.

Part 3 – challenging the 'invisibility' of Indigenous women

As noted above, studies that have examined whether the over-representation of Indigenous people in custody is attributable to racial bias have typically looked for evidence of direct discrimination, with mixed results. However, indirect and systemic forms of discrimination may have profound effects which are difficult to quantify. For instance, successive Social Justice Commissioners, Dr William Jonas and Tom Calma, have noted the 'apparent invisibility of Indigenous women to policymakers and programme designers in a criminal justice context, with very little attention devoted to their specific needs and circumstances' (SJC, 2005: 15). There is a dearth of specific programmes for Indigenous women and little data on women's participation in Indigenous programmes, or in generic programmes (Bartels, 2010b, Baldry and McCausland, 2009).

Intersectional and systemic discrimination

Indigenous women are vulnerable to intersectional discrimination within the criminal justice system and elsewhere; that is, a compounding of discrimination in specific ways brought about by race and gender (and other social categories). They are not well served by programmes designed for Indigenous men or for women generally (SJC, 2005: 158–9). Activists in Australia and internationally have instituted complaints on the grounds of discrimination as one avenue to bring recognition of the needs and interests of Indigenous women within the prison system and to seek redress.

In 2003, the Canadian Human Rights Commission (CHRC) found breaches of the human rights of women prisoners 'by discrimination on the grounds of sex, race and disability' (Kilroy and Pate, 2010: 331). The CHRC investigation followed a complaint lodged by the Canadian Association of Elizabeth Fry Societies (CAEFS) and the Native Women's Association of Canada in coalition with other activists on grounds including the inadequacy of community based release options, the inappropriate classification

system used, and inadequate and inappropriate placements of women with cognitive and mental disabilities (Kilroy and Pate, 2010). The CHRC made 19 recommendations aimed at bringing Correctional Services Canada into compliance with the *Canadian Human Rights Act* (CHRC, 2003, preface).

Australian activist group Sisters Inside Inc followed the Canadian lead and lodged a formal complaint with the Anti Discrimination Commission Queensland (Kilroy and Pate, 2010: 332). The ADCQ found 'a strong possibility of systemic discrimination occurring in the classification of female prisoners, particularly, those who are Indigenous' (ADCQ, 2006: 45) and that the 'absence of a community custody facility in North Queensland... is a *prima facie* instance of direct discrimination' (ADCQ, 2006: 110). The report also questioned the validity of a risk assessment tool and found that Indigenous women were among those likely to be assessed as high risk using such measures (ADCQ, 2006: 51). Indigenous women were commonly in prison for shorter sentences but they were over-represented in secure custody, were less likely to receive release-to-work, home detention or parole, and they had higher recidivism rates (ADCQ, 2006: 32, 108). Following a similar complaint lodged in the Northern Territory, the Ombudsman also raised concerns about systemic discrimination. Notwithstanding the requirement in the *Standard Guidelines for Corrections in Australia* (2004: para. 1.14) that 'the management and placement of female prisoners should reflect their generally lower security needs but their higher needs for health and welfare services and for contact with their children', the NT Ombudsman found 'a failure to consider women as a distinct group with specific needs' which had 'resulted in a profound lack of services' and 'discriminatory practices' (Ombudsman for the NT, 2008: 4).

Both reports emphasise *substantive* equality, rather than formal equality:

> Preventing discrimination requires addressing differences rather than treating all people the same... Equality of outcomes for Indigenous women will not occur if they are simply expected to fit into and try to benefit from existing correctional services and programs that mostly have been developed for non-Indigenous male prisoners. (ADCQ, 2006, para. 10.1.3)

Anti-discrimination actions have been lodged in other Australian jurisdictions but there have been few outcomes for criminalised women (Kilroy and Pate, 2010: 334).

Concerns about discrimination against women prisoners, and especially Indigenous women, have also been taken up in international fora. Australia's NGO Submission to the UN Committee on the Elimination of Racial Discrimination (2010) noted the substantial growth in the Indigenous women's prison population and expressed concerns *inter alia* about the inadequacy of health and other services for women in prison. The Australian

Human Rights Commission submission to Universal Periodic Review at the United Nations Human Rights Council also noted the growth in the number of Indigenous people in custody, and the distinct human rights issues affecting women in prison who are subject to strip searching (AHRC, 2010: note 57).

In 2010 the UN Special Rapporteur on the rights of Indigenous peoples recommended *inter alia* that the government fully implement the recommendations of RCADIC (Anaya, 2010: rec. 122: 22) and importantly also made a separate recommendation that '[t]he Government should take immediate and concrete steps to address the fact that there are a disproportionate number of Aboriginal and Torres Strait Islanders, especially juveniles and *women* in custody' (Anaya, 2010: rec 102, emphasis added). The separate recognition of Indigenous women is important because, while RCADIC continues to provide a significant, unrealised, foundation for reform, it does not provide an adequate basis for addressing the criminalisation of Indigenous women. Other recent reports have also recommended returning to RCADIC to guide future developments.[10] It is vital that Indigenous women have a voice in determining how best the blueprint provided by RCADIC can be reconfigured so as to adequately represent their interests.

Conclusion

This paper has documented the impact of harsher criminal justice practices on Indigenous women exacerbating their level of over-representation within the criminal justice system, together with enduring, repeated failures to pay sufficient regard to their interests. An intersectional analysis that recognises the specific circumstances that contribute to Aboriginal women's criminalisation and incarceration, coupled with an approach to the provision of services and support which recognises systemic discrimination and focuses on substantive equality, is crucial. But it is also not enough. As William's (2007) work suggests, an intersectional analysis provides a vital first step in bringing recognition to Indigenous women but does not determine how that recognition is given expression within criminal justice practices. Indigenous women need to be fully involved in shaping the meanings that emerge, including in the Indigenous justice practices.

Notes

1. In this paper the words Aboriginal and Indigenous are used interchangeably.
2. The SJC (2005) report noted that '[b]etween 1993 and 2003 the general female prison population increased by 110 per cent, as compared with a 45 per cent increase in the general male prison population. However, over the same time period the Indigenous female prison population increased from 111 women in 1993 to 381 women in 2003. This represents an increase of 343 per cent over the decade' (SJC, 2005: 15).

3. Thanks to Chris Cunneen for this observation.
4. Data supplied by Corrective Services NSW, based on the NSW inmate census at 30 June each year.
5. Bartels (2010b) notes that only 11 Indigenous women were referred to QMERIT, eight of whom were eligible; three had graduated.
6. I acknowledge the introduction of circle sentencing and Indigenous courts both of which use different processes but apply the same sentencing laws and principles as other courts.
7. *R v Kristy Lee Croaker,* NSWCCA 14/12/2004 Unreported Judgments NSW; *R v Rachelle Lee Kelly,* NSWCCA 11/08/2005 Unreported Judgments NSW; *R v Carol Anne Trindall* NSWCCA 14/12/2005 Unreported Judgments NSW; *R v Lacy Lee Jukes,* NSWSC 13/10/2006 Unreported Judgments NSW; *R v Wendy Olive Lawrence,* NSWCCA 11/03/2005; *R v Mary Ann Melrose,* NSWSC 31/08/2001 Unreported Judgments NSW.
8. [1999] 1 SCR 688; see also *R.* v. *Wells,* [2000] 1 SCR 207, 182 DLR. (4th) 257; *R. v. Ipeelee,* [2012] SCC 13.
9. Research such as that by Bond and Jeffries (2010), which found that higher courts in that jurisdiction may sentence Indigenous women *less* harshly, suggests that some courts may take a more contextual approach to sentencing Indigenous women. However, their mixed findings for Qld, including harsher sentencing in the local courts, may suggest the need for more explicit consideration of sentencing principles aligned with substantive equality. Moreover, their findings do not negate the argument offered by Rudin and Roach (2002) for sentencing provisions explicitly focused on reducing Indigenous over-representation.
10. Standing Committee of Attorneys-General Working Group on Indigenous Justice (2010) includes as objective 1.3: 'Ensure that the findings of RCADIC continue to guide governments, service providers and communities to address current issues in law and justice for Aboriginal and Torres Strait Islander peoples'.

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18

Criminal Justice, Indigenous Youth and Social Democracy

Colin Hearfield and John Scott

Introduction

The political question of how the will of a community is to be democratically formed and adhered to, the question of social democracy, is normatively tied to the mode of criminal justice employed within that democratic public sphere. Liberal, republican, procedural and communitarian forms of democratic will-formation respectively reflect retributive, restorative, procedural and cooperative modes of criminal justice. After first elaborating these links through the critical response of republican and procedural theories of democracy to the liberal practice of democratic will-formation and its retributive mode of justice, our discussion considers the recent practice of restorative and procedural justice with respect to Indigenous youth; and this in the context of a severely diminished role for Indigenous justice agencies in the public sphere. In light of certain shortcomings in both the restorative and procedural modes of justice, and so too with republican and procedural understandings of the democratic public sphere, we turn to a discussion of procedural communitarianism, anchored as it is in Dewey's (1989) notion of social cooperation. From here we attempt a brief formulation of what a socially cooperative mode of justice might consist of; a mode of justice where historically racial and economically coercive injustices are sufficiently recognised.

Social recognition and democratic will-formation

Social recognition has long been a major aspect of traditional moral theory. Certainly Aristotle held that a good life was dependent on being viewed with social esteem, and Kant maintained respect for others as a necessary first principle in his practical reason. Yet it was not until two further German Idealists, namely Fichte and Hegel, that such recognition was conceived in terms of a necessary and mutual reciprocity. Indeed Fichte was the first to argue that our individual autonomy essentially depends on our recognition

of others as equally free, autonomous beings. The need for reciprocity in this process of recognition has become the legal ground, moreover, on which a rights-based claim to individual civil freedom is upheld (Honneth, 2007: 132). Any violation of this mutual reciprocity, where one person's right to civil freedom is in some way impinged upon or disrespected by another, thus becomes a ground for lawful punishment. In supporting this principle of reciprocal recognition and its retributive implications, Hegel argues that any failure of reciprocity stems directly from the rational will of the offender, such that s/he effectively consents to forfeit the right to freedom in equal degree or value to that which s/he has criminally removed from another (Hegel, 1967: 70–1). As one commentator puts it, a criminal 'may [thus] be punished without any violation of their right' (Wood, 1993: 221). It is just such a position that classical liberal theory adheres to in its advocacy of retributive justice.

In his Philosophy of Right (1967), Hegel refers to the form of social recognition just now discussed as pertaining to the sphere of civil society. Hegel also elaborates two further spheres of recognition, which emerge in the course of a subject's self-conscious relation to others. One concerns the love between family members where their affective needs and desires are reciprocally recognised for the sake of emotional well-being. The other concerns a mutual esteem on the part of those who have made valuable political or social contributions to the state and its institutions. These three spheres of recognition, namely those of the family, civil society and the state, together constitute the very foundation of Hegel's social ethics of freedom. A rupture in any of these modes of reciprocal recognition will result in moral injury. In the sphere of the family there may be a loss of self-confidence, in civil society a loss of self-respect, and in the sphere of the state a loss of self-esteem. Without any legally endorsed right to love or self-esteem, the will to restore such losses remains the responsibility of those individuals involved. Restoring the moral injury brought about by a breach in the legally endorsed right to self-respect or civil freedom, however, has wider ethical and indeed political implications. For here, the extent to which moral restoration may occur ultimately depends on the political style of democratic will-formation through which social justice is exercised.

The liberal model of democratic will-formation concerns isolated, autonomous individuals periodically coming together to elect political representatives who are entrusted with protecting their right to civil freedom; more specifically, the right to non-interference from other individuals and from the state itself, especially if the latter seeks to go beyond a purely protective role. Social integration within the democratic public sphere is here limited to compliance with the laws of the state and occasional but regular moments of electoral choice. In view of this minimal approach to social integration, where the state ensures such integration largely through its law-enforcement agencies, any breach of an individual's civil freedom needs to be met with

the full force of judicial retribution. The shift to the welfare model of criminal justice did not derive, however, from any shift in the mode of democratic will-formation. Here there is simply a critical concession that criminal activity is not necessarily, as Hegel portrays it, the result of a rational will. An increasing capacity, largely exercised through positivist science, to diagnose emotional disturbance and psychological disability during the course of the nineteenth and twentieth centuries is undoubtedly a significant factor driving this shift. Moreover, the essential rehabilitative goal of the welfare model is precisely to resuscitate and strengthen an individual's capacity for engaging in self-reflective, rational processes, whereby s/he comes to recognise others as having a right to autonomy and non-interference. As such, rehabilitationist ideals held close to a liberal normative regime.

Critical of liberal democratic theory, where 'personal autonomy... is understood as being independent of processes of social integration', recent republican and procedural theories of democratic will-formation argue that an individual is 'capable of attaining personal autonomy only in association with all others' (Honneth, 2007: 221).[1] Social recognition now concerns not simply an isolated self-conscious relation to others but rather a communicative interaction with others in the public sphere. Honneth further indicates:

> the participation of all citizens in political decision-making is not merely the means by which each individual can secure his or her own personal freedom; rather, what this participation articulates is the fact that it is only in interaction free from domination that each individual's freedom is to be attained and protected. (Honneth, 2007: 221)

In other words, human freedom is not a pre-social, natural condition protected by law, as liberal theory would have it, but a condition only made possible through an independent – empowered – capacity for communicative interaction in the public sphere. What nonetheless differentiates republican and procedural approaches to democratic will-formation is the former's claim that civic virtues are necessary to establish the solidarity required for political self-governance, while the latter argues that reaching rational and politically legitimate agreement is dependent on morally justified democratic procedures. As the direct legislative implementation of publically negotiated decisions, however, the republican state risks transforming the virtue of solidarity into the tyranny of majority rule. As the procedurally mediated outcome of various and multiple public domains of political debate, the procedural state is better placed to defend the interests of minority groups. The procedural state, however, not unlike its republican counter-part, suffers from a public sphere reduced to the politics of communicative interaction. Without also considering the divisions of social labour and race as specifically social domains of interaction, both republican and procedural forms of democratic will-formation remain tied to a communicatively abstract (purely

political) understanding of community (Honneth, 2007: 235). Before further engaging with this line of thought, however, we need to understand the manner in which both republican and procedural forms of social democracy impact on the question of criminal justice.

Republican and procedural modes of criminal justice

The republican notion of 'dominion', where citizens have a right to freedom from any arbitrary domination, 'requires the state... to subscribe to a principle of parsimony in the formulation of the punitive and other interventions associated with the criminal justice system' (Braithwaite and Pettit, 1990: 85). While reprobation remains necessary, reintegration, or the restoration of dominion and dignity, is also seen to be vital, not only for the offender but also for the victim and the community at large. With respect to the offender, republicans speak of a process of 're-integrative shaming' (Braithwaite, 1999: 55, 100–1); a process which, over the last decade, has revealed a number of different restorative justice practices such as victim-offender mediation and dialogue, family group conferencing, circle sentencing or peacemaking circles, as well as community and victim specific reparation where the offender gains skills and inclusive recognition for this expression of social responsibility (Cunneen and White, 2007: 340).

Like restorative justice, procedural justice seeks to strengthen 'the influence of social values on people's law-related behaviour' (Tyler, 2006: 316) or, more particularly, on their self-regulating, ethical commitment to social and legal regulations. Unlike restorative justice, however, where this influence occurs through the active involvement of family and community members, with procedural justice, the influential lever is an adherence, on the part of those institutions dispensing criminal justice, to procedural rules of social fairness. For just as the democratic will is legitimately shaped through institutional and legal procedures of social fairness, so too, it is argued, socially fair procedures apparent in criminal justice institutions will lead to a social recognition of the legitimacy and moral authority of those institutions. As Tyler (2006: 314) inversely indicates: '... when the police engage in racial profiling, which people view as an unfair procedure, they [the police] diminish their moral authority by showing that they do not share the public's moral values about how the police should act'. Furthermore, a number of recent studies, conducted by Paternoster, Brame and Bachman (1997) and Tyler and Huo (2002), have shown that:

> By using fair processes, the police encourage the activation of the social values that sustain law-abiding behaviour over time. [Moreover,] fair procedures encourage immediate deference, lessen the likelihood of spirals of conflict, and increase the legitimacy of the police and courts. (Tyler, 2006: 318)

Unlike the re-integrative shaming of offenders peculiar to restorative justice, where relations with family and community members are accentuated, the model of procedural justice emphasises reciprocal relations of obligation and responsibility with the police and other institutions of criminal justice. Indeed these relations constitute the site of what Tyler (2006: 318) refers to as 'civic education'. For, as he goes on to argue, when facing the law and its procedures, people also learn of its nature and authority.

With an educative attempt to restore the values or virtues of social fairness and respect, the model of procedural justice has much in common with that of the restorative school. Yet their primary domain of application is different. For example, the procedural model has greater bearing on an offender's relations with police, courts and correctional institutions, while the restorative model has particular relevance to an offender's relations with the victim, the wider community, and their family. Much of the 'restorative justice' literature appears to neglect this significant distinction. And despite early indications that these non-retributive approaches to young offenders are resulting in slightly decreased rates of recidivism (Luke and Lind, 2005), the persistent failure to recognise racial and economic differences as the pre-political basis of communicative exchange remains a significant stumbling block to a much fuller realisation of social justice for those belonging to disadvantaged communities. In what follows we attempt to elucidate this failure through the sharply decreasing presence of Indigenous justice groups, brought about by shifting and often intermittent government policies and the current practices of restorative and procedural justice.

Indigenous justice agreements and the NSW young offenders act

In view of an alarming over-representation of Indigenous youth in corrective service institutions, Australian attempts to address the social impacts of youth crime over the last decades have regularly focused on Indigenous youth crime. The report of the Royal Commission into Aboriginal Deaths in Custody (RCADIC) in 1991 recommended the establishment of an Aboriginal Justice Advisory Council (AJAC) in each state and territory to advise government on Indigenous justice issues and monitor government implementation of the Commission's other numerous recommendations (Allison and Cunneen, 2010: 648). Such councils were duly established but by 1997 reports on the implementation of the Royal Commission's recommendations were deemed unnecessary by the then federal government; and this despite ongoing high rates of Indigenous incarceration and deaths in custody. In light of this, the AJACs, together with the Aboriginal and Torres Strait Islander Commission (ATSIC), recommended the development

of Indigenous Justice Agreements (IJA) through which improved justice outcomes for Indigenous people could be provided.

> All states and territories (except for the Northern Territory) agreed to develop, in partnership with Indigenous people, strategic agreements relating to the delivery, funding and coordination of Indigenous programs and services. These agreements would address social, economic, and cultural issues; justice issues; customary law; law reform; and government funding levels for programs. They would include targets for reducing the rate of Indigenous over-representation in the criminal justice system, planning mechanisms, methods of service delivery, and monitoring and evaluation. (Allison and Cunneen, 2010: 649)

Such negotiated, bilateral agreements, where the principle of Indigenous self-determination was paramount, came into effect in Queensland and Victoria in 2000, in New South Wales in 2003, and in Western Australia in 2004. Such agreements have led to broad government policy initiatives aimed at improving the lives of Indigenous people. Furthermore, some criminal justice agencies, notably the police, have now formulated strategic response plans focused on minimising possible contact between offending youth and the criminal courts (Allison and Cunneen, 2010: 650).

Despite these apparently improved institutional and procedural conditions for addressing the issue of indigenous over-representation in the criminal justice system, all the Aboriginal Justice Advisory Councils, with the exception of the Victorian AJAC, have now been 'abolished or allowed to collapse by government' (Allison and Cunneen, 2010: 648). ATSIC was also dissolved by the federal government in 2005. In view of the significant impact of these advisory bodies in the formulation of IJAs and subsequent government policy initiatives, as well as strategically improved agency responses to youth offenders, their dismantling cannot but diminish 'the likelihood of achieving those Indigenous justice outcomes emphasised in the RCADIC and subsequently by government' (Allison and Cunneen, 2010: 657). In referring to the New South Wales AJAC, Allison and Cunneen (2010: 661) further argue that a failure to build regional and local community-based structures, where Indigenous participation and leadership were fostered in an ongoing manner, eventually led to its abolition in 2009. The ongoing presence and influence of the Victorian AJAC, on the other hand, is due precisely, they argue, to its having established 'well-coordinated state, regional and local community-based justice structures ... that guarantee ongoing Indigenous input into the [Indigenous Justice] Agreement' (2010: 661). Under the principles of the IJA in Western Australia, an Aboriginal Justice Congress has been established which similarly owes its ongoing presence to the development of regional and local advisory planning forums.

While it remains unclear to what extent particular state IJAs or government policies explicitly support restorative and procedural justice approaches to Indigenous youth crime, it is clear that some government legislation and some criminal justice agencies have implicitly adopted such approaches in their attempt to reduce rates of recidivism with respect to Indigenous and youth crime more generally. The New South Wales *Young Offenders Act* (1997), for example, came into effect following a pilot scheme of Community Youth Conferences; a scheme developed in large part around the successful Family Group Conferencing techniques already in use in New Zealand, where 'family responsibility, children's rights (including the right to due process), cultural acknowledgment and partnership between the state and the community' (Hassall, cited in Bargen, Brame and Bachman, 2005: 18) were key elements. In view of the NSW pilot scheme, the *Young Offenders* legislation determined that a community convener, independent of the police and the government, should be responsible for these conferences, that legal advice and information be made available to a young person in line with the 1989 UN Convention of the Rights of the Child (CROC) and, provided criteria through which police would decide whether an offender should be cautioned, diverted to a Youth Justice Conference or face a criminal court (Bargen *et al.*, 2005: 20–2). Similar legislation had been enacted several years prior in Queensland, South Australia and Western Australia; however the NSW *Act* differs, particularly with respect to the three points just now mentioned. (Bargen *et al.*, 2005: 24).

The NSW YOA applies to youth between 10 and 18 years of age and for those between 10 and 14 only if it can be shown they knew their actions to be unlawful. The three forms of intervention – that is, warnings, cautions, and conference diversions – are possible only if the criminal act did not involve the death of another, a serious drug offence, a sexual offence, the breach of an apprehended violence order, or a traffic violation for those old enough to hold driving licenses (Garner, Doran and Maloney, 2005: 47). Warnings are issued only for offences not involving violence, while cautions and conference diversions first require an admission of unlawful behaviour on the part of the young offender. The latter two forms of intervention also require the consent of the young person in question and can only be issued by specialist youth liaison officers trained by the police. For a person under 16 years of age the presence of a responsible adult, able to act in an advisory capacity, is also necessary. These major procedural requirements of the *Act* concerning interventional limits are further complimented by certain administrative procedures with regard to the selection of conference conveners from within local communities, as well as preparatory steps to the conduct of conferences. Only here at the point of the conference itself, however, does any process of restorative justice properly begin. Bolitho (2005: 127) identifies a number of elements which, in her observation of around 100 youth justice conferences, appear necessary for any restorative

process to have some degree of success. These include offender support person(s), active engagement of offenders and victims (or their representatives) in open dialogue, material or genuinely felt verbal reparation to the victim(s), as well as a mutually agreed outcome which restores dignity to the offender. In the various case studies presented, two elements in particular appear to severely impede a restorative outcome: namely, the absence of the victim from the conference and some form of ongoing power relation between victim and offender.

From still early studies concerning the relationship between youth justice conferencing and rates of recidivism, it would appear that a very small decrease in reoffending is evident (Luke and Lind, 2005). The immediate impact of the NSW YOA has certainly resulted in a marked increase in warnings and cautions, with around 5 per cent of cases being referred to a conference (Chan and Luke, 2005: 185). There was no significant difference, however, in the percentage of Indigenous and non-Indigenous youth being referred to a conference (2005: 179). These authors also found that, despite there being almost half as many Indigenous first offenders facing court proceedings than before the *Act*, the rate of Indigenous youth being referred to court proceedings under the NSW YOA was almost double that of other youth (2005: 186). Moreover, the rate of imprisonment for all Indigenous people in NSW increased 48 per cent between 2001 and 2008, due not so much to increasing numbers of convictions but to lengthier prison sentences (Fitzgerald, cited in Allison and Cunneen, 2010: 669, n.90). Hence despite an apparent turn towards restorative practices, at least with respect to youth crime, retributive justice clearly remains a high priority for government. In a pointed critique of law and order politics, Boersig (2005) argues:

> Consequently, the state, caught in a shallow debate, fails to address the fundamental socially based flaws that arise from marginalisation and exclusion from power, and the 'problem' of Indigenous youth offending remains perennial. Boersig (2005: 125)

If restorative justice in the indigenous context does not address the historical question of racial power relations, he continues, then it can hardly said to be restorative.

> In short, if restorative justice does provide a pathway to justice then it must be an initiative embraced and controlled by Indigenous people. The subtext of this analysis, then, is one that also embraces notions of Indigenous sovereignty and self-determination as the foundation and core for any initiative. (Boersig, 2005: 127)

Now while the IJAs, negotiated in four states by their respective AJACs, were indeed premised on Indigenous self-determination, the dismantling of these

advisory councils, except in Victoria, has clearly left a political vacuum with respect to any real practice of self-determination, not to mention a capacity to represent the views of Indigenous people. And while the NSW YOA stipulates that any youth justice conference convener needs to be drawn from the local community, it remains unclear to what extent such conveners, in the context of conferences involving Indigenous victims and offenders, are themselves Indigenous.

Further criticisms have also been directed at the theory and practice of restorative justice. Cunneen and White (2007: 349) argue, for example, that when the practice of restorative justice is tied solely to 'trivial offenses... at the soft end of the juvenile justice spectrum... [it acts] as a [legitimising] filter that reinforces the logic and necessity of the hard end of the system, [namely] the real justice of retribution and punishment'. Moreover, if restorative justice remains tied merely to restoring the harm done to particular individuals and their families, no attention is given to the need for 'transforming communities and building progressive social alliances that might change the conditions under which offending takes place' (Cunneen and White, 2007: 350). This emphasis on social and community justice, developed as a critique of the limitations of current restorative practices, is also evident in Lofton's (2004) more economically directed appeal against systemic injustices. First, she argues, restorative justice theory takes no account of wide-scale socioeconomic deprivation or poverty and the extent to which young individuals are driven to theft through seemingly unchangeable or deeply embedded social disparities. As ongoing victims of social deprivation, young offenders are for the most part attempting to rectify this injustice, however momentarily. Second, with an all too narrow focus, restorative justice understands crime simply as relations between individuals and small groups. Restorative justice thereby fails to address crimes perpetrated on countless individuals through the often fraudulent yet systemically justified pursuit of economic profit and power by large corporations and other unscrupulous operators. Third, restorative justice seeks only to heal a particular, isolated harm without attempting to heal those harms through which an offender is likely to be at once a victim of both social and family circumstance. The labels of 'victim' and 'offender', she maintains, thus appear far too simplistic. Fourth, as currently practiced, restorative justice remains at best a medium-term, band-aid solution to a problem that would be better addressed from a long-term, whole-of-society perspective.

Similar criticisms may be directed at procedural justice practices, which, while emphasising the principle of social fairness or equality before the law, nonetheless fail to address long-standing racial and socioeconomic injustices; injustices which, for the most part, are unconsciously reflected in the criminal acts of young offenders. In light of these criticisms of procedural and restorative justice practices, and Honneth's earlier mentioned criticism

concerning the one-sided political nature of both republican and procedural notions of community, the question arises whether there is some other mode of criminal justice and democratic will-formation which may sufficiently overcome these critical issues.

Procedural communitarianism and cooperative justice

Just such an alternative, Honneth argues, is evident in Dewey's understanding of the democratic public sphere as at once social and political. For a normative democratic community does not consist merely in a politics of communicative exchange, whether dependent on civic virtues or procedural fairness, but also in what Dewey refers to as social cooperation through a just division of social labour. Not dissimilarly to the communitarianism evident in Marx's early writings, the early Dewey presents the normative ethic of social democracy as the 'free association of all citizens for the purpose of realising the ends they share on the basis of a [just] division of labor' (Honneth, 2007: 225). In other words, while any political dimension to the democratic public sphere still remains absent, Dewey's emphasis on social cooperation indicates the resolution of social and economic injustices as a necessary aspect of social democracy. In his later work, in particular *The Public and its Problems* (1927), this cooperative social realm is mediated, however, by a politically institutionalised public sphere. For measures regulating the impact of particular group interactions are also necessary, he argues, to protect the freedom and interests of others in the social community; and such legally endorsed measures can only be determined through the institutionalised politics of communicative exchange. Here the procedural aspect of Dewey's communitarianism is clearly evident.

Yet while Dewey defends rationally justified procedures as the political medium of democratic will-formation, his is not a socially vacuous proceduralism where legally guaranteed rights are deemed a sufficient response to social and economic injustices.

Indeed a democratic public sphere depends first and foremost on the inclusion of all members of society in the social reproduction process, for only through their sense of making a cooperative contribution to communal well-being will individuals form some interest in participating in the political domain (Honneth, 2007: 235). Hence the social recognition of others occurs not solely through a procedural recognition of rights or a republican esteem for political virtues but, rather more significantly, through a cooperative capacity for overcoming socioeconomic injustices. In contrast to the singularly political notion of esteem adhered to by republican theory, Dewey's communitarianism acknowledges a multiplicity of social abilities and values worthy of esteem. Moreover, as Honneth argues, 'within networks of groups and associations that relate to one another on the basis

of a division of labor, the factual pluralism of value orientations has a functional advantage [over republicanism] because it ensures the development of an abundance of completely different interests and abilities' (2007: 233).

How then might Dewey's procedural communitarianism translate as a mode of cooperative justice? Criminal activity would here be associated with hindering the capacity of others to cooperatively partake in processes of social reproduction and renewal. With respect to social groups within the division of labour, the abolition of ATSIC and the Aboriginal Justice Advisory Councils (AJACs) discussed earlier, is implicated in the generation of crime. Similarly, government failure to build the capacity of Aboriginal communities for becoming significant partners in a wider social cooperative might also be considered generative of crime. Without increased community capacity and sense of social well-being, achieved through the redistribution of wealth from the already wealthy, it is hardly surprising that some Indigenous youth all too frequently and repeatedly find themselves confronting the criminal justice system. Despite the restorative mode of justice showing some slight improvement in rates of Indigenous recidivism, a cooperative mode of justice would seek to minimise the effects of an overwhelming, already culturally inscribed, sense of shame which can exist among sections of the Indigenous population; a shame which springs not so much necessarily from the offense committed but from the prospect of being cut off from community. While nonetheless pursuing family and community conferencing as a court diversionary strategy, such conferencing would emphasise the need to develop socially cooperative relations between victim and offender through an agreed process of tasks or services. Such cooperation would also entail appropriate community groups or mentors forming ongoing valued relations with the offender through the development of a sustaining self-narrative. The availability of conference facilitators drawn directly from the Indigenous community would also need to be assured. In effect, the question of building social capacity becomes the cooperative responsibility of government and local Indigenous and non-Indigenous community groups. Until the presence of Indigenous agencies becomes institutionalised, however, and until social cooperation becomes a foundation for democratic relations, it seems unlikely that rates of Indigenous youth crime will substantially decline.

Note

1. Honneth (2007) refers to Arendt and Habermas as representative of these respective republican and procedural theories. Notwithstanding certain differences which have emerged within republican theory itself between so-called civic humanists and civic republicans, on the basis of their respective allegiance to those notions of positive and negative liberty set out by Isaiah Berlin, for the purposes of this paper it is sufficient to note that both republican perspectives adhere to a model of restorative justice.

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Part VI

Eco-Justice and Environmental Crime

19

Eco Mafia and Environmental Crime

Reece Walters

Introduction

> Environmental crime is currently one of the most profitable forms of criminal activity and it is no surprise that organised criminal groups are attracted to its high profit margins. (Banks *et al.*, 2008: 2)

The industrialisation of societies continues to create an indelible human footprint with both immediate and long-term environmental consequences (White, 2010). It is a footprint that represents rapid human activity and with it has come new commercial opportunities, not only for global businesses, but also for organised criminal networks. Both the acceleration and byproducts of global trade have created new markets as well as underground economies. As the opening quotation from the Environmental Investigation Agency suggests, the 'environment' is big business for organised crime. The United Nations Environment Programme (UNEP), for example, estimates that organised crime syndicates earn between US$20–30 billion from environmental crimes (Clarke, 2011, UNEP, 2005). Such earnings come at substantial social, economic and environmental expense for communities, their livelihoods and habitats. Indeed, organised environmental crime is identified by the UN as a key factor in the impoverishment, displacement and violent conflicts experienced by millions of people, notably in developing societies (UNODC, 2009). The theft of biodiversity and the demise of animal species and habitats have resulted not only in financial loss but the increase of 'environmental refugees', people dislocated and forced to migrate due to loss of livelihoods. Between 1950 and 2000, 80 per cent of all armed conflicts occurred in areas with 'threatened species'. Hence, political unrest and armed conflict provide both the conditions and impetus for organised environmental crime that result in species decline and human dislocation (Humphreys and Smith, 2011). This chapter will explore the links between organised crime and the environment, and examine the regulatory and environmentalist responses to this growing issue of global concern.

Contextualising organised environmental crime

> In the 1970s, a new menace became the centrepiece for a new generation of environmentally minded reformers. Organised crime, which controlled the private sanitation industry in the Northeast, moved center stage. (Block, 2002: 61)

As Block notes, the severity of organised environmental crime has a long history. Notably, it was environmental groups in the mid-1970s that raised awareness of this activity and, as we shall see later in this chapter, it is green and social movements that are central to current efforts of policing and regulation. For now it is important to explore what is meant by organised environmental crime and to chart its contemporary reach and impacts.

Defining organised environmental crime

The United Nations Interregional Crime and Justice Institute (UNICRI) has established a now widely used categorisation of organised environmental crime based on various international protocols and multilateral agreements. Other organisations including Interpol, the UN Environment Programme and G8 also adopt the following five key areas when referring to transnational and organised environmental crime. The areas are:

1. Illegal trade in endangered species and wildlife (breach of the 1973 Washington Convention on International Trade in Endangered Species (CITES);
2. Illegal trade in ozone-depleting substances (breach of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer);
3. Illegal dumping, trade and transport of waste and hazardous substances (breach of the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes and their Disposal);
4. Illegal, unregulated and unreported commercial fishing;
5. Illegal logging and trade in protected woodlands (CITES) (see Hayman and Brack, 2002: 5).

Illegal trade in flora and fauna

It is widely recognised that organised environmental crime syndicates, motivated by substantial financial rewards, continue to flourish and expand in disadvantaged societies with porous borders where corruption is widespread and regulation poor (UNODC, 2009). Emerging international laws and environmental policing efforts are gradually beginning to engage with issues inextricably linked to legitimate global trade. The impacts of these emerging markets continue to decimate flora and fauna whilst having widespread impacts on human populations. For example, the CITES protects about 5, 000 species of animals and 28,000 species

of plants, yet 4,000 African elephants per year continue to be killed for illicit trade (Interpol, 2011a). Banks *et al.* (2008: 7) identify that since the 1990s, '80 per cent of timber coming out of Indonesia was illegal, and the government has estimated that is costs the nation US$4 billion a year'. In Thailand and the Malaysian peninsula, recent reports identify that the Sumatran rhinoceros has become extinct from organised criminal poachers. Moreover, the numbers of tigers, elephants, saiga antelopes and anteaters has become 'dangerously low' (Viegas, 2011). In the United States, the illegal trafficking in wildlife continues to accelerate at an alarming rate and has caused the State Department to establish a Coalition Against Wildlife Trafficking comprising government, protest groups and corporate partners to address an industry of organised crime (US Department of State, 2011). The Wildlife Conservation Society in New York continues to emphasise the serious nature of the issue, stating: 'we are rapidly losing big, spectacular animals to an entirely new type of trade driven by criminalised syndicates, and the world is not yet taking it seriously' (Coghlan, 2011, online). The situation is equally serious across the Atlantic. During 2004 alone, European Union officials reportedly made 7,000 seizures involving 'more than 3.5 million wildlife specimens that were prohibited from being traded' (WWF, 2011: online).

Endangered Species International concludes that 'despite international laws, animal body parts of protected species are traded around the world. For example, body parts of hawksbill turtle shells, shahtoosh shawls from the Tibetan antelope, and furs from rare otters in South-East Asia are found in both black and open markets. Of the estimated 350 million animals and plants being traded worldwide every year, it is believed that 25% is carried out illegally' (ESI, 2011: online). The prices for exotic and protected species vary on the black market from tens of thousands of dollars for a macaw, to just a few dollars for a giant cockroach (PETA, 2011). Recent seizures in Vietnam near the Chinese border revealed over 1,000 tonnes of African elephant ivory smuggled in bundles of cloth (TRAFFIC, 2011). There are numerous other examples of declines or extinction of native fauna from organised illegal activity (Cantu *et al.*, 2007, Herrera and Hennessey, 2007, Weston and Memon, 2009). As Antonio Maria Costa, Executive Director of the United Nations Office on Drugs and Crime (UNODC) has stated:

> People are profiting from the destruction of our planet, by dumping hazardous waste, illegal logging, or the theft of bio-assets. This crime not only damages the ecosystem, it impoverishes so many countries where pollution, deforestation and population displacement trigger conflict and prevent reaching the MDGs. (Costa, 2008, online)

While social, economic and political conditions of 'origin nations' undoubtedly facilitate organised environmental crime, issues of demand and global

trade are noticeably absent from international discourse. Fröhlich has previously noted that EU countries have a 'soft approach' with organised environmental crime, often because the perpetrators, or those involved, are reputable business personnel engaging in essential trade. She concluded: '...enforcement agencies thus are not confronted with the classical "bad guys" but moreover with often highly respected players of economic life with the resulting unattractiveness of the environmental sector as profiling platform for enforcement' (2003: 5). For many, globalisation has provided the contexts for 'easy passage of illegal goods' (Bricknell, 2010: 7, cf. Wyler and Sheik 2009).

Organised environmental crime continues to flourish because of trade and market demand. Countries such as the United Kingdom, that actively promote international environmental treaties to preserve and protect natural heritage, provide the markets for organised crime syndicates to dispose of their illegal merchandise. For example, Britain is the world's third largest importer of illegally logged timber. Up to 3.2 million cubic meters of timber sold in the UK and used for household furniture or garden woodchip is stolen from the Amazon rainforest and other protected habitats, and comprises a £700 million per year British industry (EIA, 2007). Moreover, imported fish is worth £4–9 billion to Britain per annum. By conservative estimates, more than 12,000 tons per annum originates from illegal fishing in the offshore waters of poor countries. This illegal fishing decimates the local industry and food supply of debt stricken countries in western Africa, while destroying marine biology. Yet unregistered pirate vessels enter British ports unchecked and the stolen fish are sold at London markets without question (Environmental Justice Foundation, 2007, cf. Walters, 2011).

Internationally recognised businesses often facilitate the commercial trade in illegal and endangered species. The internet service provider 'Yahoo' has reportedly been providing shopping sites in Japan to purchase more than 130 tonnes of endangered Icelandic whale (EIA, 2011). Moreover, environmental activists have lobbied eBay to ban the sale of endangered species after 7,000 wildlife products were identified on 183 websites across 11 countries (IFAW, 2011).

Illegal disposal of waste

Not only have endangered and protected species of flora and fauna proved lucrative for crime syndicates, but so has the illegal disposal of waste. The excesses of globalised consumption and capitalism continue to produce harmful wastes that pollute and contaminate the environment. As mentioned above, the dumping and illegal transport of various kinds of hazardous waste is widely recognised by international law as an environmental crime. However, for decades, the control and enforcement of

the illegal movement in waste has proved inadequate, as Rebovich (1992) notes:

> it has been said that illegal hazardous waste disposal is very much like one long game of hot potato. The idea is to make as much profit as you can by being the temporary possessor of the hot potato before unloading it on some other person, organisation, or place. In the end, the final recipient is the loser. (Rebovich, 1992: 125)

The 'losers' in the illegal movement of waste are most often the poor and vulnerable. There continues to exist within political and policing circles, noticeably across Europe, complacency and lack of awareness regarding the seriousness of illegal waste disposal and its links to organised crime (Dimov, 2011). Nowhere is this more apparent than in Italy, which is worth exploring further here in some detail to understand organised environmental crime and its links with global trade and national governance.[1]

Throughout the 1990s, international headlines reported 11 million tonnes of industrial waste unaccounted for and large amounts of toxic waste dumped in Italy in what came to be known as acts of the 'eco mafia' (Edmondson, 2003). Mafia related enterprises were reported to be monopolising waste disposal contracts from industries producing toxic residues and illegally dumping the pollutants in various areas of the Italian countryside (Ruggerio, 1996). Furthermore, the mafia or 'rubbish tzars' (Ruggerio and South, 2010) were bidding for, and successfully obtaining, provincial contracts to clean up the very environmental mess they themselves had created. This sort of organised criminal activity is not new. Block and Scarpetti (1985) documented the ways in which the mafia in the US monopolised the solid waste management, eliminated industry competition, bribed officials and routinely illegally disposed of toxic waste in the New York and New Jersey region. Interestingly they note how the US Environment Protection Agency was obstructionist in regulating toxic waste. Indeed, Szasz (1986) argues that 'lax implementation and enforcement' were key factors in the expansion of organised crime monopolies over waste management contract and the concomitant illegal activity, an insight pertinent to southern Italy's procurement of waste contracts and lack of regulatory oversight.

Italy continues to uphold the worst environmental infringement record in the EU. In early 2002, a total of 125 breaches of EU environmental directives were lodged against the Italian authorities with some cases referred to the European Court of Justice (Ferrigno, 1993). In December 2006, the European Parliament identified that 60 environmental infringement notices remained outstanding against the Italian Government (the highest in Europe), mainly for breaches of waste management. In 2009, the European Environment Commissioner, Stavros Dimas, stated: 'EU environmental law

aims to prevent damage to the environment and minimise health risks to European citizens. To ensure its citizens are provided the utmost protection I urge Italy to quickly put right the shortcomings of certain of its environmental laws in line with those of the EU' (Europa, 2009: 1). Italy has yet to implement seven different EU environmental directives relating to water, air, soil, waste and nature protection, and its legal regimes are often severely criticised for not harmonising EU law. The European Commission is pursuing legal action against the Italian Government for failing to implement directives into national law (Europa, 2009, UNEP, 2010).

One of the reasons for Italy's non-compliance with EU environmental regulations is, as mentioned above, the widespread organised criminal activity of the 'eco mafia'. As South (2010: 234) rightly points out, 'eco mafia' was first coined by the environmental group Legambiente and is now widely accepted in Italian society to mean 'organised criminal networks that profit from illegally disposing of commercial, industrial and radioactive waste'. Eco mafia is big business in Italy, estimated at 20.8 billion Euro in 2008 (Legambiente, 2009). Almost all criminal activities occur in the mafia strongholds of Campania, Calabria, Sicily and Peglia. In this area alone, 31 million tonnes of domestic and commercial waste simply 'disappeared' in 2008 – dumped at sea or in local waterways. More recently, mafia groups have taken to illegally burying waste in southern Italy and then rapidly building housing estates on top. Between 2008 and 2010, 17,000 houses were illegally built on waste dumps, and 10,000 forest fires were mafia related (Legambiente, 2010). The impacts of organised environmental crime in Italy also have a global reach. In 2008, it was widely reported that mozzarella cheese exported from Campania contained high levels of dioxins, the result of dairies contaminated by the illegal disposal of toxic waste (McCarthy and Phillips, 2008).

Italy's longstanding record of environmental non-compliance, combined with prolific illegalities of the eco mafia that continue to assert media headlines, has necessitated a political response. Within the Carabinieri (reputedly Italy's most elite law enforcement body) has emerged a specialist policing unit to tackle environmental crime. It should be noted that Italy has a complex structure of state policing and law enforcement. There are eight separate law enforcement agencies: Arma dei Carabinieri (military police), Polizia di Stato (state police), Guardia di Finanza (financial and customs police), Polizia Provinciale (provincial police), Polizia Municipale (municipal police), corpo forestale dello stato (forestry police), Guardia Costeria (coast guard police) and Polizia Penitenziaria (prison police). All these agencies combine to govern and enforce federal, provincial and municipal law across Italy.

The creation of a specialist unit within an existing police force to tackle corporate environmental crime is a first in Europe. Yet the resources and police personnel devoted to the initiative are minuscule. Moreover, it is the

provinces in the north of Italy that have witnessed the greatest political and municipal 'buy-in', while the troubled areas of the south continue to struggle for inter-agency collaboration against a culture of suspicion and official corruption.

Emerging from Italy's eco policing, which is still in its early days, is a story of how environmental movements can identify and target organised crime, mobilise political opinion, involve local government and raise public awareness. In Italy, organised environmental crime is not being addressed or tackled by senior political officials, government administrators or policing agencies; they all play a part, but the real difference is being made through Legambiente. Established in 1980, Legambiente is a left-wing environmental activist organisation with 115,000 active members across 45 offices in Italy. With the use of its technologies, databases and local intelligence, Legambiente has been instrumental in tightening waste disposal regulations and for the prosecutions of mafia personnel. In a similar fashion to the eco mafia having a public identity in Italy; Legambiente are widely thought of as the 'eco police'. However, Italy's four biggest mafia groups, namely, the 'Ndrangheta in Calabria, the Sacra Corona Unita in Apulia, the Neapolitan Camorra and the Cosa Nostra in Sicily are so embedded in the social and economic fabric of Italian society that organised criminal activity accounts for 7 per cent of the country's gross domestic product' (Phillips, 2008, online). As the eco mafia compete amongst themselves for waste management contracts, amidst poor and corrupt regulation, recent endeavours by Legambiente and its alliances to highlight the extent of corruption in Italy's south has intensified EU focus on what has been dubbed the 'Naples rubbish crisis', where 7,200 tonnes of rubbish is accumulating every day in the Campania region (BBC News, 2011).

Environmental movements and international responses to organised environmental crime

Environmental activism also continues to play a major role alongside international instruments to combat organised environmental crime (White, 2011). Such initiatives include the Interpol Environmental Crimes Committee, which focuses on the training, data collection and enforcement of pollution and wildlife crimes (UNEP, 2011). It implements an 'intelligence-led policing' model which emphasises 'operational partnerships'. In 2010, during the UN's International Year of Biodiversity, Interpol's General Assembly passed a resolution that would see 188 national law enforcement agencies collaborate with organisations such as the World Bank and environmental movements; an initiative that promises substantial increase in policing resources to reduce organised environmental crime (Environment News Service, 2010, Interpol, 2011a, 2011b). In 2007, signatory countries to the United Nations Millennium Development Goals agreed to 'ensure environmental stability' through, inter alia, targeting and preventing organised environmental crime

(United Nations, 2007). The proceeds of organised environmental crime are laundered through legitimate and legal commercial activities. As a result, the Financial Action Task Force now officially recognised environmental crime as explicably associated with money laundering. The Asian Regional Partners Forum on Combating Environmental Crime (ARPEC) was set up in 2005, and continues to play an active role in coordinating enforcement endeavours in the Asia Pacific region, an area renowned for trade in illicit wildlife. One important initiative, the Partnership Against Transnational Crime through Regional Organised Law Enforcement, has witnessed significant increases in wildlife seizures through coordinated policing and information exchange (UNODC, 2010). Finally, in July 2011, eight signatory countries to The Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora, which was the brain-child of Wildlife Law Enforcement Officers from eight Eastern and Southern African countries, met to increase enforcement resources to prevent wildlife crime (African Regional Coverage, 2011).

In a similar fashion to the successful involvement of citizen environmental activism in the historically progressive regulation of environmental crime in the United States (Clifford and Edwards, 2012), the above international approaches expressly rely upon organisations such as Greenpeace, Endangered Species International, Environmental Investigation Agency, Environmental Justice Foundation, Legambiente, and the World Wide Fund for Nature – just to mention a few – to combat global organised environmental crime. Environmental movements are becoming central in the identification, detection and prevention of environmental crime. Their resources, technologies, data bases and personnel are increasingly utilised by law enforcement agencies to police, regulate and prosecute organised environmental crime. The advent and mobilisation of activist movements for prevention and regulation of organised environmental crime is arguably what Habermas referred to as a style of participatory democracy, or more specifically the 'revival of the public sphere'. Here, social movements respond to a passive and compliant citizenry by constructing a counter discourse that is harnessed through action, and mobilised as truth (Habermas, 1991). Here, environmental activism, through technology and networks of action and local alliances, as well as appeals to citizens and officials, elevate the social movement to a reliable and reputable status that is inculcated into government and regulatory structures. Environmental activism becomes not mere representative democracy but participatory democracy, with both a visible presence and impact. As such, with public and political integration, it becomes a new and important form of environmental governance. The momentum created by environmental movements is a source of mobilised power. Emerging from alliances with local institutions of governance, knowledges have come to be relied upon as accepted and trusted regimes of truth; they become sources of official discourse (Foucault, 1979).

Green criminology and organised environmental crime

Within criminological studies, debates about organised environmental crime have emerged within discourses on state and corporate crime or 'crimes of the powerful' and within the rapidly expanding area of 'green criminology' (Lynch and Stretesky, 2003, South, 1998, South and Bierne, 2006). The pioneer and inspiration of the green criminological enterprise, Professor Nigel South from the University of Essex, argues that the growing phenomenon of green crime is a product of a late-modern risk society. As a result, he rightly identifies that emerging environmental harms and injustices require 'a new academic way of looking at the world but also a new global politics' (South, 2010: 242). This includes an intellectual narrative that moves 'beyond the narrow boundaries of traditional criminology and draws together political and practical action to shape public policy' (South, 2010: 242). This interdisciplinary approach combined with environmental activism and public policy has facilitated a green criminological perspective with three dimensions: first, scholarship that conceptualises environmental crime; second, that is devoted to exploring and uncovering various types of environmental crimes; and, finally, a commitment to environmental policing and enforcement (White, 2009).

A substantial amount of green criminological scholarship seeks to put issues of environmental harm on the academic, political and public radar. As this chapter argues, too often when actions violate international environmental agreements or domestic laws, they are referred to as 'breaches' or 'offences' and not crimes. From a purely legal perspective, this is best explained by the fact that environmental offences are often not contained within either international or municipal criminal law. As such they are dealt with as administrative offences and prosecuted in civil jurisdictions. Such offences only become issues for the criminal courts when offenders fail to comply with a court sanction and are subsequently referred to a criminal court. While the language of eco-crime is used (most often by activists and NGOs), it is not expressed in such terms at international law and only in reaction to anti-social behaviour within domestic law. With new laws emerge new regulations and new offences. Eco-crime, therefore, must be an important area, within what South (2010) above refers to as a new academic way within a new global politics.

Organised environmental crime often occurs, and is intrinsically linked, to the free-market policies of state and corporate trade. For Westra (2004: 309), acts by governments and corporations in pursuit of free trade that deliberately destroy and damage biodiversity are 'attacks on the human person' that deprive civilians (notably the poor) from the social, cultural and economic benefits of their environment. As a result, eco-crime is an act of violence and should be viewed as a human rights violation, as citizens are deprived of freedoms and liberties. As Halsey and White (1998) have noted,

'environmental harm' is often publicly and politically accepted as necessary for maintaining human well-being. To use a Gramscian analysis, capital accumulation and the prominence of trade is preserved through ideologies of 'necessity'. There is cultural hegemony that underpins the imperatives of trade that come about through consensus or 'common sense values' that cannot be undermined. As a result, it is essential to inculcate discourses in political economy to analyse and understand the interconnectedness between organised environmental crime and legitimate global trade.

To understand the complexities of organised environmental crime requires an examination of the networks of corruption that facilitates criminal markets (Elliot, 2009). Lorraine Elliot is correct to assert that addressing this expanding and global enterprise requires 'joined up thinking' across various transnational government and non-government agencies. Notwithstanding the importance of this network-type analysis, it must be recognised that policies of free trade governed by principles of market regulation provide the contexts for organised environmental crime to flourish. The role of green criminologists must be to unpack and disentangle the ways that policies and practices of legitimate trade facilitate the opportunities and activities of organised environmental criminal networks.

Conclusion

As mentioned in the opening paragraph, the environment has become big business for global trade and illegal enterprises alike. The language of 'environment' has become a powerful discourse for various social, commercial and political sectors. The environment is both a resource for human exploitation and consumption that provides the basis for trade and high standards of living; as well as something to be conserved and cared for. What we mean by environment remains uncontested and often confused. As a result, notions of environmental preservation and development remain blurred and often in competition. Moreover, the environment has become a taken-for-granted subject, often romanticised and uncritically idealised. Yet advancing technologies and increased human interaction with nature raise questions about what and where is this thing we call the environment? Answers to, or discourses about, this will help shape future social, political and environmental agendas that are increasingly becoming central to contemporary modes of governances and democracy. Green criminology must continue to wrestle with these important questions. The fluidity associated with the term 'environment' and its cavalier usage in political and public discourse creates ambivalence for regulation and protection. Whilst trade continues to assert an international priority within the landscapes of global economics and fiscal prosperity, organised environmental crime takes advantage of growing markets. As a result, movements of environmental activism emerge as the new front in the surveillance, regulation and

prosecution of organised environmental crime. Such voices must continue to be central to future green criminological perspectives that seek environmental, ecological and species justice.

Note

1. This section is based on fieldwork conducted in Italy during 2008–2010 that was funded by the British Academy. It included an examination of an eco policing initiative, and interviews with police and government personnel. It also included exploring the role of environmental resistance movements. I was required to have an official host in order to make contact with Italian Government departments and I'm grateful to Justice Amedeo Postoglione and Dr Deirdre Pirro of the Court Seprema di Cassazione.

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20

Corporate Risk, Mining Camps and Knowledge/Power

Kerry Carrington

Introduction

Australia is currently in the midst of a major resources boom. However the benefits from the boom are unevenly distributed, with state governments collecting billions in royalties, and mining companies billions in profits. The costs are borne mostly at a local level by regional communities on the frontier of the mining boom, surrounded by thousands of men housed in work camps. The escalating reliance on non-resident workers housed in camps carries significant risks for individual workers, host communities and the provision of human services and infrastructure. These include rising rates of fatigue-related death and injuries, rising levels of alcohol-fuelled violence, illegally erected and unregulated work camps, soaring housing costs and other costs of living, and stretched basic infrastructure undermining the sustainability of these towns. But these costs have generally escaped industry, government and academic scrutiny. This chapter directs a critical gaze at the hopelessly compromised industry funded research vital to legitimating the resource sector's self-serving knowledge claims that it is committed to social sustainability and corporate responsibility. The chapter is divided into two parts. The first argues that post-industrial mining regimes mask and privatise these harms and risks, shifting them on to workers, families and communities. The second part links the privatisation of these risks with the political economy of privatised knowledge embedded in the approvals process for major resource sector projects.

Privatising corporate risk, post-industrial mining regimes and the risks of camp life[1]

The global increases in demand for energy and minerals have led to the rapid development of the Australian resource sector (Cleary, 2011a: vii, Petkova *et al.*, 2009: 211, Syed *et al.*, 2010). By the end of 2011, 'there were 102 projects at an advanced stage of development, with a record capital expenditure of

$231.8 billion' (Bureau of Resources and Energy Economics, 2011: 8). Mining booms have punctuated Australian history and made a significant contribution to population growth, economic development, and the establishment of rural and remote towns, transport networks and other infrastructure in the interior (Blainey, 1969). The current mining boom is qualitatively different. Until the 1970s, the development of townships and communities went hand-in-hand with mining development approvals (Houghton, 1993), except in far remote locations. However, this is no longer the case. Over the past 30 years, under the growing influence of global economic forces, the exploration, extraction, transport, processing and maintenance stages of mining projects have become increasingly reliant over the last decade on fly-in, fly-out (FIFO) and/or drive-in, drive-out (DIDO) non-resident workers (NRWs) (Beach and Cliff, 2003, Carrington *et al.*, 2011, Gillies, Just and Wu, 1991, Houghton, 1993, Storey, 2001).

In parts of regional Australia, thousands of NRWs housed in work camps even exceed the number of residents in host communities (Carrington, McIntosh and Scott, 2010, OESR, 2011). Everything points to huge increases in numbers of NRWs in the immediate future, though no government or industry body is seriously monitoring its associated risks, growth or researching its impact (Carrington *et al.*, 2011). According to an industry-commissioned survey, most new projects will rely on high proportions of NRWs for both construction and operations workforces (Deloitte Access Economics, 2011: 33). The sudden influx of high-risk male population living in camps adjacent to existing communities disrupts the social ecology and gender dynamics of existing communities located in rural Australia (Murray and Peetz, 2010: 23–5, ABS, 2008). The effective local population may massively increase overnight as a predominantly male, itinerant labour force moves in, creating a climate of fear, risk and vulnerability (Lozeva and Martinova, 2008, Scott, Carrington and McIntosh, 2011).

Alongside the growth in mobile mining workforces, post-industrial mining regimes are characterised by low rates of unionisation, decline in collectivisation of labour agreements, massive increase in contract labour, an intensification of work through continuous production cycle, and a restructuring of the labour processes around 12-hour shifts (McDonald, Mayes and Pini, 2012, Murray and Peetz, 2010). More flexible work arrangements such as these are part of a larger global trend toward precarious employment in a post-industrial world (Louis *et al.*, 2006: 466–7). Much of the industrial relations research about the risks of the mining sector focuses on the work-employment relationship and especially the issues of mine safety. This is understandable given that mine collapses, causing mass deaths in small tightly knit communities, have been a recurrent feature of the industry's history in Australia (Hopkins, 1989). The shift to open-cut mining alongside a safer mining culture has done much to reduce this risk. While many of these dangers have significantly abated, new post-industrial mining regimes

raise a fresh set of challenges and risks that extend beyond the immediate geography or spatiality of the work contract (McDonald, Mayes and Pini, 2012: 23).

The new mobilities of labour bought about by non-resident work practices in the mining sector have profound impacts at an individual, family and community level. While the lifestyle associated with non-resident workforce practices no doubt suits some and is character-building for others, layers of risk and adversity are experienced by other non-resident individuals and their families. These include stress levels; lifestyle and health issues including fatigue; dysfunctional gender relationships and inequalities; parenting problems; family violence; and family break-ups (Carrington and Pereira, 2011a, 2011b, Gallegos, 2005, Gier and Mercier, 2006, Guerin and Guerin, 2009, Haslam McKenzie *et al.*, 2008, Kaczmarek and Sibbel, 2008, Murray and Peetz, 2010, Taylor and Simmonds, 2009, Watts, 2004). These shifting forms of capital-work-community boundaries mean that the employment relations impact not just the worker or the work site, but also the privatised realms of family life and collectivised forms of social life (McDonald, Mayes and Pini, 2012). Rising rates of fatigue-related injuries and deaths that occur off the work site, on the long journey home after an extended roster, is one such example. These are risks of working in the minefields for which companies are unlikely to acknowledge any responsibility, but they are predictable impacts of the growing congestion of the transport corridors in mining communities, for which there is already some worrying evidence (Murray and Peetz, 2010: 36, 192–3, 218–21, Queensland Courts, Office of the State Coroner, 2011, Carrington, McIntosh and Scott, 2010).

The global post-industrial mining regime has been at the forefront of a trend to encourage the trading of rights, security and conditions for high wages (Carrington and Hogg, 2011). A longer term, more holistic view of the role of work is giving way to a narrower, shorter term focus on immediate economic benefits. Local communities once based on dense patterns of acquaintanceship, participation in local sporting and other activities are eroded by a continuous labour process hostile to family and communal life. This has the effect of fostering social division and 'generating discontent and breaking up the traditional physical intimacy of rural spaces' (McDonald, Mayes and Pini, 2012: 24). In this sociological context, FIFO (Fly in, fly out/fit in or f*** off) has come to represent this seismic shift in contemporary work-capital-family relations (Scott, Carrington and McIntosh, 2011).

Mobile workforces in the mining industry are generally accommodated in work camps during rostered-on work cycles. Camps are typically comprised of demountable dwellings or 'dongas' uniformly arranged in compounds with a common mess, laundry and entertainment facilities. There is a paucity of consistent planning regulations governing the erection of these temporary dwellings. Some resemble 'gulags', others eco-retreats with air-conditioned quarters, restaurant-quality food and superior recreational

facilities such as gyms and swimming pools, while others are hastily and sometimes illegally erected structures, surrounded by barbed wire where the only recreational outlet is the 'wet mess' a canteen that sells liquor (Carrington, McIntosh and Scott, 2010). The camps, while not used to detain refugees or prisoners-of-war, easily convert to immigration detention centres. They conform in some respects to Agamben's (1998) assessment of such spaces of confinement as places of non-belonging where justice and citizenship are suspended in time and place. What characterises the camp is 'that the inhabitants are outside the normal assurances of law; they are outside the communities of security and justice' (Hudson, 2012: 16). In what follows I illustrate how the risks of mining camp life remain largely invisible and how the mining industry evades taking any corporate responsibility for risks and impacts that arise from the housing of thousands of NRWs this way.

The use of contractors in the mining sector has risen substantially over the past two decades (Rolfe *et al.*, 2007). Contractors comprise more than half the mining workforce in Western Australia (DMPWA, 2009), and probably the majority of NRWs. Like so much else in the mining industry, the management of camps along with their security is also sub-contracted. The work camps are usually patrolled by private security officers, heightening the prospect that any disturbances will remain hidden from public view. What follows is a first-hand account from a private security guard of one such disturbance.

> On the night of Saturday... the camp at X... erupted into near chaos. It began with drinkers from the wet mess area using a fire hose in order to spray others and spilling out into the area where the residents are accommodated. I believe they were horsing around and were extremely drunk at the time. Others were coming and going from the wet mess area, to and from the accommodation area yelling... I was approached by an angry man claiming residents were banging on doors, breaking into rooms and in one case tipped a bed upside down and placed toilet paper around and over a hand basin in the bath room...

It has been estimated that anywhere between a quarter and three-quarters of all assaults involve alcohol and that '[a]lcohol is also a significant contributor to serious injury from assault' (Morgan and McAtamney, 2009: 2). It was a likely risk then that a lone security guard who described his occupation as 'baby-sitting' 245 drunks would inevitably be threatened. In fact, he was several times and subsequently seriously assaulted, sustaining two fractures including a broken arm, dislocated shoulder, head wound, lacerations and other injuries. While his injuries were severe, an ambulance was not called until the following day and only after he vomited and lapsed into unconsciousness. Nor was the incident reported to police by the

camp manager, the licensee or the security firm for which he worked. He concluded: 'It would be fair to say that I was very disappointed, gutted that no charges would be laid against X and felt let down and betrayed by the criminal justice system.'

After being treated in a Perth hospital, the security officer reported the assault to metropolitan police, but no charges were laid until two years later, and only after a review of the first flawed police investigation. This incident has remained hidden from public view, highlighting the limits of policing mining camps through privatised security arrangements reliant on trust, self-regulation and corporate responsibility.

Interpersonal violence is one of the most under-reported of crimes. Where alcohol is involved, the risk of violence is strong as is the tendency to under-report (Morgan and McAtamney, 2009). Police we interviewed in both the Queensland (Qld) and Western Australia (WA) mining regions were adamant that few such instances were reported to them. A senior WA police officer explained why:

> I gotta say, I don't believe that most assaults are reported to us. When you talk to people around town, and they say: 'I was down the pub the other night and there was a big punch up', and then you get into work and there's no report of it, and that can be for a variety of reasons. Either the guys have let off a bit of steam and sorted it out and don't want police intervention to resolve an issue; or someone wasn't seriously injured enough to warrant telling the police; or maybe the licenced premises are protecting their licence to an extent, because they know we keep records of every time we have to attend licensed premises to quell a disturbance... So my feeling is that crime stats are not worth the paper they're written on.

While local crime talk about FIFOs housed in camps may exaggerate perceptions of risk and deviance attributed to NRWs regarded as outsiders (see Scott, Carrington and McIntosh, 2011), one thing we do know is that the social processes and conditions that produce high concentrations of men in relatively isolated conditions free from close supervision invariably also produce high levels of interpersonal violence and disorder (Tilly 2003: 1). Not surprisingly, the housing of thousands of men in work camps with little else to do off roster than consume alcohol, incubates male-on-male alcohol-fuelled violence (Carrington, McIntosh and Scott, 2010). Much of this low level intra-male violence, policed by private security officers (if policed at all), remains unreported as participants in brawling risk losing their jobs if such altercations become known (Carrington, McIntosh and Scott, 2010). Where employees and contractors sign confidentiality agreements as part of their employment contract, they are further discouraged from reporting such matters. Additionally, hoteliers risk losing their liquor licences if such

disturbances are noted in official police reports. As one publican from a Qld mine field recalled:

> We had a few fights there [at the pub]... We never ever got the police involved. If the police ever got involved, someone else usually rang them... I had three pretty strong young boys, my sons, and we could handle most situations; calm them down.

In an unusual act of public transparency in 2007, Francis Logan, then Western Australia's Resources Minister, 'called on mining companies to clean up their act' after using his ministerial discretion to reveal that 82 per cent of exploration sites inspected in that state, involving 33 different companies, were found to have breached mining regulations (Logan, 2007, 13 November). Hancock Prospecting, owned by mining magnate Gina Rinehart, 'had been fined $20,000 for the unauthorised construction of a 59-person exploration camp at Roy Hill, 120km north of Newman' (Logan, 2007, 13 November). A sense of impunity is detected in this Minister's extra-ordinary measure of exposing corporate breaches by the mining industry in this fashion. More recently, an inquiry by the Australian Securities and Investment Commission (ASIC) discovered that giant multinational corporations – of which the mining corporations were prominent – were openly flouting the Corporation Act by failing to lodge annual financial returns (West, 2012, 23 March). Gina Rinehart and Clive Palmer, two of the richest mining entrepreneurs in Australia, were chief among those failing to comply with the Corporations Act (West, 2012, 23 March). The compliance regime of ASIC, the corporate watchdog, has been described as a disgrace. The Rosewood Camp outside Blackwater which had never obtained building, planning or plumbing approval and housed 500 NRWs is another example of a corporate breach given a green light by a state regulator. The Central Highlands Regional Council terminated the illegally erected camp's lease; however, the Qld state government overruled the Council's decision, extending the camp operators lease for an additional year (Unhappy Campers, 10 April 2011: 1). Around the same time, Jo-Ann Miller, an ALP Member of Qld's Parliament, gave this first-hand account of her visit to the camps outside Collinsville:

> The workers fly in, they go out to these camps, which are often on the distant outskirts of the particular towns, and they make no contribution to the community.... In my view, it is not good enough that they have these disgraceful camps. Some of them that I have seen are not even hooked up to sewerage systems. They have sewage running freely over land... I cannot see how it is good to have miners living in dongas cooped up like chooks in a pen. (Miller, 2011: 376–7)

There is no public register of corporate breaches of social and environmental regulations available for either Qld or WA mining sector; hence breaches of all sorts that occur in the minefields remain largely invisible. Other than the odd ministerial release or MP speech recorded in *Hansard*, there remains minimal public information about corporate breaches. The penalties – ranging from $10,000 to $100,000 – would in any case amount to a trifling tax on illegal activities for companies that count their profits in the billions (see Carrington, Hogg and McIntosh, 2011). What this illustrates is that regulating social and environmental breaches by mining corporations pose difficult challenges for government and law enforcement agencies (Tombs and Whyte, 2010: 151) even when these breaches are identified. The privatisation of risk that characterises post-industrial mining regimes means that the harms that occur behind work camp enclosures, the pain privately felt by families living apart, the burdens of a labour process that erode communal life and splinter collective solidarities have been largely overlooked in the political economy of knowledge embedded in the approval process for new mining projects.

The political economy of knowledge in the mining project approval process

The political economy of knowledge is vitally important in the mining sector because new projects are subject to an Environmental Impact Statement (EIS) and in Qld have to also comply with a Social Impact Management Plan (SIMP). Under current regulations, such as the Commonwealth Government's *Environment Protection and Biodiversity Conservation Act 1999*, project developers are required to produce their own environmental and social impact assessments. This, as Hepburn points out, has 'encouraged the development of a new industry of privatised environmental impact assessment specialists' (Hepburn, 2012, 5 March). It has also spawned the extensive privatisation of knowledge and industry sponsorship of research, and the industry capture of Australian universities.

There are some high quality social impact studies undertaken by mining proponents, of which the BHP Billiton (2009) Olympic Dam social impact study is an example. Nevertheless, industry funded research in the resources sector is susceptible to influences that independent research is not. According to a study by Hamilton and Downie (2007):

- the abrupt discontinuation if preliminary results produced are adverse to the industry interests;
- there is no requirement for independent peer review prior to publication as a report, public dissemination, or acceptance by government environmental approval authorities;

- there is no requirement to reveal the extent or amount of industry funding or support;
- reports are susceptible to 'massaging the message' highlighting the positive while burying any inconvenient findings in the detail;
- reports are silent about important issues relating to the exercise of corporate power in furnishing survey samples, such as 'captive' industry workers; and
- proponents may insist that researchers sign confidentiality clauses and/or forfeit their moral rights to publish.

The whole knowledge production process is fraught with conflicts of interest and yet this is the process informing vital government approval decisions for around 40 multi-billion dollar resource extraction projects in Qld alone (BREE, 2011). Additionally, the singular project focus of these assessment processes make it unlikely that the cumulative social or environmental impacts will be adequately evaluated, if at all. The state does not act as a neutral arbiter either in this approvals process and cannot be relied upon to fairly or independently scrutinise the knowledge claims underpinning industry-supplied EIS and SIMP. State governments who grant mining licenses and regulate the industry also earn a share of the minerals extracted through royalties. In 2010 Queensland and Western Australian governments collected around $6 billion in royalties. Hence state governments have a fundamental conflict of interest in setting themselves up as the arbiters in disputes over access to agricultural land, the granters of exploration licenses and the approvers of EIS and Social Impact statements, precursors to project development consent from which royalty payments flow (Carrington *et al.*, 2011). Not only is there no requirement for independent research in this process, there is also no independent broker to make informed decisions about mining and energy developments in the long-term best interests and prosperity of the nation (Cleary, 2011a). The striking absence of independent, non-industry funded research into the impact of resource extraction in Australia stymies the quality control of the resource sector approval processes.

In an attempt to address growing concerns about the lack of independent research in this sector, the Australian Government has recently established a National Partnership Agreement for the Regulation of Coal Seam Gas (NPACSG) and an Independent Expert Scientific Committee, to assess which projects require scientific research and to commission bio-regional assessments where considered necessary (Hepburn, 2012, 5 March). These initiatives were secured from the Australian government by Tony Windsor, an Independent MP, in return for his support for the Mineral Resources Rent Tax. While the role of the expert committee is still only advisory, this is an improvement on the existing environmental assessment triggers, although it does not appear to extend to social impact, and is not 'a panacea for what

the community see as a flawed and biased mining and coal seam gas (CSG) approval process' (Willgoose, 2012, 26 March).

Industry funded research has been powerfully shaped by industry agendas highlighting a problem known as university 'capture' (Hamilton and Downie, 2007). The University of Queensland's (UQ) Sustainable Minerals Institute (SMI) is an example. The Institute has seven centres, which includes the Centre for Social Responsibility in Mining (CSRM) and a newly established Centre for Coal Seam Gas. The three major industry partners – Santos, Arrow Energy and Queensland Gas Company – have committed a total of $15 million over five years, twice as much as the university's contribution (Woodward, 2012, 26 March). This centre has become the focus of UQ staff and student protests keen to distance themselves from its industry agenda and its unique governance model where membership on the advisory board is not governed by expertise but by the extent of financial contribution (Woodward, 2012, 26 March).

The SMI already has a controversial history. The water study undertaken by SMI advised the Qld government that the risk of CSG extraction to the water table was 'as a low 200 GL a year' (Cleary, 2011a: 113). Through a freedom of information request, the investigative journalist Paul Cleary discovered that, at the time of providing this advice to state and commonwealth governments about the contentious CSG projects undergoing approval, SMI was between 60 and 80 per cent funded by industry and had received an additional $20–30 million in industry funding since (Cleary, 2011b, 5 October). Professor Moran, the SMI Director, acknowledged that the governance model of the new Centre for Coal Seam Gas meant that 'the more funds that a member puts in, then the more say that member has if there is disagreement over the distribution of funds' (Woodward, 2012, 26 March). He claims that encouraging researchers to publish their results acts as a check on the industry's influence over the research findings. If only it were that simple.

A more recent example of the influence of mining industry funding over this SMI's research centres can be detected in the submissions of the Queensland Resources Council (QRC) and SMI's Centre for Social Responsibility in Mining (CSRM) (the recipient of substantial resource industry funding) to the Australian Parliament House of Representatives Standing Committee's ongoing *Inquiry into the Use of FIFO/DIDO Workforce Practices in Regional Australia*. Both organisations' submissions to the inquiry claim that the proportion of FIFO/DIDO workers was only around 15 per cent of the Bowen Basin workforce (QRC, 2011b: 12, CSRM, 2011: 4). Contrary to the most rudimentary academic standards, CSRM's source is not referenced, although it happens to be identical to the QRC estimate which misquotes a Qld government report. What this government report actually states is that 'Non-resident workers account for 15 per cent of the Bowen Basin's FTE [full time equivalent] population in 2010' (OESR, 2011: vi), not 15 per cent of the workforce.

The estimate provided within our independently-funded ARC research team's submission to the House of Representatives FIFO/DIDO inquiry (Carrington *et al.*, 2011), based on this government report and triangulated with other data, indicates that NRWs accounted for around 59 per cent of the resource sector workforce in the Bowen Basin; that is, four times the proportion stated by the QRC (2011b) and the CSRM (2011) submissions. Why does this contested knowledge-claim matter? The politics of this knowledge-claim has implications for an estimated 67 new or expanded multi-billion dollar resource projects currently seeking approval by the Qld state government (Carrington and Pereira, 2011b, Appendix 1) to recruit most of their workers as non-resident (Deloitte Access Economics, 2011: 33). The proportion of NRWs has been a source of bitter dispute between the QRC, regional mayors and members of Mining Communities United who claims the existing proportion of NRWs is already too high in the Bowen Basin, undermining the sustainability of towns like Dysart, Collinsville, Moura and Moranbah. Hence new mining projects seeking to recruit most of their workers as non-residents should not be approved. This controversial issue was at the centre of a long running public dispute over the BHP Mitsubishi Alliance Caval Ridge project which sought, and was ultimately granted approval, to recruit 100 per cent of its workforce as NRWs, to be housed in camps outside Moranbah (Moranbah Action Group, 2011). Knowledge-claims central to disputes over mining project approvals matter greatly to the parties involved and the sustainability of existing towns, which is why the distortion of the proportion of NRWs by the QRC and CSRM in their submissions to the Australian Parliament inquiry is so egregious. The QRC has the defence that it represents the commercial interests of the mining industry and acts as an adversary in protecting those interests. But the CSRM has no such excuse.

Additionally, the CSRM claimed in its submission to the Australian Parliament inquiry that it was 'well positioned to provide balanced and independent insights into the social and economic impacts, as well as the opportunities and challenges, associated with FIFO/ DIDO practices' (CSRM, 2011: 1). The covering letter claims that the Centre's submission was based on issues raised by their own research (CSRM, 2011). Given its focus on the social responsibility of mining, one could expect this centre would have been at the forefront of researching the impact of FIFO – one of most significant social transformations in that sector. However, this is not the case. A search of the CSRM website (at www.csrm.uq.edu.au/Publications, date accessed 27 March 2012) reveals that it has not published a single peer reviewed publication about FIFO. In 2003 the centre did publish two reports on workforce turnover among FIFO workers – but that is the extent of research conducted by this centre. This might explain why there were only three references in the CSRM submission, and not a single reference to any of its own publications. Curiously, the CSRM and the QRC submissions

also relied on an unpublished study (Clifford, 2009) to support their view that FIFO lifestyles are not any more stressful than others.

The unpublished WA-based study, supported by the Chamber of Minerals and Energy of WA, ten mining companies and a number of other safety and social organisations (Clifford, 2009: 5), has not been subject to any independent external scrutiny and contains very obvious limitations. There are an estimated 38,000 NRWs in the Pilbara alone (Carrington *et al.*, 2011: 9, Heuris Partners Ltd, 2010), yet the study uses inferential statistical analysis on a sample size of only 222 FIFOs – none of whom were randomly selected but recruited directly by the investigator or through industry contacts (Clifford, 2009: 5). Inferential statistical analysis is only credible when the sample size is large enough to make claims about generalisability and the design uses probability sampling, not a convenience sample such as this (Walter, 2006: 198). Using inferential statistics in this context creates an aura of scientific validity but is meaningless. Being a convenience sample, not surprisingly the respondents were heavily skewed to professionals and managers who accounted for 60 per cent of the responses. Additionally the paper survey only had a 24 per cent response rate, and almost half (47 per cent) had only been working FIFO for less than a year, questioning the validity of the methodology and any claims to generalisability. Yet in the wider political economy of knowledge, this piece of pilot research, with all its short comings, was misrepresented by the QRC as a factual counter to the 'speculative commentary' (QRC, 2011a: 13) of those who criticise the impact of FIFO practices – and by the CSRM as 'one of the few studies that has been undertaken in Australia that has sought to objectively evaluate stress impacts of the FIFO lifestyle' (CSRM, 2011: 8). Really? What this episode in the political economy of knowledge reveals is that the truth claims which serve corporate vested interests are subject to little scrutiny and verification 'before they are accepted as truth by political, media and economic elites' (Snider, 2000: 180).

By contrast, independent research that highlights the social impacts of mining has been subject to strident criticism by the mining industry bodies. ARC-funded research, subjected to international peer review, has been published in the *British Journal of Criminology* (Carrington, McIntosh and Scott, 2010) and a survey of the social impact of mining in Qld, also peer reviewed and subsequently published in the *Journal of Rural Society* (Carrington and Pereira, 2011b) attracted widespread public condemnation from the mining industry. I was the lead chief investigator in both projects. Mr Roche, the Chief Executive Officer and a Director of the QRC, a body that represents the commercial interests of the resources sector, publicly criticised this research as 'dodgy' (QRC, 2011a, 21 June) and 'unreliable' (Taylor, 2012). In what could be seen as an act of intimidation, Mr Roche even contacted my Vice-Chancellor to convey his self-serving views. When I appeared as a witness before the Australian Parliament FIFO/DIDO inquiry

on 24 February 2012, I was asked to respond to these industry-body criticisms. I explained they were the ill-founded, self-serving criticisms by an industry-body hostile to independent research and as such were based on ignorance, not expertise.

Eager to be on top of the production of knowledge for the approvals process, peak industry bodies such as the Minerals Council of Australia (MCA) and the QRC have sponsored their own research and public policy monographs and even produced a toolkit for developers to assess the social and economic impact of mining, espousing:

> The Australian minerals industry's vision is a thriving industry working in partnership with communities in which they operate for the present and future development of mineral resources and the establishment of vibrant, diversified and sustainable regional economies and communities. (MCA, n.d.: 1)

Of the 175 submissions to the Australian Parliament FIFO/DIDO inquiry, many provide a stark contrast to the above claims that the mining industry is committed to socially sustainable regional communities. The doctors practicing in the only surgery in Moranbah, a community undergoing rapid sociodemographic change as a direct result of mining and now surrounded by thousands of mobile workers housed in camps, had this to report:

> Moranbah's current GP workforce numbers 4 and the doctor patient ratio is estimated to be around 1: 2750 – an unsustainable and unsafe level for doctors and patients alike. This shortage is further exacerbated by the effects of the resources boom and the influx of population into the area... too often Industry comforts themselves with the delusion that a non-resident workforce has no impact on the town's soft infrastructure such as medical services, police, ambulance and other emergency services. (Scholtz and Nieuwoudt, 2011: 2)

The gripes of local residents about the impact of FIFO on their communities is captured by what one WA resident in a township at the forefront of the mining boom told the Australian Parliament Inquiry:

> we are appalled at what the FIFO culture is turning our town into... We have less services, less volunteers, less everything. Nobody wants to invest anytime here in terms of volunteering, services groups or sporting groups as soon as the shift is done they are back to camp, and fly off on days off, then these same people will not want to volunteer in their home towns as they want to spend time with their family, so we all lose out. (Resident of Port Headland, WA, 2011)

While the concepts of social sustainability and corporate responsibility have been coopted into audit compliance and corporate language (Bartlett, May and Ihlen, forthcoming, Kirsch, 2010: 88, Sadler and Lloyd, 2009), these buzz words are a simulacra – not a reflection of reality. An emerging body of research contests the industry's claims to really support 'social sustainability' or to act responsibly (Carrington, McIntosh and Scott, 2010, Carrington *et al.*, 2011, Carrington, Hogg and McIntosh, 2011, Carrington and Pereira, 2011a, Haslam McKenzie *et al.*, 2008, Lockie*et al.*, 2009, Murray and Peetz, 2010, Petkova *et al.*, 2009), affirming the lay knowledge of this Port Hedland resident and the doctors of Moranbah. The post-industrial mining industry has effectively eschewed its social responsibility by shifting the burdens of block roster intensified labour process reliant on NRW onto communities, placing a considerable burden on local services and residents (Carrington and Hogg, 2011). Additionally the 'fly-over' effects of mobile workforce who expend most of their income in their urban homes, threaten the continuing sustainability of regional towns (Storey, 2001). 'Sustainable mining', like 'clean coal' is a corporate oxymoron that 'conceals harm and neutralises critique' (Kirsch, 2010: 87).

Pat Carlen reminds us that all good research is critical in that it is driven by a 'criminological imagination' predisposed to think the unthinkable (Carlen, 2010). Good research of this kind is almost entirely absent from the officially recognised knowledge bank about the social impact of resource development in Australia, encouraged by a hopelessly compromised approvals process that relies heavily on research sponsored by industry developers, who have a vested interest in the outcome. Reliable independent research is crucial for a fair and effective approval process that harnesses public confidence. When the knowledge bank is not independently verified or subjected to public scrutiny confidence in its objectivity is naturally questionable. Yet in the wider political economy of knowledge, mining industry bodies have promoted research that can't withstand scrutiny, while attacking independent research that produces 'facts' 'inconvenient' to 'party opinion' (Weber, 1958: 147). There is a dire need for more critical research about the impact of successive mining projects on Australia's society, environment and economy, to better inform the government approval processes. This chapter makes a very small contribution to addressing that knowledge gap, but there is much more to be done.

Notes

I acknowledge a debt to my co-investigators on this ARC Discovery Grant (DP0878476), Dr Alison McIntosh, Professor John Scott and Associate Professor Russell Hogg.

1. The ARC-funded research which I draw upon in this chapter did not set out to study the criminological impact of mining camps. It set out to explore the reasons for the higher rates of mortality, morbidity and violence for men in rural Australia.

Our initial triangulation of this data identified some high-risk regions in WA and Qld where significant mining activity was occurring. That data analysis also identified a region in NSW that had undergone rapid sociodemographic decline mainly as a result of drought. It was not until the team undertook field research interviewing 143 purposively selected representatives from a cross section of these communities in Qld and WA that we discovered the profound social and criminological impact NRWs housed in camps could have on local communities (for details see Carrington, McIntosh and Scott, 2010; Carrington *et al.*, 2011 Carrington and Hogg, 2011). In the WA mining community we studied, the rate of violence was 2.3 times the state average and had risen almost threefold since the beginning of the resources boom (Carrington, McIntosh and Scott, 2010: 11). In the Queensland mining community we studied, the offences against the person had grown from 534 per 100,000 in 2001 to 2,315 per 100,000 in 2003 – a rate more than twice the state average (Carrington *et al.*, 2011).

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Part VII

Global Justice and Transborder Crimes

21

Ideal Victims in Trafficking Awareness Campaigns

Erin O'Brien

Introduction

Amidst a proliferation of bestseller books, blockbuster films, television documentaries and sensational news reports, public awareness campaigns have claimed their place in a growing chorus of concern about the crime of human trafficking. These campaigns aim to capture the public's support in efforts to eliminate a 'modern slave trade' in which individuals seeking a better life are transported across borders and forced into exploitative labour conditions. Constrained by the limitations of primary campaign materials (posters, print ads, billboards) typically allowing for only a single image and minimal text, it is unlikely that these awareness campaigns can accurately convey the complexity of the trafficking problem. One anti-trafficking advocate tasked with constructing a clear, digestible message for the general public has indicated that these campaigns are, by necessity, reductive in their representation. 'We try to come up with an anecdote that crystallizes the problem' said the advocate. 'I'm trying to find a way to boil it down to its most, in some ways emotional essence... the heartening, the compelling story that makes people really understand the problem' (Anti-trafficking activist, 2008, personal communication).

Despite this context of essential simplicity, awareness campaigns intend to contribute to public understandings of human trafficking. This intention may be grounded in a genuine desire to draw attention to a significant injustice and foster greater popular support for the upholding of the human rights of individuals facing significant risks in crossing borders. However, in attempting to champion the cause of victims of trafficking and highlight the social and political inequalities which fuel this breach of human rights, awareness campaigns perpetuate a form of exclusion through the construction of a typical or 'ideal' victim of trafficking. Discourses on migration, particularly illegal or irregular migration, remain a highly contested space with the increasing categorisation of those on a continuum of migration as legitimate or illegitimate, as harmed or harmful (Grewcock, 2009, Weber

and Bowling, 2008). Victims of trafficking emerge from this mix as those deemed most worthy of public sympathy and government protection, yet in garnering this sympathy for a very specific type of victim, awareness campaigns can undermine these protection efforts.

This chapter explores how the depictions of trafficking victims in awareness campaigns can exclude those who do not fit a restrictive narrative mould. Nils Christie's (1986) pivotal work on the construction of society's ideal victim offers an appropriate lens through which to examine the literal 'poster child' of the anti-trafficking movement. Christie's characterisation of the 'ideal victim' can assist in the identification and unpacking of the ideal trafficking victim, within an analysis of the contribution that awareness campaigns make to trafficking discourse.

Awareness campaigns favour 'descriptive' terms of victims of trafficking, in which victims are defined according to 'a certain set of experiences' as depicted by the media and non-government organisations, as opposed to an 'administrative' definition drawn from legislation (Andrijasevic and Anderson, 2009: 92). In these descriptions, a dominant trafficking narrative can be established through the choice of images and 'true stories'. This chapter critiques the contribution awareness campaigns make to public understandings of human trafficking by initially highlighting their 'educative' role in trafficking discourse. It then identifies three key themes consistent in the construction of the typical trafficking victim: firstly, the victims are primarily trafficked for the purposes of sexual exploitation; secondly, trafficking victims are primarily women and girls; thirdly, trafficking victims are compulsorily vulnerable and innocent. It is argued that the majority of these campaigns favour this specific victim narrative and that these constructions manifestly conform to Christie's mapping of the ideal victim. Furthermore, this establishment of an 'ideal victim' contributes to the construction and perpetuation of a hierarchy of victims and can act as a significant hindrance to attempts to combat trafficking by misrepresenting the nature of the problem.

This research is drawn from an analysis of ten anti-trafficking awareness campaigns[1] from Europe and North America as well as worldwide campaigns including the United Nations' 'Blue Heart' campaign, and the Body Shop's 'Stop' Campaign. These campaigns were chosen because they represent a mix of large-scale government, non-government and corporate campaigns which reflect a diversity of actors engaged in awareness raising activities. The materials associated with these campaigns (including websites, posters and leaflets) have been examined in order to review the primary narratives disseminated. In particular, the gender of the victim, the industry highlighted as a destination for trafficking, and the 'origin story' as represented through images and text in the campaign materials were explored in order to gain a better understanding of how these campaigns contribute to constructing an understanding of the key characteristics and experiences of

trafficking victims, and subsequently exclude experiences which do not fit this limited narrative.

The construction of public understandings of trafficking

Despite the amount of scholarly attention that has been directed towards the crime of human trafficking, there is still a great deal of uncertainty about the scale and nature of this global issue (Danailova-Trainor and Belser, 2006, UNODC, 2009). Understandings of trafficking derived from research cannot be separated from the construction of the trafficking problem established by awareness raising activities, as attempts to understand the scope and characteristics of trafficking are heavily reliant on data from agencies and organisations engaged in anti-trafficking advocacy and service delivery. These organisations often focus on specific forms of trafficking (for instance sex trafficking) or specific types of victims (only women and children), which can skew statistical representations of trafficking victims and their experiences (Di Nicola *et al.*, 2005). Hoyle, Bosworth and Dempsey (2011) argue that the language of slavery itself can result in the creation of ideal types of trafficking victims and 'oversimplifies our understandings of the range of causes and experiences of trafficking' (2011: 314). The efforts of anti-trafficking advocates to gain support for their cause can also often result in the exaggeration of claims, reliance on inflated figures or emphasis on only the most horrifying examples (Weitzer, 2007: 448).

In the absence of reliable data, the image of the trafficking victim is most strongly established through public discourse, media and fictional depictions. Non-government organisations (NGOs) play a significant 'educative' role in this process (Stolz, 2005). Public awareness campaigns, established by both NGOs and government agencies, have been declared by the United Nations to be an essential tool in combating trafficking (UNODC, 2008). These campaigns draw their opposition to trafficking from differing values which can govern the narrative of trafficking put forward. However, despite feminist NGOs, faith-based groups and government agencies differing somewhat in their approaches to trafficking, a fairly consistent trafficking narrative dominates these campaigns and entrenches a uniform image of the 'ideal' trafficking victim.

This is important to analyse because, as Christie declares, being a victim is not 'an objective phenomenon' (1986: 21) and therefore these narratives have specific effects. The experience of victimisation differs according to the individual and can be influenced by the perceptions of those with the ability to grant victim status (Hoyle, Bosworth and Dempsey, 2011: 315). Christie argues that ideal victims are primarily those who are able to be heard (Christie, 1986: 21), and awareness campaigns certainly generate a platform for victim stories. Ideal victims are labelled as such due to the status of public

attention granted to certain victims (Christie, 1986: 18), often granted this status due to public awareness campaigns which select stories of trafficking and prioritise some types of experiences over others.

The ideal victim is trafficked for sexual exploitation

A clear commonality amongst the campaigns reviewed is a prioritising of sex trafficking as opposed to trafficking for other forms of labour in the experiences of trafficking depicted. Four out of ten of the campaigns focus almost exclusively on the issue of sex trafficking, with the primary intentions of campaigns encapsulated in poster slogans and information leaflets. The Purple Teardrop campaign, established by NGO Soroptimist International, seeks to bring attention to the issue of 'Women and children trafficked for prostitution'. The Body Shop campaign, run in conjunction with the non-government organisation Child Wise, asks people to sign a petition to help stop children being 'tricked into trafficking for sexual exploitation'. The Euro 08 campaign, released prior to and during the European Soccer Cup in 2008, was directed at participants and spectators attending the event who may seek out sexual services from women who are 'exploited or trafficked'. The fourth campaign, The Truth Isn't Sexy, endorsed by the UK Human Trafficking Centre and Crime Stoppers, utilises graphics designed to look like print ads for sexual services in order to draw attention to women who have been forced into the sex industry, with the tag line that, 'the truth isn't sexy'.

The other campaigns all draw attention to sex trafficking, but also present narratives of victims trafficked into other forms of labour in their campaign posters and fact sheets. The Blue Blindfold campaign, which originated in the UK and Ireland but was also released in the United States and Canada, declares that 'grown men and teenage boys are used for forced labour, older women as domestic workers'. The Blue Heart campaign, funded by the United Nations Office on Drugs and Crime (UNODC) and the United Nations Global Initiative to Fight Human Trafficking, points to forced service in the hospitality and construction industries as well as the sex industry. The Hidden in Plain Sight and Rescue and Restore campaigns established by the US Government, and the Alliance to End Slavery and Trafficking (ATEST) campaign created by a coalition of 11 US human rights and anti-slavery organisations, call for increased awareness and reporting of trafficking in all industries, not specifically the sex industry. The campaign materials for the European Commission's EU Anti-Trafficking Day (held annually since 2007) depict trafficking in a number of industries including hospitality and cleaning services.

While these six campaigns included narratives of trafficking in a number of different industries, what is notable is that they universally include victim

stories of trafficking into the sex industry. It is also conspicuous that those campaigns that have chosen to focus on trafficking in only one industry have chosen trafficking for sexual exploitation. As the only form of trafficking featured in all ten campaigns and exclusively in nearly half of the campaigns, sex trafficking is positioned as somewhat unique and also more prevalent or critical an issue.

The representation of victims of sex trafficking in all campaigns and exclusive depiction of sex trafficking victims in several, contributes to an understanding of trafficking as directly associated with the sex industry, and a typical understanding of a trafficking victim as someone forced into prostitution. This would not be surprising to Christie, as this slavish devotion to the sexual exploitation narrative not only constructs a particular type of victim but also a specific offender.

Christie argues that an ideal offender is unknown to the victim and excludes those who have also been victimised (Christie, 1986: 25). The existence of this ideal offender can greatly enhance society's concern for the ideal victim. In these human trafficking awareness campaigns, the offender is rarely depicted. Only the Euro 08 campaign shows a possible offender in the form of a man holding up an auction paddle, ostensibly bidding on a person to be 'bought'. Despite the lack of obvious depictions of offenders, they can be easily imagined due to the frequent representation of the sex industry as central to the exploitation of the trafficking victim. It is the sex industry itself and the actors within it who are suggested to be at fault. The pimp, the brothel owner and the man who buys sex are the ideal offenders. They are deemed irredeemable, engaged in a socially unacceptable trade, and profiting from the rape and sexual abuse of women. The struggling farmer or the person who buys cheap orange juice may contribute to the demand for trafficked labour as equally as a brothel owner, yet they are less likely to be demonised. This establishment of an ideal offender as one closely associated with the sex industry serves to reinforce the blamelessness of the target audience of awareness campaigns. The demand for sexual services, already viewed as undesirable even in places where it is legalised, is seen as the cause of trafficking. Capitalistic modes of exchange, demand for cheap goods and restrictive visa regimes are also frequently identified as causes of trafficking (Sullivan, 2009: 96), with the blame for these factors resting on a much wider sector of the population in destination countries. However, these causes of trafficking serve up a much less ideal offender. Christie argues that the focus on what is perceived to be the worst and least 'humane' type of offender means that 'other acts, not quite that bad, can escape attention and evaluation ... business for the rest of us can go on as usual' (1986: 29). By placing the blame on a socially undesirable other, awareness campaigns allow the target audience to feel outrage at the actions of others, while deftly sidestepping our own complicity in the pull factors of trafficking.

The ideal victim is a young woman or girl

The depiction of the age, gender and race of victims through the choice of primary images in these campaigns also contributes to a particular understanding of trafficking and the construction of the typical trafficking victim. Christie argues that the ideal victim should be perceived as weak, and vulnerable to attack (1986: 21). Anti-trafficking campaigns conform to this understanding of victims by selecting predominantly young female victims, exploiting the assumption that they are weak as a result of their gender and age.

Three of the campaigns only depict female victims of trafficking and they are also, not surprisingly, the three campaigns with a primary or exclusive focus on trafficking for sexual exploitation. The Euro 08 and Purple Teardrop campaigns use images of women crying and appearing to be in distress. The Truth Isn't Sexy campaign shows women's legs in sexy lingerie, with headlines such as 'Fancy it' and 'Punish me'. The text accompanying these ads tells stories from the first person perspective of women trafficked into the sex industry, finishing with the line, 'the truth isn't sexy'.

Images of women as victims of trafficking are also dominant in the other campaigns. The Blue Hearts campaign, the Body Shop campaign, and the Hidden in Plain Sight campaign all acknowledge in their campaign materials that trafficking victims can be both male and female. However, there is a notable absence of men in their choice of images and stories. The Body Shop campaign materials often use a distinctive yellow and pink logo; however, when images of individuals do appear in their print materials and on the website, they are primarily of young girls, and in one instance of a girl standing behind bars. This image evokes a very conventional understanding of trafficking as a crime in which victims are physically imprisoned. The Blue Hearts Campaign and the Hidden in Plain Sight campaign both explicitly state that victims of trafficking are both male and female, yet the only male victims of trafficking depicted in the campaign materials are young boys.

Only three campaigns, ATEST, EU Anti-Trafficking Day and the Blue Blindfold campaign, prominently acknowledge or represent male victims of trafficking. Notably, neither the Blue Blindfold campaign nor the ATEST campaign use imagery of victims at all. Blue Blindfold uses images of men and women blindfolded to represent their ignorance of the crime of trafficking, while the ATEST campaign communicates only in text. This leaves the EU Anti-Trafficking Day campaign as the only awareness raising effort using imagery of victims to prominently feature adult male victims of trafficking. In this instance, the images are clearly not of real victims. Instead, the campaign uses images of men's arms and women's legs manipulated to look as though their skin has grown to permanently attach them to items such as heels (perhaps to represent the sex industry) and brooms (possibly to

represent domestic servitude). Of the ten campaigns reviewed, it is the only one to use imagery to draw attention to adult male victims of trafficking. However, none of the ten campaigns feature a 'real' or embodied adult male victim of trafficking in their primary or secondary images.

The representation of women in trafficking campaigns has been a source of previous criticism. Andrijasevic notes that female figures in trafficking campaigns are often scantily clad and never shown looking towards the audience, reiterating the notion that victims are passive entities and bodies 'to be gazed at' (2007: 38). This criticism was originally levelled at the International Organisation of Migration campaigns. The organisation has since responded to the criticism by abstaining from the presentation of 'eroticised pictures of naked, mistreated women' (Schatral, 2010: 239). It is also a valid criticism of the campaigns analysed in this study, especially with the imagery chosen for the Euro 08 campaign which includes an image of a girl in sexy attire standing in what is assumed to be a brothel. The Truth Isn't Sexy campaign also depicts women in highly sexualised clothes and poses, though seems to be using this imagery to intentionally juxtapose the objectification of women in commercial settings with the exploitation of trafficking.

The favouring of young female subjects for trafficking campaigns contributes to what Schatral describes as a 'gender specific and gender hierarchic' phenomenon (Schatral, 2010: 252). Adult male victims are rendered invisible by awareness campaigns that prioritise young, female victims. This is perhaps to be expected in campaigns that only focus on trafficking for sexual exploitation where the pervading assumption is that the majority of victims are female. However, this focus alone overlooks male victims of trafficking in both the sex industry and for other forms of labour. Furthermore, in campaigns addressing a wider range of trafficking, adult males are still largely absent from the narrative, contributing to a discourse where women who migrate become trafficked, while men who migrate simply disappear. While statistics on trafficking report that women are most often the victims (UNODC, 2011: 11), data is skewed by the fact that organisations recording victim statistics may only offer services to a specific type of victim – typically female victims or victims of sexual exploitation (Di Nicola, 2007). This results in the under-representation of male victims of trafficking in statistics. In addition, many cases of trafficking involving male victims, or victims who have not been trafficked into the sex industry, are often recorded as cases of labour exploitation rather than trafficking (Laczko, 2007: 4). This again results in the over-representation of female victims of sex trafficking in the statistics.

The construction by campaigns of trafficking victims as typically female, young and vulnerable should not be viewed as unintentional. Rather, these depictions are considered most likely to capture the public's attention and support. Jahic and Finckenauer argue that human trafficking discourse has

surrounded a sympathetic characterisation of victims as 'young, usually uneducated, willing to move abroad, and attracted by a flashy lifestyle' (2005: 26). These observations are echoed elsewhere (Chapkis, 2005, O'Connell Davidson, 2006: 14–15, Pearson, 2002), with Jahic and Finckenauer (2005: 27), Doezema (2000) and Chapkis (2003: 931) all arguing that this stereotype has been adopted in order to create a more sympathetic protagonist for the public and policymakers to be moved by.

The choice of explicitly weak or vulnerable victims for depiction in these campaigns perpetuates what Christie observed to be a societal expectation that the ideal victim is weak and that 'sufficient strength to threaten others would not be a good base for creating the type of general and public sympathy that is associated with the status of being a victim' (Christie, 1986: 21). The depiction of these victims in awareness campaigns subscribes to problematic conceptions of strength and weakness by implying that supposed physical weakness (represented by femininity or youth) are precursors to trafficking. In reality, the physical strength of the victim is largely irrelevant and these depictions ignore understandings of trafficking that are vital to addressing it. The assumed physical strength of a man will not protect him from becoming a trafficking victim. Power imbalances between migrants and citizens, economic imbalances between worker and 'employer', and the virtual necessity to migrate for work in order to survive (Sullivan, 2009) contribute significantly more to the vulnerability of an individual to traffickers than assumptions of physical strength based on gender

These constructions of 'passive victimisation' (Hoyle, Bosworth and Dempsey, 2011: 319) undermine the status of men as potential victims of trafficking and also undermine the agency of migrant women, especially migrant sex workers. In particular, the characterisation of victims of sex trafficking as virginal, helpless and childlike marginalises them by reinforcing notions of female dependence (Doezema, 2000). The Hidden in Plain Sight campaign epitomises this concept with a billboard depicting a young girl in a black and white image, with bright red lines drawn over her mouth, pictorially gagging her. The tag line of the campaign reads, 'she can't ask for help', simultaneously decrying the powerlessness of her situation, whilst obliterating her agency.

The ideal victim is 'innocent' and 'blameless'

Central to Christie's conceptualisation of the ideal victim is that they must be perceived not only as weak but also 'blameless' in their victimisation (1986: 19). This theme is clearly evident in anti-trafficking awareness campaigns where the 'origin stories' of victims present the blamelessness or innocence of the victim as an essential ingredient. The Blue Heart Campaign provides a factsheet with three stories of trafficking. One of these features 'Peter and Kevin' who are duped by a construction manager.

This is a rare example of a campaign highlighting the experiences of adult male victims. The other stories focus on young women. 'Maria' is introduced as a 15-year-old who was persuaded by a new friend to come to the capital city for a lucrative job. Once there, she was drugged, raped and then forced into waitressing and ultimately prostitution. The other story features 'Adenike', also 15, who was offered a job as a hairdresser and instead forced into prostitution. Another campaign offering an origin story, The Truth Isn't Sexy, tells of a girl abducted from Albania and sold into prostitution. These stories of trafficking are common in policy discourse and public debate where victims are typically depicted as girls and young women who are seeking work in another industry, but are forced into the sex industry (Chapkis, 2003: 929, Soderlund, 2005). This explicit lack of consent to participate in sex work is a key ingredient in the construction of the ideal trafficking victim.

In Christie's deconstruction of the ideal victim, he argues that innocence, or blamelessness, is denoted through the victim's engagement in respectable activities (1986: 19). In Christie's elaboration, he describes an elderly woman who, returning home after caring for her sister (a respectable pursuit), is attacked in daylight on the street (where she could not reasonably expect to be assaulted). He compares this to the less sympathetic story of a young man in a bar assaulted and robbed by a male acquaintance, or of a sex worker making an accusation of rape.

In the awareness campaigns' construction of the ideal trafficking victim, the stories of women who were seeking a better life through respectable employment (waitressing, hairdressing) are prioritised over those who intended to work in the sex industry, despite the fact that both groups are ultimately victimised and exploited. In this instance, the social stigma attached to prostitution, even in societies where sex work is legal, seems to taint victims of trafficking who began their journey intending to migrate for sex work. The intent to participate in an industry that is deemed unsavoury and unsafe somehow diminishes the exploitation these women experience, making them less worthy of the showcase status granted to other victims of trafficking.

Doezema (2000) argues that narratives white-washing the existence of trafficking victims who have chosen to work in the sex industry, and depicting only 'innocent' and 'virginal' victims, have pervaded trafficking discourse since the nineteenth century. She argues that:

> The effect of these motifs of deception, abduction, youth/virginity, and violence is to render the victim unquestionably 'innocent'. Desperately poor, deceived or abducted, drugged or beaten into compliance, with a blameless sexual past, she could not have 'chosen' to be a prostitute... The construction of a 'victim' who will appeal to the public and the policy makers demands that she be sexually blameless. (Doezema, 2000: 36)

The imagery and stories chosen by anti-trafficking awareness campaigns contribute to the construction of a Madonna/whore dichotomy of victims of sex trafficking in both the minds of decision-makers and the general public (Farrell and Fahy, 2009: 623). The key distinguishing feature is women's consent, or lack thereof, to initially agree to work in the sex industry. Jordan argues that this dichotomy results in the treatment of trafficking victims as either '"madonnas" (innocent, vulnerable) who need assistance and support, or as "whores" (conniving, tainted) who need redemption and rehabilitation' (Jordan, 2002: 30). This construction of the ideal victim as 'blameless' only if they have never consented to work in the sex industry has significant ramifications for both the identification and support of trafficking victims. Hoyle, Bosworth and Dempsey have found that this dichotomy can create 'strong incentives' for women to deny that they were aware they would be involved in sex work, as they 'believe that assistance and support will be conditional on being perceived as "pure victims"' (2011: 322).

Conclusion

There is little doubt that anti-trafficking awareness campaigns are limited in the messages they are able to communicate to the public due to the need to deliver a brief, compelling picture of the trafficked experience. However, the choices made by the architects of these campaigns result in the exclusion of certain victims, implicitly defining them as less worthy of attention, and essentially rendering them invisible.

This construction of an ideal victim of trafficking has occurred through the choice of imagery and 'origin stories' put forward by anti-trafficking awareness campaigns. Their consistent focus on trafficking for sexual exploitation, depictions of primarily young female victims and emphasis of the 'blamelessness' of victims satisfies society's expectations for victims who are weak and innocent. This construction not only oversimplifies an extremely complex issue but also diminishes the victim status and experiences of those who do not meet the ideal victim criteria. The perpetuation of a hierarchy of victims damages efforts to identify trafficking victims and also serves to obscure some of the key causes of human trafficking. Ultimately, the focus on only an 'ideal victim' is likely to undermine attempts to gain an accurate picture of both the scale and nature of trafficking and hinder efforts to design appropriate methods for combating the crime and supporting victims.

Note

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1. Campaigns analysed: Blue Blindfold (www.blueblindfold.co.uk); Blue Hearts (www.unodc.org/blueheart); Purple Teardrop (www.purpletearddrop.org.uk); Body Shop 'Stop' campaign (www.thebodyshop.com.au/stop); Rescue and Restore (www.acf.hhs.gov/trafficking); ATEST (endslaveryandtrafficking.org); Hidden in Plain Sight (www.dhs.gov/files/programs/humantrafficking); Euro 08 (www.frauenhandeleuro08.ch/en/spot); EU Anti-Trafficking Day (ec.europa.eu/anti-trafficking); The Truth Isn't Sexy campaign (thetruthisntsexy.com/campaign).

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22

People Smuggling and State Crime

Michael Grewcock

Introduction

On 16 April 2009, an Indonesian fishing vessel carrying 47 asylum seekers exploded into flames near Ashmore reef off Australia's north-west coast, killing five people and injuring 40 others, including two crew members.[1] Code-named SIEV 36,[2] the boat was one of 23 intercepted by Australian authorities between 1 July 2008 and 29 June 2009 (Phillips and Spinks, 2012) as part of an ongoing mobilisation against people-smuggling. The subsequent coronial inquiry found that the explosion occurred after one or more of the passengers, fearful of being forcibly returned to Indonesia, set fire to petrol below the deck with a view to disabling the boat.[3] While no prosecutions relating directly to the deaths seem likely,[4] Australia's political leaders were quick to attribute blame. The following day, Prime Minister Kevin Rudd, declared:

> People smugglers are engaged in the world's most evil trade and they should all rot in jail, because they represent the absolute scum of the earth. We see this lowest form of life in what we saw on the high seas yesterday (Griffiths, 2009, online).

Rudd's sentiments about smugglers have been reiterated many times by his successor, Julia Gillard, and leading politicians from the major parties, particularly following the deaths of at least 48 passengers on board the SIEV 221 that foundered on the rocks of Christmas Island in December 2010 (Ewart, 2010), and the estimated loss of over 200 lives when two separate boats sank off the coast of Indonesia en route to Australia in November and December 2011 (Allard, 2011b, Allard, Flitton and Needham, 2011).[5] The official consensus that people smuggling represents a profoundly immoral and extreme form of criminality is evidenced further by the bi-partisan support for an exceptional legal and policing regime that locates people smugglers alongside the most violent and homicidal offenders and, at the

time of writing, by repeated declarations from both sides of mainstream politics that as a priority, they aim to 'break the people smuggling business model'[6] by enforcing the offshore processing of asylum applications. This has largely confined the heated political debates on this issue to arguments over how best to 'stop the boats'[7] and in particular, whether the government's proposed 'Malaysia Plan' should be preferred to the Opposition's plan to re-open an immigration detention centre on Nauru.

This chapter argues that rather than using these deaths as a rationale for preventing asylum seekers from exercising their rights to enter Australia and claim protection, we should focus instead on the criminogenic role border policing plays in generating risks for those forced to make illicit border crossings (Weber and Pickering, 2011)[8] and the abusive impact of the anti-smuggling regime (Weber and Grewcock, 2011). Boat tragedies such as those outlined above will not always operate as a deterrent to desperate people (Guest, 2012). For many refugees faced with the prospect of being stranded in camps or vulnerable stateless communities in transit countries like Malaysia, unauthorised boat travel is a risk worth taking.

Moreover, from a criminological perspective, Australia's highly punitive anti-smuggling laws have failed in their own terms. Between 1989 and 1999, when the current legislative framework was put in place,[9] 176 boats carrying 6,845 passengers arrived. Between 2000 and 2011, during which time the legislation was amended to extend policing and sentencing powers and widen the definition of smuggler, 382 boats carrying 22,750 passengers arrived (Phillips and Spinks, 2012). While many factors have contributed to these patterns of travel, there is little evidence that organised criminal networks are a primary reason why refugees seek protection in Australia, especially given the intensity of the conflicts and persecution in the major source countries of Afghanistan, Iran, Iraq and Sri Lanka.

It also seems clear that the punitive impact of the anti-smuggling regime outweighs any deterrence value attributed to it. Most of the 'smugglers' arrested and prosecuted to date have been crew members, typically drawn from impoverished fishing communities and marginal to any smuggling organisation, or lower level organisers who are also refugees.

Positing these people within a paradigm of transnational organised crime obstructs our understanding of the sociology of forced migration; obscures the humanitarian role played by smugglers; and distorts meaningful understandings of transnational crime. It also provides a rationale for measures such as mandatory detention, offshore processing and forced removal that despite their abusive impact on refugees, have been justified on the basis of deterring 'queue jumpers' from availing themselves of the services of smugglers (Grewcock, 2009, Smit, 2011). Australia's anti-smuggling regime therefore does not represent a legitimate front in a war against transnational organised crime; rather it operates as a form of neutralisation (Cohen, 2001) that in the process of diverting attention from the legitimate expectations

and protection needs of refugees, sustains patterns of serious and systemic abuse that can be defined as state crime (Green and Ward, 2004, Grewcock, 2009).

In developing these arguments, this chapter outlines the main elements of the anti-smuggling legal regime; examines the prosecution experience and the emerging criticisms of it; and, drawing on state crime literature, critically analyses the models of deterrence and punishment that underpin present border policing policy. It offers an alternate perspective on people smugglers as illicit migration agents and concludes that because border controls ensure that smuggling operates as an integral part of the refugee experience, the smugglers' 'business model' will only be broken by governments facilitating entry rather than devoting enormous resources to abusive policing measures designed to disrupt the free movement of refugees.

The prosecution regime

Australia's anti-smuggling practices are underpinned by an exceptional and punitive legal regime.[10] Under s233A *Migration Act* 1958, smuggling is defined as the organising or facilitating of the entry or proposed entry of a non-citizen, who has no lawful right to come to Australia. Contrary to international law,[11] this broad definition includes smuggling without material benefit solely for humanitarian purposes; while in order to circumvent imminent legal challenges, legislation was introduced into federal parliament in November 2011 making it clear that 'unlawful non-citizens' includes people who are subsequently recognised as being entitled to protection by the Australian government.[12] In practice, the basic smuggling offence serves to define two types of aggravated smuggling offence: where there is exploitation or danger of death or serious harm[13] or when five or more passengers are being carried.[14] Given that virtually all boats that were intercepted since 1991 have carried more than five passengers,[15] being charged with an aggravated offence is the norm. The penalties for smuggling offences are severe: the maximum penalty for the basic offence is 10 years imprisonment and, for the aggravated offences, 20 years imprisonment. Moreover, the aggravated offence of carrying five or more people attracts a mandatory minimum sentence of five years imprisonment with a non-parole period of three years; for exposing passengers to high risk and repeat offences the minimum increases to eight years imprisonment with a non-parole period of five years.[16]

Prosecutions under this legislation have risen steadily with the recent spike in boat arrivals. Between November 2007 and October 2011, 493 people were charged with smuggling offences (Owens, 2012). Active cases before the courts increased from 32 on 30 June 2009, to 102 on 30 June 2010 to 288 on 18 May 2011,[17] while between 2008 and December 2011, there were 227 convictions, 66 discontinuations and 33 acquittals (Dodd, 2012). These

cases have overwhelmingly involved crew members, rather than those with a more primary organising role. Between 19 May 2009 and 2 April 2010, six alleged organisers were charged in relation to two boats carrying 1,209 passengers; while between 9 October 2008 and 10 March 2011, 347 crew members were charged in relation to 133 boats carrying 5,805 passengers.[18]

Policing the crews

The predominance of crew arrests is partly the product of a policing strategy that relies heavily upon interdiction. Boat crews are immediately vulnerable to naval interception, while organisers typically do not participate in the boat journeys and have to be extradited from overseas (Owens, 2012). The arrest and prosecution of significant numbers of crew members might provide imagery to sustain the government's repeated claims that its anti-smuggling measures are having an impact but, rather than acting as a deterrent, it simply reinforces the punitive and abusive character of Australia's border policing strategy.

The legal and policing regime impacts severely on crew members in a number of ways. First, contrary to the basic principle that a person cannot be detained without charge, most must spend prolonged periods in immigration detention before being charged and gaining access to lawyers – as of 17 October 2011, 57 crew, including 14 acknowledged to be children, were in immigration detention[19] and as of February 2012, the average time spent in detention prior to charge since the end of 2008 was 161 days.[20]

Second, child crew members are particularly vulnerable. Minors are not subject to the mandatory sentencing provisions and are generally returned without being prosecuted. However, it need only be shown 'on the balance of probabilities'[21] that a person was aged 18 or over when the offence was committed. Further, the methods used to determine the age of crew members, especially the use of wrist x-rays, are widely discredited (Dodd and Taylor, 2011, Carbonell, 2011) and are now the subject of an Inquiry conducted by the Australian Human Rights Commission (AHRC, 2011). In 2011, there were up to 50 people facing charges who disputed their age (O'Brien and Marriner, 2011) and at least 35 smuggling cases have been dropped because of the unreliability of these tests, although many accused have had to endure months in detention and on remand in adult jails before this has happened (Dodd and Taylor, 2011, O'Brien, 2011, O'Brien and Marriner, 2011). In one case, an intellectually impaired 15-year-old boy spent nearly two years in prison before his case collapsed. In the absence of any serious background checks by the Australian authorities, his solicitor had to travel to Indonesia to obtain evidence of his age (O'Brien, 2011).

Third, the mandatory sentencing regime is requiring courts to impose sentences significantly higher than those that would normally apply. Prior to mandatory sentencing coming into effect in September 2001, only 13 of the 148 people sentenced for smuggling offences received sentences of

four years or more. Typically, for a first offence, a crew member would be sentenced to two to four years, to be released on a suspended sentence after serving half,[22] in effect, most sentences were served on remand.

Mandatory sentencing is rarely used in Australia. The only analogous regime that specified minimum terms of imprisonment for a first offence operated in relation to a range of property offences in the Northern Territory between 1997 and 2001. That scheme was extensively criticised for its excessively punitive and damaging impact on Indigenous people (Johnson and Zdenkowski, 2000). It was partly with that experience in mind that the Australian Law Reform Commission (ALRC) recommended in 2005 that no federal offence should carry a mandatory minimum term of imprisonment (ALRC, 2005). Moreover, at least 10 judges in smuggling cases have voiced concerns about the mandatory sentencing regime, making it clear they would have imposed much lesser sentences had they had the discretion to apply the normal principles (Gordon, 2012),[23] while in January 2012, Greens Senator Sarah Hanson-Young introduced a bill to abolish the mandatory minimum sentences for smuggling offences, although it is extremely unlikely that it will be passed.[24]

The concerns about mandatory sentencing are underpinned by the socio-economic context in which the crews operate. Current smuggling operations are shaped by more than just an available population of refugees seeking entry into Australia. Profiles of those charged highlight how relatively small sums of cash are offered to entice poorly educated people without regular incomes or knowledge of the smuggling operations (Gordon, 2012, O'Brien and Marriner, 2011). As Balint (2005) documents, smuggling became an important source of income for fishing communities squeezed by the expansion and zealous policing of Australia's fishing zone after 1989. By 2001, this helped create a situation where fishermen were 'offered sums of, on average $200 [or] as little as $60', with crews often including 'only one or two experienced seamen, with the rest made up of young men or boys who ha[ve] never been to sea before' (Balint 2005: 144–5). Such a cohort can hardly be described as operating according to an established 'business model'.

Policing the 'kingpins'

There is no independent research that provides detailed insight into regional smuggling networks. Periodically, claims are made regarding the successes of the various disruption programmes conducted by Australian and regional policing agencies. For example, in Indonesia between September 2008 and May 2011, there were reportedly 147 identified disruptions; 3,813 foreign nationals (presumably refugees) were detained; and 87 facilitators/organisers were arrested (Spinks *et al.*, 2011: 18). However, this does not necessarily support the proposition that people smuggling into Australia is the product of large-scale, entrenched organised crime. Clearly, some form of organisation is required but it is misleading to characterise the organisers brought

before Australian courts as criminal 'kingpins'.[25] Typically, those convicted of organising offences have had protection needs of their own and have become involved in illicit travel arrangements predominantly due to their personal experience of being a forced migrant (Kelly, 2010, Schloenhardt, 2011).

This suggests that people smuggling networks are organised on a fluid and episodic basis, with key roles on the ground being played by people committed as much to successful human movement as to private profits. Rather than viewing regional smuggling networks through the prism of organised crime and its attendant assumptions about business models, we could understand them instead as a distorted form of collective organisation that has arisen as a result of a transient community's migration needs. Just as formal migration requires agents, so too does its informal equivalent. Two examples of high profile organisers illustrate this point.

Ali Al Jenabi

Ali Al Jenabi is an Iraqi national who was extradited in 2003 from Thailand, where he had been imprisoned for seven months, to face charges relating to the organisation of four boats carrying 359 passengers from Indonesia between 2000 and 2001. He eventually pleaded guilty to two charges and in September 2004 was sentenced to eight years imprisonment with a non-parole period of four years – the longest sentence imposed to date for an 'organiser'. Al Jenabi was released from prison in June 2006 but was immediately placed in immigration detention for a further 20 months, for which the Australian Human Rights Commission recommended he be paid $450,000 compensation.[26] During that time, Al Jenabi applied for a protection visa on the grounds that he and his family faced a long history of persecution in Iraq – Al Jenabi, his father and his brother were all imprisoned in Abu Ghraib and his brother was killed (Ewart, 2011). After protracted delays, the application was refused on character grounds as a result of his convictions, and despite his release, he remains in limbo on a bridging visa. Al Jenabi's role as a smuggler was intimately connected to his personal circumstances. Those he helped smuggle to Australia included his mother, two sisters, three brothers and an uncle – all of whom have refugee status and are settled in Australia. In sentencing Al Jenabi, Judge Mildren commented:

> I accept that the prisoner was concerned to assist his family and that he did what he could on occasions to assist others who were unable to pay fully... I accept also that he did show special consideration for families with children. I also accept that humanitarian acts are not necessarily inconsistent with some financial reward... I accept that the prisoner was not solely motivated by money... Nevertheless, there was a money motive; that activity was how he lived and supported his own family.[27]

Hadi Ahmadi

Hadi Ahmadi is a dual national of Iran and Iraq and the first person to be extradited from Indonesia to Australia to face people smuggling charges. Ahmadi, who is recognised as a refugee by the United Nations High Commissioner for Refugees and who made two failed attempts to come to Australia by boat before running out of money, faced charges in relation to four boats carrying a total of 900 passengers. Ahmadi was accused of 'working for the "number one people smuggler" in Indonesia at the time' (Weber, 2010, online) with his role described as 'finding accommodation for asylum seekers, collecting fees and taking them by bus to beaches where boats were waiting' (Raphael, 2010, online). He pleaded guilty in relation to two of the boats and was sentenced in September 2010 to seven years and six months imprisonment with a non-parole period of four years. Much of the evidence against Ahmadi was provided by another refugee who had also worked for smugglers but who was paid $250,000 by the Australian Federal Police to be an informant and now has Australian citizenship (Weber, 2010). However, like Ali Al Jenabi, Ahmadi's actions objectively served a humanitarian purpose – 866 (approximately 97 per cent) of those he assisted were subsequently granted protection visas by the Australian authorities.[28]

Both the above cases highlight the inherent tensions between the humanitarian and criminalisation perspectives on people smuggling. From a humanitarian perspective, the legitimacy of refugees is not determined by their methods of travel but by their needs for protection. For a refugee confronted with border controls and with no immediate prospect of resettlement, the use of smugglers is an often necessary act of survival and part of the wider forced migration experience. Individual choices need to be made about the level of risk one is prepared to take – even if the choice is not particularly well informed – but, in the absence of alternatives, whether the smuggler is paid for the service provided is largely beside the point. Hoffman's survey of 22 refugees who used smugglers to get to Australia found that '[a]lthough the majority ... were critical, about one quarter considered the smugglers in a positive light as people who helped them find a place of safety' (Hoffman, 2010: ii). And as one of those assisted by Al Jenabi commented: 'Ali Al Jenabi is absolutely hero' (Ewart, 2011, online).

By contrast, the criminalisation and demonisation of smuggling reflects the extent to which official constructions of the legitimate refugee are defined by the policing and migration policies of the state. Australia's refugee policies have never focused primarily on the protection needs of the individuals concerned; rather, they have been based on the resettlement of predetermined numbers of refugees chosen according to criteria that have also included labour market shortages, geo-political considerations and until the 1970s, compliance with the White Australia Policy (Grewcock, 2009). Within this paradigm, smuggling does not constitute a

'threat' simply because of its real or imagined associations with organised crime but because it enables refugees to claim protection on their own terms in accordance with their legitimate expectations that the Australian state will honour its formal commitments to universal human rights.

This does not mean that smugglers will always have impeccable moral scruples or that passengers do not face serious risks. As I set out below, there are possible formal pathways that would be infinitely preferable. However, the objectively humanitarian role of smuggling sits in contrast to the inherently and systemically abusive measures deployed by successive Australian governments to deter people smuggling, even when the human cost is known.

Deterrence at all costs

Deterrence is one of the legitimising ideological threads binding together Australia's border policing policies. In particular, the anti-smuggling regime sits alongside the mandatory detention of all unauthorised non-citizens and various forms of offshore processing, the primary aim of which is to deter any unregulated access to the refugee determination processes established in accordance with Australia's obligations under the 1951 UN Convention on Refugees. Both mandatory detention and offshore processing are characterised by destructive levels of state force being exercised against unauthorised migrants through mass imprisonment, interdiction and forced removal. Within the official discourses of border policing, such practices are deemed necessary to deter the abusive role of smugglers, even though the state's practices have a severe impact on those they supposedly aim to protect.

Mandatory detention

Since its introduction in 1992,[29] the mandatory detention policy has repeatedly been justified as a form of deterrence against 'queue jumping' and 'smuggling'. In a display of misplaced triumphalism, Senator Jim McKiernan, Chair of the Joint Standing Committee on Migration, proclaimed in 1993: 'the firm government policy on detention of non-documented arrivals has... already paid dividends. The gangs who benefit from the business of carrying human flesh for profit appear to have received the message' (McKiernan, 1993: 5).

However, as the numbers in detention began to grow in the late 1990s, so too did the disclosures of the damaging impact indefinite detention was having on detainees. As I document elsewhere (Grewcock, 2009: 196–241), by the early 2000's (and continuing at the time of writing),[30] there was irrefutable evidence before the government that mandatory detention was causing widespread physical and psychological damage to detainees, many of whom were already very vulnerable as a result of their experiences of persecution and flight.

Some of the most damning evidence was contained in the Human Rights and Equal Opportunities Commission (HREOC) Report into the Detention of Children (HREOC, 2004). Had the extraordinary catalogue of abuse and self-harm outlined in this report been identified in any other context, such as a school, where the state has responsibility for children, there undoubtedly would have been a major political scandal and very likely a criminal investigation. As it was, the government was given options for immediate reform. The inquiry made a number of recommendations including the release of all children with their parents from immigration detention; amendments to the *Migration Act* to require compliance with the Convention on the Rights of the Child; and the appointment of an independent guardian for unaccompanied children (HREOC, 2004: 2–3). However, the pre-eminence of deterrence as a moral frame for government policy was exemplified by the federal government's response. On the day the report was published, the immigration minister told journalists why she was rejecting the recommendations: 'What it says to people smugglers is if you bring children, you'll be out in the community very quickly, and that is a recipe for people smugglers to in fact put more children on these very dangerous boats and try to bring them to Australia' (Yaxley, 2004, online).

The Coalition government's hardline response to the report generated criticisms from within its own ranks and the then Labor Opposition. While this eventually led to formal commitments to remove children from detention (Grewcock, 2009: 224–30), children remain a significant part of the detainee cohort. By February 2011, 1,040 children were detained of whom 226 were under six years old; 169 aged six to nine; and 86 aged 10–12.[31] Of these children, 381 were unaccompanied[32] and 786 had been detained for between three and 18 months.[33]

This continued preparedness to expose even young children to abusive detention environments reflects the shared philosophical view of the Labor and Coalition parties that unauthorised refugees have no legitimate claim to personal agency. Decisions about whether and under what circumstances unauthorised refugees are detained, moved, allowed outside contact or released are solely matters for the state. Within this paradigm, unauthorised refugees become objects to be manipulated in the wider offensive against smuggling and unauthorised movement. Increasingly this offensive is being conducted offshore as the Australian government seeks to exclude asylum seekers from its jurisdiction and induce neighbouring states to police smuggling across Australia's borders; for example, by persuading the Indonesian government to introduce anti-smuggling legislation (Brown, 2011).

Offshore processing and the externalisation of border controls

Since the introduction of the current smuggling laws in 1999, there have been three distinct policy phases in the push to externalise Australia's border controls. The first was the Pacific Solution pursued by the Coalition

government between 2001 and 2007, during which time all unauthorised arrivals were forcibly removed to detention centres in Papua New Guinea and Nauru.[34] The Labor government formally ended this policy in 2008 but replaced it with a strategy of detaining all unauthorised arrivals on Christmas Island although, from 2010, pressure of numbers led to the use of mainland centres as well. Through diplomatic mechanisms such as the Bali Process,[35] the Labor government also embarked on various efforts to forge a 'regional solution' that included a failed attempt in 2010 to persuade the Timor Leste government to open a regional detention centre (Gillard, 2010, Murdoch, 2011) although, in August 2011, a Memorandum of Understanding was signed with the government of Papua New Guinea to establish an Australian operated processing centre on Manus Island (Bowen, 2011b).

The third variation on the theme was based on the agreement signed by the governments of Australia and Malaysia in July 2011.[36] The stated aim of the agreement was to undercut people smuggling by the transfer to Malaysia of up 800 unauthorised refugees, including unaccompanied children, arriving after the agreement was signed, in exchange for Australia accepting an additional 4,000 refugees for resettlement from Malaysia over four years. The Australian government signed the agreement knowing that Malaysia is not a signatory to the UN Convention on Refugees and ignoring recent evidence of the abuse of refugees, including public caning, by Malaysian authorities (Allard, 2011a, Gordon and Needham 2011). The plan was to be implemented by force if necessary. According to one report, a 'specialist federal police team [was] authorised to use bean-bag bullets, teargas, handcuffs and physical force if necessary to prepare and escort asylum seekers from Christmas Island to Malaysia' (Taylor, 2011, online). Further, those subject to the plan would be placed in a high security unit on Christmas Island, 'regardless of gender or age, because it has two rows of high wire fences that will soon be electrified' (Taylor, 2011, online).

No persuasive reasons were given for how the figure of 800 was reached, other than it being an estimate of the numbers of forced transfers required to act as a 'disincentive' to smugglers.[37] The assumptions of deterrence underpinning the plan were expressed by Prime Minister Gillard, who described the agreement as a 'big blow' to people smugglers and warned that '[i]f someone comes to Australia, then they are at the risk of going to Malaysia and going to the back of the queue' (AAP, 2011, online). This was consistent with the unfounded view expressed by previous governments that detention and removal act as deterrents against smuggling and reinforced the perception that the use of force against asylum seekers is legitimate if they do not seek entry through formal channels.

Despite the government's optimism, the plan was declared invalid by the High Court of Australia[38] in August 2011 on two grounds: first, notwithstanding assurances from the Malaysian government, the immigration minister could not declare Malaysia a suitable destination for transfer given

the Malaysian government has not signed the 1951 Refugee Convention and other relevant human rights instruments; and, second, as legal guardian for unaccompanied children, there would be a conflict of interest if the immigration minister authorised their removal to a state such as Malaysia. The government responded to this decision by immediately introducing into parliament legislation that would enable the immigration minister to declare a country suitable for offshore processing without 'reference to the international obligations or domestic law of that country'.[39] At the time of writing, that legislation has stalled in parliament because the Coalition parties will not vote for it without the government committing itself to re-opening the detention centre on Nauru, thus reviving the Pacific Solution.

Anti-smuggling and state crime

The preparedness of the government to abandon any pretence of privileging formal commitments under international human rights law over the policing of people smuggling adds just another dimension to the entrenched patterns of abuse inflicted on unauthorised refugees by the Australian state. Drawing on the definition of state crime as 'state organisational deviance involving the violation of human rights' (Green and Ward, 2004: 2), both Sharon Pickering (2005) and I (Grewcock, 2009) have argued that the multiple abuses endured by unauthorised refugees are both systemic and deviant. This deviance can be identified formally as the multiple breaches of human rights obligations documented, for example, in relation to mandatory detention and the Malaysia Plan. Deviance can also be identified from below by refugees whose legitimate expectations of free movement in search of protection from the Australian government are systematically thwarted by a combination of border controls, interdiction and anti-smuggling measures designed to prevent any informal movement.

Resistance to state deviance takes many forms – not least being the continued preparedness of refugees to utilise smugglers to seek entry into Australia. But conceptually, it is necessary to challenge attempts to justify human rights abuses on the basis that they are protecting the human rights of refugees from 'scum of the earth' smugglers. Within such legitimising narratives, especially those laced with the language of deterring transnational crime, anti-smuggling constitutes a mechanism for denial (Cohen, 2001: 58–64) that enables governments and state agencies to evade responsibility for the human impact of their policies and to neutralise opposition on the basis that there is a more pressing national interest at stake in relation to migration policy. Such calls to higher national loyalties generally underpin human rights abuses and highlight the tensions outlined above between humanitarian and criminalisation perspectives on smuggling and refugee movement. It is out of this tension that an alternate perspective can be formulated.

A new policy paradigm

The experience of Australia's failed people smuggling policies highlights the need for an approach to illicit migration that recognises the necessity for refugees to move and the legitimacy of their attempts to enter and seek protection from Australia or other states that have signed the Refugee Convention. A perspective structured around the human rights of refugees and the normality of mobility would not prioritise deterrence, detention and punishment. Rather, state resources would be deployed to facilitate entry through an expanded resettlement programme and through state sponsored transport arrangements, such as airlifts, that would enable asylum seekers to arrive safely and live in the community while their claims for protection are processed. Of course, such an approach would challenge the political wisdom that Australians do not want to accept 'too many' refugees. However, Australia's intake of refugees remains tiny by world standards and much of the hostility to 'boat people' arises from re-constructed historical fears of invasion (Grewcock, 2009). Within contemporary narratives of border protection, the people smuggler has emerged as somewhat of a folk devil character (Cohen, 2002). But breaking the 'business model' according to which this character supposedly operates will not occur through the continued expenditure of billions of dollars[40] and the unacceptable collateral human costs. Instead, developed and wealthy states like Australia should be decriminalising smuggling and allowing formal entry for those who need it.

Notes

1. See Inquest into the Deaths of Mohammed Hassan Ayubi, Muzafar Ali Sefarali, Mohammed Amen Zamen, Awar Nadar, Baquer Husani [2010] NTMC 014.
2. SIEV is an acronym for Suspected Illegal Entry Vessel. All unauthorised boats intercepted by the Australian authorities are given a SIEV number in numerical order.
3. See Inquest as cited in Note 1, paras 11–13.
4. One passenger, an Afghan who was subsequently recognised as a refugee, was charged with obstructing a Commonwealth official. The case was ongoing at the time of writing and no other charges look likely to be laid (ABC News, 2011, online).
5. Two other boats are believed to have sunk in 2009 and 2010 but the Australian authorities have not been willing officially to confirm this (see Kevin, 2011, online).
6. This is the phrase used repeatedly by government ministers to describe the current policy goal. See for example the comments of immigration minister Bowen in Sales (2011).
7. This was one of four key policy goals stated by the conservative Coalition Opposition during the 2009 federal election campaign. See for example Abbott (2010).

8. According to Weber and Pickering, approximately '14,000 people are known to have died between 1993 and 2010 trying to enter Europe, or while in detention or during forcible deportation'; while between 2000 and 2010, the similarly calculated toll for Australia is 673 (Weber and Pickering, 2011: 1, 217–21).
9. For an account of how the anti-smuggling laws developed from the 1970s up to that point, see Smit (2011).
10. People smuggling offences are covered by parallel provisions in the Migration Act 1958 and the Commonwealth Criminal Code. In this chapter, I refer only to the Migration Act provisions as these deal with offences committed outside of Australia and are the most commonly used.
11. See article 3, Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organised Crime 2000, which at least requires there be a material benefit.
12. Deterring People Smuggling Bill 2011.
13. S233B Migration Act 1958.
14. S233C Migration Act 1958.
15. Senate Standing Committee on Legal and Constitutional Affairs, Estimates hearing, 26 May 2011, Answer to Question on Notice, No. 61.
16. S236B Migration Act 1958.
17. Senate Standing Committee on Legal and Constitutional Affairs, Estimates hearing, 25 May 2011: 62.
18. Senate Standing Committee on Legal and Constitutional Affairs, Estimates hearing, 22 February 2011, Answer to Question on Notice, No. 25. It should be noted that one of the most significant challenges facing researchers in this area is the absence of systematic data.
19. Senate Standing Committee on Legal and Constitutional Affairs, Estimates hearing, 17 October 2011, Answer to Question on Notice, SE11/0384.
20. Senate Standing Committee on Legal and Constitutional Affairs, Estimates hearing, 14 February 2012: 90.
21. S236B Migration Act 1958.
22. Per Mildren J R *v.* Balu and Others, [2001] NTSC, 27 September.
23. See for example the comments of Mildren J in relation to the two crew members injured on the SIEV 36, The Queen and Mohamid Tahir and Beny, [2009] NTSC, SCC20918236 and 20918261, 28 October. See also Bagaric (2012) and Wilson and Dodd (2012).
24. Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012. In April 2012, a Senate committee recommended that the bill should not be passed but that the mandatory penalties should be reviewed, particularly in relation to those not charged with organising offences (SLCALC, 2012).
25. A term typically used in the media in relation to alleged organisers. See for example Alford and Zumaidar (2012).
26. Mr Al Jenabi *v.* Commonwealth of Australia (Department of Immigration and Citizenship) [2011] AusHRC 45. The government has refused to follow the recommendation.
27. Per Mildren J, The Queen and Al Hassan Abdolamir Al Jenabi, [2004] NTSC, SCC 20302840 and 20302843, 21 September.
28. Trial documents in author's possession. See also Project Safecom, http://www.safecom.org.au/ahmadi-case.htm.
29. See Migration Reform Act 1992.

30. See for example, Amnesty International (2012).
31. Senate Standing Committee on Legal and Constitutional Affairs, Estimates hearing, 21 February 2011, Answer to Question on Notice, No. 259.
32. Senate Standing Committee on Legal and Constitutional Affairs, Estimates hearing, 21 February 2011, Answer to Question on Notice, No. 261.
33. Senate Standing Committee on Legal and Constitutional Affairs, Estimates hearing, 21 February 2011, Answer to Question on Notice, No. 260.
34. I discuss this at length in Grewcock (2009: 152–95).
35. See http://www.baliprocess.net/.
36. Agreement Between the Government of Australia and the Government of Malaysia on Transfer and resettlement, 25 July 2011. See also Bowen (2011a).
37. Senate Standing Committee on Legal and Constitutional Affairs, Estimates Hearing, 24 May 2011: 39.
38. Plaintiff M70/2011 *v.* Minister for Immigration and Citizenship; Plaintiff M106/2011 *v.* Minister for Immigration and Citizenship [2011] HCA 32.
39. Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011.
40. Funding for the immigration department's Offshore Asylum Seeker Management programmes is estimated at $1.05 billion for 2011–12 alone (Spinks *et al.*, 2011: 19).

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23

Against Social Democracy Towards Mobility Rights

Leanne Weber

Introduction

Critics of neoliberalism may long for a return to the kinder days of social democracy. But is social democracy as we know it the answer for a global age? Modern social democracies have pursued social justice objectives through the redistribution of risks and resources within a strictly defined territory. Under conditions of neoliberal globalisation, this state based conception of the boundaries of justice exposes the populations of corrupt and bankrupt states, those who cross borders without legal authorisation to escape conflict and destitution, and others with only tenuous or conditional permission to remain in the affluent countries of the Global North, to circumstances of pervasive insecurity. It is possible to support social democratic ideals as a matter of principle, while recognising their limitations in the face of global inequality. In this chapter I argue 'against social democracy', not due to a rejection of its egalitarian and redistributive principles but on the basis of its inadequate scope in a globalising world. Of course, this problem of scope is as much a problem of the individual sovereignty of nation-states within which social democratic principles have been embedded, as with social democracy itself.

I argue here that a reconceived notion of social justice that is fit for a globalising world must somehow transcend these historical limitations if the promise of 'genuinely *human* rights' (Gready, 2004: 352) is to be realised. This vision entails the denationalisation of ideologies of social justice and their replacement with a broader conception of universal human security. At present it is difficult to imagine a redistributive system that is global in scope (although it could be local in its institutions) and even the attempt to do so is likely to be dismissed as hopelessly utopian. However, some small signs can be discerned in a number of spheres which suggest that the current order of entitlement based on national citizenship is being unsettled. In this chapter I will identify some nascent trends towards the recognition of an individual right to cross state borders, which could

provide one pathway towards the achievement of justice and equality in a globalised world.[1] It is important to acknowledge that crossing borders is not the only, or even the best, solution to resolve deficits in human security. However, if Zygmunt Bauman (1998) is correct that differential mobility entitlements are one of the most powerful forms of social stratification in the contemporary world, then equality in opportunities for border crossing presents itself as an important site for the pursuit of social justice at a global level.

I will develop the argument in four steps. First I will discuss the exclusionary trends that are apparent within contemporary neoliberal societies, using everyday examples from the Australian city where I work and sometimes live, and linking these observations to familiar criminological critiques. I then consider the way in which exclusionary mentalities play out on a global scale under conditions of neoliberal globalisation. Next I consider small signs of movement towards greater global inclusion, concentrating on just one example from within the Australian legal domain. Finally I will reflect briefly on what these developments might mean for a critical criminology that seeks to promote a social justice agenda that reaches beyond geographical borders.

Mobility and exclusion in a globalising world

Erasure from within

At the time of writing, Metlink – the railway operator in the city of Melbourne – has launched a fare evasion poster campaign. This is not surprising given that the neoliberal mentalities underlying the provision of public services in most developed societies have created a ubiquitous interest in curbing fraud and maximising cost recovery. Public information posted on the Metlink website claims more than 225,000 trips are made each day without payment and describes fare evaders as 'unfairly occupying valuable space' that apparently could be taken up by legitimate customers (Metlink, 2011, online). At the same time, railway stations in cities throughout Australia are increasingly demarcated as dangerous places, requiring special policing powers and additional security staff to ensure public safety. Although ostensibly about cost recovery, the mentality driving the Metlink campaign resonates with community safety approaches that depend on categorising people and places to risk categories. In the fare evasion posters, suspect individuals are pictured, not just travelling on trains but also passing through automated turnstiles at the entry to railway stations or standing in various locations within the prescribed area in which validated tickets are required. Fare evasion, it seems, no longer consists merely of travelling on a train without a valid ticket but may be constituted by unauthorised presence within a zone of exclusion intended to keep at bay illegitimate and untrustworthy consumers.

On the Metlink posters, apparently ticketless travellers have been roughly 'scribbled out' of the frame in the way a toddler might draw with their crayons over the lines in a colouring book that is too advanced for their age. In one version of the poster series, the caption reads 'If you don't have a ticket you shouldn't be here'. Clearly, the message intended for those without a ticket is not to avoid getting on the train but rather to stay away altogether. Some of the pictures are so crude as to be comical but others are quite disturbing – both visually and in terms of their underlying conception. In case this seems like an over-reaction from someone who spends too much time reading academic critiques of neoliberalism and too little time travelling on trains, it is instructive to consider the first public comment lodged on the Metlink website when the poster campaign was launched. Clearly unsettled by this exclusionary framing, this perceptive blogger wrote simply: 'I don't think it's very nice to suggest that a person shouldn't exist' (Metlink, 2011, online).

In his book *The Exclusive Society* (Young, 1999) and associated writings, Jock Young argues that late modernity has generated 'an exclusionary tendency towards the deviant' (Young, 2003: 390). Of particular relevance to the Metlink campaign image, Young refers to the social identity element of exclusion as a failure of 'recognition' – effectively sending messages to excluded individuals that they are 'nothing'. It is important to note that this vision of contemporary societies is not one of unremitting exclusion: 'Young thus describes late modern societies as "bulimic": they are inclusive, they culturally absorb massive populations; however, they simultaneously reject, "vomit up" and structurally exclude these same populations' (Aas, 2007: 19). Although his analysis is focused on a heterogeneous 'underclass', Young identifies immigrants as one category of contemporary folk devil that is particularly likely to be subject to structural exclusion and to experience punitive responses from included, and yet insecure, insiders. Those with disputed entitlements to cross external and/or internal borders or to remain in secured zones reserved for members, may find themselves targeted for exclusion at both sub-national and transnational levels. Thus, '[w]hile influenced by profound global movements and transformations, the immigrant also finds himself or herself situated at the heart of local struggles for safety and security' (Aas, 2007: 82).

It seems possible to discern a broad continuity between the forms of physical exclusion from public space that are observable in local settings, and the contemporary imperative towards boundary reinforcement and redefining of membership at the nation-state level. As Bosniak (2006: 133) notes: 'Liberal democracy's allegedly soft interior cannot be entirely insulated from its exclusionary edges; rather, through alienage, that exclusion routinely penetrates the interior as well'. In relation to the external border, Grewcock (2009) has described offshore measures taken by the Australian government to prevent the arrival of asylum seekers as the creation of

'exclusion zones'. With respect to the internal border, Dauvergne (2004: 601) has argued that labelling certain people 'illegal' allows them to be 'erased from within'. In similar fashion, labelling a person a fare evader, as in the Metlink campaign, justifies their symbolic erasure from restricted public space. All share the goal of physically quarantining legitimate and entitled populations, commuters or residents from the threats posed by risky outsiders, driven by an exclusionary mentality born of the 'institutionalised insecurity' that global neoliberalism has generated (Bourdieu, 2003).

Global apartheid

Seen from a global perspective, the intensified sorting of insiders from outsiders is opening up major fault lines in the attainment of human security. As expressed by Aas (2007: 98): 'Rather than creating "citizens of the world", the globalising process seems to be dividing the world; creating and even deepening the "us" and "them" mentality – the national from the foreign'. Citing Bourdieu's dichotomy of 'natives' and 'immigrants', Aas argues that struggles over access to lawful residence and citizenship are overtaking even domestic class struggles and other divisions in the face of the inequalities of neoliberal globalisation. Distinguishing those who belong from those who don't is not a new phenomenon – indeed, it is an age-old human practice. But it is evident that this distinction is sharpening and becoming more contested at the level of the nation-state as the material conditions of neoliberal globalisation push towards greater, although selective, connectivity across national borders. Mobility itself becomes an important human resource under these conditions, so that those excluded from its potential benefits experience a form of global apartheid (Richmond, 1994), being either immobilised or relegated to the precarious category of global vagrants (Bauman, 1998, Weber and Bowling, 2008).

Of course, all of this is broadly consistent with current conceptions of sovereignty within the international legal order and it is hardly surprising to see governments 'locking the doors', as Bauman (2002: 111) puts it, 'against all who knock asking for shelter'. Article 12 of the International Covenant on Civil and Political Rights (ICCPR), for example, guarantees the right for anyone *lawfully present* to move freely *within* a country; ensures *everyone* the freedom to *leave*; and guarantees citizens the right to enter their *own* country. The absence of a right for non-citizens to enter reaffirms the sovereign right to control borders. Even the right to seek asylum as first articulated in article 14 of the Universal Declaration of Human Rights and later in the United Nations Convention Relating to the Status of Refugees 1951 – one of the few cracks in the national sovereignty-border control edifice – is a right to *seek* and *enjoy* in other countries protection from persecution, not a guarantee that entry will be granted. In fact, Emma Haddad argues that refugees are a logical consequence – what she calls 'side-effects' – of the very creation of sovereign states: 'as long as there are political borders

constructing separate states and creating a clear definition of insiders and outsiders, there will be refugees' (Haddad. 2003: 297). For refugees, one might substitute the 'surplus populations' or 'wasted lives' of modernity evoked by Zygmunt Bauman (2004) in order to include the various historical casualties of state-building projects and the construction and reconstruction of borders. The wasted lives of late modernity can be glimpsed today in overcrowded detention centres; while overloaded boats and lorries, and specially chartered aircraft, carry surplus populations across the borders of the Global North. As noted by Joppke (2005: 43): 'The predominant mode of organising political space in the modern world, the Western nation-state, is marked by a tension between universalistic liberalism and particularist nationalism, the first pushing toward equal rights and liberties for all of its members, the second toward excluding from these privileges all non-members'.

At the same time, distinguishing between citizens and others is also consistent with – in fact constitutive of – established principles of social democracy, since projects of redistribution are underpinned by judgments about membership status. Walters associates modern uses of deportation – the ultimate form of territorial exclusion – with the advent of forms of governance designed to 'defend and promote the welfare of a nationally-defined population' (2002: 279). Boundary defining serves symbolic as well as practical purposes. For example Anderson, Gibney and Paoletti (2011) have argued that '[t]he act of expulsion simultaneously rids the state of an unwanted individual and affirms the political community's *idealised* view of what membership should (or should not) mean' (Anderson, Gibney and Paoletti, 2011: 548). Locating the will to exclude as a longstanding element of social democracy as practiced within nation-states creates a conundrum for those who hope for a transformative politics that aims to deliver social justice and human security at a global level.

Given that all nation-states define themselves by seeking to control the dynamic of inclusion and exclusion, one might seek to differentiate between different political systems on the basis that some are less discriminatory than others in controlling their borders. For example, Joppke (2005) has argued that the overt *group*-level exclusions characteristic of the ethnically-defined 'nationalist state' have given way to more acceptable *individual* exclusions by 'liberal states' which are typically based on skills and family ties, and are mediated by human rights considerations. While it is important to acknowledge the incursions of human rights considerations into contemporary citizenship and border control, Joppke seriously underestimates the extent to which 'individual' characteristics translate within neoliberal states into discriminatory border control policies. Access to visas and enforcement efforts are now mediated by aggregate 'risk categories' based primarily on nationality which reinforce the old ethnic exclusions, albeit imperfectly, supplemented by facilitated border crossing available only to the wealthy. Sparke (2006: 153) has identified new forms of identity-based

exclusion arising from what he calls the 'notably *neo*liberal [emphasis in original] nexus of securitised nationalism and free market transnationalism'. This is exemplified by new fast-lane technologies installed at the US–Canada border aimed at facilitating the free movement of an emerging 'transnational business class' characterised by 'seemingly unbounded global visions of belonging' (Sparke, 2006: 156), while leaving the majority of citizens and non-citizens to negotiate the securitised border. In the UK, the policy of 'selective' immigration announced by the Conservative-led government has attracted fierce criticism for abandoning commitments to family reunion and linking immigration opportunities directly with the capacity to contribute to the British economy (BBC, 2012). These policies signal the redrawing of the contours of access and membership that aligns with neoliberal conceptions of inclusion and entitlement based on merit (Zedner, 2010). Although it is a particularly overt statement of the neoliberal mentality underpinning contemporary border control, analysts note that the British policy merely adopts the same selectivity that Australia and the United States have long practiced.

Even neoliberals masquerading as social democrats seem unable to extricate themselves from the politics of exclusion. When Julia Gillard became the Prime Minister of Australia in June 2010, her pledge to govern in the 'national interest' was so often repeated as to become something of a mantra. This mentality has since spawned a raft of policies designed to support 'working families' in Australia, alongside extreme and often absurd proposals for offshore 'refugee swaps' and measures to break the people smugglers 'business model' (Pickering and Weber, 2012). At the time of writing, Barak Obama is asserting his social democratic credentials with plans to phase out tax breaks for the rich (Eltham, 2011). At the same time he has presided over the highest deportation rate in US history – far surpassing the levels recorded under the previous Republican administration (Anderson, Gibney and Paoletti, 2011).

Towards global inclusion?

In search of genuinely human rights

Social democrats with a cosmopolitan outlook must consider how the limits of their egalitarian political philosophy could be expanded in a way that might eventually collapse the distinction between citizen and non-citizen. For citizenship scholars, extending meaningful citizenship rights across the world's population requires the formulation of non-territorial or transnational forms of citizenship (for example McMaster, 2001, Bauböck and Faist, 2010). For political sociologists and anthropologists, the search is on for pathways to social justice through 'progressive' globalisation (for example Kitching, 2001) and through moral and civic action instigated by globally-minded world citizens (see Cabrera, 2010, Horsman and

Marshall, 1994, Keane, 2003, Urry, 2000). Some economists and political scientists have seen potential for a revival of welfarism through consensual bargaining at sub-state level which expands the range of contracting actors beyond the traditional contract between citizen and state (van Waarden and Lehmbruch, 2003). Legal scholars have imagined deterritorialised forms of sovereignty in which governance attaches to populations not places (McCorquodale, 2001, Pangalangan, 2001). And from a human rights perspective, globalised social democratic principles demand that the universalist aspirations of the international human rights regime be realised in a system of truly universal rights that are available to all regardless of their standing in the 'birthright lottery' (Schachar, 2009). This goal is well expressed by Gready (2004: 352) who argues: 'The violence of population mobility and immobility; conflicts, intervention and non-intervention; the global economy and contemporary politics, is nothing if not a call for genuinely *human* rights [emphasis in original], accessible on the borders, carried across borders'.

Although it may now seem difficult to believe, Dauvergne (2008) has noted that regulation of global migration at an international level was seriously proposed in the early years of the twentieth century but was ultimately subverted to state interests. If the prospect of decoupling rights claims and entitlements from the territories of particular states still seems unimaginable in practice, it may be instructive to consider that the social contract is already deterritorialising in a grossly unequal way under conditions of neoliberal globalisation to further benefit citizens of developed nations and transnational business elites. Mobile citizens of the Global North increasingly expect their home governments to extend them the protections of safe evacuation from natural disasters and other danger zones, to advocate on their behalf when they stand accused of wrongdoing, and to allow them the capacity to vote even when they reside elsewhere. In addition, powerful governments extend their coercive capacities extraterritorially, as always, through military means to protect their collective interests or the assets of elites, and increasingly to fortify and externalise their borders against unwanted arrivals. The technologies therefore exist for deterritorialised forms of governance. In fact Bourdieu (2003: 49) posits the emergence of 'a sort of invisible world government in the service of the dominant economic powers' forged out of existing international institutions with the collusion of domestic governments.

There seems to be a long road to travel before these resources are redirected towards the objectives of globalised justice. Nevertheless, all journeys must begin somewhere and commentators are beginning to identify some small steps towards the breakdown of the citizen–non-citizen distinction, effected through legal, political and social action. Bosniak (2006) argues that a kind of 'alien citizenship' exists in liberal democracies such as the United States in which a restricted range of rights are accorded to

non-citizens. Liberal democracies increasingly grant voting rights to resident non-citizens (Earnest, 2008). Regimes of legal responsibility are reportedly emerging to hold governments to account for coercive actions taken against citizens of other countries beyond their sovereign territory (Mantouvalou, 2005, Motomura, 1993). And domestic courts sometimes derail exclusionary policies directed against non-citizens through the application of international human rights law or more fundamental principles governing the rule of law (Dauvergne, 2008, Pickering and Weber, 2012). In Britain, groups campaigning against the deportation of named individuals from their communities effectively claim for themselves 'some authority to determine the boundaries of membership' (Anderson, Gibney and Paoletti, 2011: 559).[2] All this is gradually eroding the distinction between citizen and non-citizen from the top down and the bottom up, and challenging the absolute power of sovereign governments to determine the boundaries of belonging. A recent case challenging the decision of the Australian government to deport a longstanding non-citizen which was decided by the United Nations Human Rights Committee (UNHRC) in July 2011 is a small but highly significant example of new interpretations of membership rights and legally enforceable notions of belonging.

Belonging beyond citizenship

In a highly publicised case, Stefan Nystrom – a man born in Sweden who had spent all his adult life in Australia and mistakenly believed himself to be a citizen – was deported following cancellation of his permanent residence visa due to a history of serious offending. An individual complaint was brought under the ICCPR on his behalf alleging breaches of his right to family life, his right to enter his own country, and his right to equality before the law and freedom from discrimination on the basis of nationality. Unfortunately, the UNHRC did not consider that latter point. Any decision concerning the meaning of equality before the law with respect to nationality would have far-reaching consequences for legal understandings of the entitlements of non-citizens. As it stands, the judgement is extremely interesting for what it tells us about the limits of the state's role in assigning identity and determining belonging, as assessed from a human rights perspective.

The UNHRC found that Nystrom's right to family life was breached unjustifiably because deportation in this case was disproportionate relative to legitimate concerns for the protection of the community. Of more interest for this discussion is the decision on the interpretation of article 12.4 of the ICCPR which states that: 'No one should be arbitrarily deprived of the right to enter his own country'. The majority of the committee held that the phrase 'own country' does not apply merely to those who hold formal citizenship status but, in fact, could 'embrace an individual who, because of his or her special ties to or claims in relation to a given country,

cannot be considered to be a mere alien' (UNHRC, 2011: para. 3.2). The facts of this particular case were held to establish:

> that Australia was [Nystrom's] own country within the meaning of article 12, paragraph 4 of the Covenant, in the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden. (UNHRC, 2011: para. 7.5)

This broad reading effectively allows a socially determined conception of identity and belonging to trump notions of citizenship as defined under domestic law.

Dissenting committee members expressed the view that the interpretation of 'own country' had been drawn too widely, and that departures from a strictly legal determination should only be allowed where individuals were entirely deprived of the opportunity to acquire citizenship anywhere. The dissenting opinion from Neuman and Iwsawa was expressed in terms of the 'dangers' of this wider reading as 'vastly increasing the number of non-nationals whom a state cannot send back to their country of nationality, despite strong reasons of public interest and protection of the rights of others for terminating their residence' (UNHRC, 2011: para. 12.4). The longstanding concern of the international human rights regime to preserve the sovereign right of Member States to control entry to and residence in their territory is evident in these dissenting views. On the other hand, before proceeding to the Human Rights Committee, lawyers representing Nystrom had successfully appealed against deportation to the Australian Federal Court after which the power to deport was reinstated by the High Court. The findings of the Federal Court in June 2005 show some similarities in reasoning to the later decision of the UNHRC – even referring to legal citizenship as a 'mere technicality'.

> It is one thing to say that the responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies with the discretion of the responsible minister. That has little to do with the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere. [The applicant] has indeed behaved badly, but no worse than many of his age who have also lived as members of the Australian community all their lives but who happen to be citizens. The difference is the barest of technicalities. (Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 121 (1 July 2005) per Moore and Gyles JJ at [29] 2.4)

Although it seems the power to determine the boundaries of belonging and inclusion are still contested and unsettled at both the domestic and international level, we also find some support in both these domains for legal interpretations which narrow the distinction between citizen and non-citizen in quite a remarkable way.

Conclusion: critical criminology beyond borders

In a recent volume *What is Criminology?*, David Brown (2011) has advocated the reconnection of social, economic and penal policy within criminological analysis, through the application of a social democratic lens (see also Richie, 2011). But can this concern with social justice and inclusivity be translated into a criminology that is also global in its scope? In this chapter I have argued not so much against social democracy, as for a conception of social justice that extends beyond territorially-bounded forms of social democratic governance in order to extend genuinely human rights beyond the boundaries of individual nation-states. If there are indeed some early signs of the erosion of the fundamental distinction between citizen and non-citizen that underpins social democratic systems of redistribution, what then are the implications for a critical criminology that seeks to promote social justice objectives from a global perspective? These are enormous questions, and like the future prospects for the globalisation of some form of social democratic governance itself, the answers can only be hinted at here.

The first priority for a critical, transborder criminology is to continue to expose the excesses of exclusionary state agendas by documenting the avoidable harms they produce (see Grewcock, 2009, Nevins, 2008, Pickering, 2005, Weber and Grewcock, 2011, Weber and Pickering, 2011). A broader programme for academic critique and advocacy could include contributions to the growing literature on 'crimmigration' whereby both criminal and immigration law are brought to bear against a range of undesirable non-citizens (see Aas, 2011, Bosworth and Guild, 2008, Krassman, 2007, Stumpf, 2006, Welch and Schuster, 2005). As Carrington and Hogg (2012) have argued, a pitfall for many varieties of critical criminology can be an entrapment in endless critique. A second step, then, would be to advocate a more inclusionary law enforcement agenda, including the building of criminal justice institutions appropriate to a more interconnected world. The direction here is less clear and the task enormous, not least because of the manifest failings of many existing criminal justice institutions to serve the purposes of social justice even at a domestic level.

To take the example of policing, Loader and Walker (2001) have argued for the reconstitution of the policing project as a collective good – effectively calling for a recommitment to a social democratic form of policing. Leaving aside the question of whether such a form of policing has ever been achieved

in practice, Loader (2006: 202) argues that the key to such a project is for police to recognise 'the legitimate claims of individuals and groups affected by police actions and affirm[ing] their sense of belonging to a political community'. When considered at the level of individual societies, this imperative is generally translated into a need for police to respect and negotiate cultural diversity (Weber, 2012). But the realisation that contemporary societies are not merely multicultural but increasingly are dynamically connected through transnational networks of often transient residents – both legally and illegally present – poses an even greater challenge for inclusive policing. Local police in the United States have been forced to ponder these questions in response to recent proposals to involve them for the first time in the enforcement of federal immigration controls. Police in Australia have historically played an active role in patrolling the boundaries of belonging as designated enforcers of immigration law (Weber, 2011). In contrast, the strong resistance from some American policing agencies to taking on this role speaks directly to the question of what is needed if criminal justice agencies are to provide a service that crosses the citizen/non-citizen and even the legal/illegal divide. A report commissioned by the American Police Foundation rejected as divisive the immigration enforcement proposals, concluding that '[l]ocal police must serve and protect *all* [emphasis in original] residents regardless of their immigration status, enforce the criminal laws of their state, and serve and defend the Constitution of the United States (Khashu, 2009: xiii).

If this seems to be a surprisingly cosmopolitan conclusion – extending the boundaries of distributive justice beyond citizens to recognise an explicit duty to protect even those who are unlawfully present – then it should serve as some encouragement that a criminology beyond borders is possible both in theory and in practice. The challenge for a social democratic, critical criminology is to build on these small beginnings to re-imagine at a global level the principles of social and distributive justice which underpin our disciplinary perspective.

Notes

Thanks to Helen Gibbon for assistance in locating materials concerning *Nystrom v. Australia* (see UNHRC, 2011).

1. As is the case with virtually all recognised human rights, these imagined mobility rights need not be absolute and may not be realisable for everyone in practice.
2. See for example http://www.ncadc.org.uk/campaigns/index.html

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