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TABLE OF CONTENTS

FORWARD 1

CHRIS CUNNEEN
MICHAEL SALTER

LATE-MODERN DEVELOPMENTS IN SENTENCING PRINCIPLES FOR INDIGENOUS OFFENDERS: BEYOND DAVID GARLAND'S FRAMEWORK 2

THALIA ANTHONY

A CRITICAL PERSPECTIVE ON MENTAL HEALTH DISORDERS AND COGNITIVE DISABILITY IN THE CRIMINAL JUSTICE SYSTEM 30

EILEEN BALDRY, LEANNE DOWSE, PHILLIP SNOYMAN, MELISSA CLARENCE AND IAN WEBSTER

WOMEN-CENTRED CORRECTIONS: A NAIVE VIEW 46

LILLIAN M. BARRY

THE EFFECT OF TERRORISM AND TERRORIST TRIALS ON AUSTRALIAN PRISON REGIMES 61

DAVID BROWN

ISOLATION AS COUNTER-INSURGENCY: SUPERMAX PRISONS AND THE WAR ON TERROR 77

BREE CARLTON

COLONIAL GENOCIDE AND STATE CRIME 91

MICHAEL GREWCOCK

EXTREME TRANSPORT: CUSTODIAL TRANSPORT IN WESTERN AUSTRALIA & BEYOND 107

CLIFF HOLDOM

USING A FLASHPOINTS MODEL OF PUBLIC ORDER POLICING IN INDIGENOUS COMMUNITIES TO EXPLORE THE STRUCTURES AND PRACTICES OF INTERNAL COLONIAL POWER RELATIONS IN AUSTRALIA 124

CHRISTINE JENNETT

VICTIMS AS SURVIVORS 141

JAN JORDAN

THE GROWTH OF VICTIM AGENCY IN AUSTRALIAN JURISPRUDENCE: LIMITATIONS AND CHALLENGES 159

TYRONE KIRCHENGAST

THE RISE OF A GLOBAL CARCERAL COMPLEX: FROM GARRISON STATE TO GARRISON PLANET 184

JUDE MCCULLOCH

FROM CARE TO CRIME – CHILDREN IN STATE CARE AND THE DEVELOPMENT OF CRIMINALITY 207

KATHERINE MCFARLANE

WOMEN'S BODIES, MORAL PANIC AND THE WORLD GAME: SEX TRAFFICKING, THE 2006 FOOTBALL WORLD CUP AND BEYOND 222

SANJA MILIVOJEVIC

ORGANISED ABUSE AND THE POLITICS OF DISBELIEF 243

MICHAEL SALTER

EXPLORING THE GROUP-IDENTITY FUNCTION OF CRIMINAL LAW 285

MOLLY TOWNES O'BRIEN

LOSING THE WAR ON DRUGS: PROHIBITION AND PROLIFERATION 311

MARGARET PEREIRA

TRAFFICKING IN PERSONS AS LABOUR EXPLOITATION 322

MARIE SEGRAVE

STUNNING DEVELOPMENTS : SOME IMPLICATIONS OF TASERS IN AUSTRALIA 341

EMMA RYAN

PRISONERS, WORK AND RECIPROCAL REINTEGRATION 361

ROB WHITE AND GARRY COVENTRY

RESEARCHING CCTV: SECURITY NETWORKS AND THE TRANSFORMATION OF PUBLIC SPACE 383

DEAN WILSON

Forward

We are pleased to present the refereed proceedings of the 2008 Critical Criminology Conference on behalf of the Crime and Justice Research Network and the Australia and New Zealand Critical Criminology Network.

These proceedings showcase the diverse criminological viewpoints presented at the conference this year. Forty five papers were delivered across two days by researchers from Australia and overseas, with over one hundred and fifty academics, policy-makers and students in attendance.

The 2008 conference was the second Critical Criminology conference. The proceedings of the first conference held at Sydney Law School is 2007 are currently published by Federation Press as "The Critical Criminology Reader", edited by Chris Cunneen and Thalia Anthony. The annual conference is emerging as the key forum for critical criminology in the Australasian region

We would like to thank the contributors to this collection and to acknowledge the referees who gave up their time to review these papers, including: Alex Steele, Gary Coventry, Eileen Baldry, Bree Carlton, David Brown, Sharon Pickering, Michael Grewcock, Julie Stubbs, Rob White, Jan Jordon, Caitlin Hughes and Jude McCulloch.

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Late-modern developments in Sentencing Principles for Indigenous Offenders: beyond David Garland's framework

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This paper explores the late-modern shifts in the characterisation of Indigenous offenders in sentencing judgments and legislation in New South Wales (NSW) and the Northern Territory (NT). It considers whether David Garland's (2001) thesis (developed in relation to the United Kingdom and the United States) applies to judicial and political conceptualisations of Indigenous offenders. Garland identifies of a shift in criminal justice conceptualisations from 'penal welfarism' in the Post-WWII period – when offenders are contextualised in social relations – to 'law and order' in late modernity (1970s) – when offenders are decontextualised.

This paper will argue that Garland's framework does not fully explain rationalities in sentencing offenders in Indigenous communities. While judicial discourses in sentencing Indigenous offenders resonate with Garland's observations about the re-emergence of emphasis on the victim's interest, retribution and protection of the wider community protection, it does not account for a changing view about the functionality of Indigenous communities. A post-colonial narrative of sentencing in 'late modernity' in the NT and NSW identifies the ongoing contextualisation of Indigenous offenders. However, this context is a dysfunctional community. The community is both condemned and in need of rescue, particularly through a bolder assertion of post-colonial crime control. The scapegoat in these rescue efforts is the Indigenous offender.

Garland's *Culture of Control* and the control Australian Indigenous culture

In the *Culture of Control*, Garland (2001) claimed that in the post-WWII period, offenders were conceived of and treated as products of social relationships. They were capable of reform and rehabilitation. In the 1970s, armed with a 'nothing works' attitude to penal-welfarism as well as the broader welfare state, politicians, and eventually judges, began to view the offender as morally corrupt and beyond repair (also see: Melossi 2000). Punitive urges were given freer reign in public discourses on crime control, offenders were condemned and harsher sentences were handed down.

Garland's thesis that a 'law and order' discourse emerged in late-modern policies is silent on crime policies as they relate to Indigenous people or racial minorities. In the *Culture of Control*, which compares the United Kingdom and the United States, the only mention of race is that the situation for ethnic minorities is worse because they are part of an 'excluded underclass' that has been intensively targeted by law enforcers in 'late modernity' (Garland 2001).

Doubts have been raised about whether Australian Indigenous offenders experienced post-War penal-welfarism (Hogg 2001; Broadhurst 1987). Assimilation policies reigned in the Australian post-War World II context. Indigenous people were decontextualised from their communities and aligned with the expectations of the non-Indigenous community. Enforcement of Indigenous assimilation policies was far from liberal; there was forced unpaid labour, forced removal of children from their Indigenous families and restrictions on movement, marriage and the practice of culture (ALRC 1986).

Nonetheless, as the protectionist aspects of assimilation policies withered away in the 1960s, and the liberal aspects seeped in, incarceration rates for Indigenous people soared. This was because Indigenous people were released from the stranglehold of government settlements and church missions, and allowed to live in

towns. In doing so, they moved into the ambit of the street police and into prisons (Hogg 2001). By the late-twentieth century (which David Garland would regard as late-modernity), incarceration rates had escalated. This was revealed by the 1991 report of the Royal Commission into Aboriginal Deaths in Custody. Indigenous people continue to be dramatically over-represented in custody (Joudo & Curnow 2008, 3; ABS 2007, 6).[1]

While, the shift to Indigenous incarceration in prisons and policy custody (as opposed to government settlements and missions) was a matter of Indigenous policies rather than crime policies in the 1960s and 1970s, there have been in more recent times a hardening of judicial views and government sentencing policies towards Indigenous offenders. Since the late 1990s, sentences for Indigenous offenders have become harsher as courts and governments have sought to make an outcast of them. This culminated in Commonwealth legislation in 2007 that removed the capacity of courts to take into account Indigenous cultural and customary factors in sentencing Northern Territory Indigenous offenders (*Northern Territory National Emergency Response Act* 2007 (Cth) s 91). It is from the late 1990s for which this paper considers whether Garland's law and order framework explains the tougher stance on sentencing towards Indigenous offenders.

This paper suggests that Garland's framework in the *Culture of Control* does not account for processes of colonial and post-colonial control of Indigenous people in 'settler societies'. While his schema is able to explain the condemnation of the offender, it is unable to account for the particular judicial and government rationalisation of harsh sentencing of Indigenous offenders to condemn not only the individual, but also the Indigenous community. Also, it is not only the failure of penal-welfarism that requires a tougher approach to sentencing, but also the failure of post-colonial society and policies in controlling Indigenous people. Notably, the

[1] Joudo and Curnow (2008) report that 26.3% of people in police custody are Indigenous. Rates for Indigenous youth and women are especially soaring. The ABS (2007, 6) notes that Indigenous adults are thirteen times more likely than non-Indigenous people to be imprisoned.

failed policy of self-determination needs to be addressed through the reassertion of paternalist policies.

A paradox has emerged where sentencing seeks to protect the Indigenous community needs from the offender, while at the same time the offender represents the dysfunctional community. In other words, the offender is condemned for harm to the community, but in turn the community is also condemned for having an offender among its ranks. Sentencing has become increasingly harsh due to the need to teach both the offender and the Indigenous community a lesson.

Methodology and some trends

This paper will analyse sentencing principles applied to Indigenous offenders in NSW and the NT, where 'Indigenous factors' have been at issue. It addresses the changing approach from the 1970s until 2008, including legislative changes governing the sentencing of Indigenous offenders in courts. It demonstrates that in the 1970s when 'Indigenous factors' first emerged, courts considered socio-economic hardship, cross-cultural breakdown from a history of colonisation and different cultural expectations (especially in more 'traditional' communities) as mitigating factors (NSW Law Reform Commission 2000, [2.26]).

Since the late 1990s, due to the perceived failure of Indigenous communities and Indigenous policies, being Indigenous has emerged in some cases as an aggravating factor. Sentencing has become a vehicle for dealing with the failed Indigenous societies. Most recently, the approach has become one of undermining cultural factors – irrespective of whether they are aggravating or mitigating. This represents an objective which perhaps Garland's approach is most unequipped to explain: the effort to undermine any recognition of cultural difference through sentencing.

i. Why focus on sentencing?

Sentencing is a relatively minor contributor to the over-representation of Indigenous people in custody. Factors such as policing are described as far more significant in incarceration rates (Royal Commission Into Aboriginal Deaths In Custody 1991, [13.2.20]; Cunneen 2001, 85). However, an analysis of sentencing reveals the rationalisation for punishment. Unlike police discretion, the use of judicial discretion in the sentencing process is transparent, in the sense that judges must provide reasons and these reasons are made public. In the past, discretion has been used to take into account an offender's Indigenous background or community circumstances.

Judicial sentencing interplays with government policy on sentencing. It may ignite a reactive policy response in order to curb discretion. For example, the *Crime (Sentencing and Bail) Amendment Act* 2006 (Cth), which removed customary law and cultural factors in sentencing, can be seen a response to cases such as *The Queen v GJ* [2005] NTCCA 20) that took these factors into account. On the other hand, sentencing may pre-empt restrictive sentencing legislation. For example, *R v Jurisic* 45 NSWLR 209, which set down guideline sentences, pre-empted the *Crimes Act* 1900 (NSW), ss 52A and 52AA that legislated sentencing grids. Therefore, sentencing influences trends in public policy and illustrates the competing characterisations of Indigenous peoples in informing the trends.

ii. How have courts accounted for Indigenous factors in sentencing?

Judges can generally exercise discretion in taking into account a broad range of factors that aggravate or mitigate a criminal sentence. These include the gravity of the offence, the nature of the victim, the impact of the offence and the character of the offender. Legislation also provides for such discretion and in some jurisdictions

lists a set of inexhaustive criteria that may be considered in sentencing.[2] Where specific factors are mentioned such as in NSW and NT sentencing legislation, there is additionally general judicial discretion to take into account any other relevant factors.[3]

Until recently, no sentencing legislation for adult offenders referred to Indigenous or customary law factors, and other than the *Crimes (Sentencing) Act* (ACT) s33(m), no jurisdiction referred to the 'cultural background' of the offender. It is within the legislative provisions allowing for 'other factors' to be considered in sentencing that Indigenous background has been raised (Fougere 2006, 42-43).[4] Accordingly, Indigenous mitigating factors have developed through the common law. The situation changed in 2006 when legislation was enacted to specifically curb consideration of customary law and cultural practises in sentencing Commonwealth and NT offences.

iii. Why a comparative approach to sentencing in NSW and the NT?

There has been a tendency to focus on remote *or* urban Indigenous communities in explaining the sentencing of Indigenous offenders. Recently, policy makers, the media and commentators have had a fascination with the sentencing of Indigenous child sex offenders in remote Indigenous communities (see Brough 2007, 22; Ruddock 2006, 18-19; Hawke 2006; Douglas 2005). A comparative approach allows for a broader appreciation of the trend in Indigenous sentencing and the judicial representation of Indigenous communities outside remote communities.

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[2] See *Crimes (Sentencing Procedure) Act* 1999 (NSW) s21A; *Sentencing Act* 1995 (NT) ss5, 6, 6A; *Sentencing Act* 1991 (Vic) s5; *Sentencing Act* 1995 (WA) ss7-8; *Sentencing Act* 1997 (Tas) s 80; Criminal Law (Sentencing Act) 1988 (SA), s29A; *Penalties and Sentences Act* 1992 (Qld) s 9.

[3] In New South Wales, the court has discretion to take into account 'any other objective or subjective factor that affects the relative seriousness of the offence' (*Crimes (Sentencing Procedure) Act* 1999 (NSW) s21A). In the NT, there are 20 factors that may be taken into account as well as 'other relevant factors' (*Sentencing Act* 1995 (NT) ss5, 6, 6A).

[4] For example, courts have taken into account customary law under s5(2)(s) of the *Sentencing Act* (NT), which states that 'any other relevant circumstance' may be taken into account when sentencing an offender.

NSW and the NT give rise to divergent 'stock stories' about Indigenous communities and crime. On the one hand, lawyers (and subsequently judges) rely on 'tradition' and lack of 'civilisation' or understanding of non-Indigenous law and concepts to explain offending in NT communities (see North Australian Aboriginal Justice Agency 2006, 1). The judicial approaches in the NT align with what has been described as criminology's 'vulgarised cultural heritage' approach (see Broadhurst 1997, 413). Certainly, critics have recently highlighted the crude way in which information about culture is submitted to the courts (see Douglas 2005).

On the other hand, lawyers in NSW point to the breakdown of traditional structures in NSW Indigenous communities; the inability of community members to conform with a foreign post-colonial society, and a susceptibility to its post-colonial vices such as alcoholism. The judicial approaches that developed in NSW resonate with the criminology paradigms of conflict theory and strain theory.

A comparative approach can reveal a deeper rationale in sentencing beyond addressing a particular crime problem, and towards a broad anxiety about the failure of Indigenous communities experiencing various phases of interaction with the post-colonial state. In both NSW and the NT there are appeal court decisions on Indigenous factors in sentencing that illustrate the shift away from Indigenous factors in sentencing.

Sentencing developments in NSW and the NT from the 1970s to the late 1990s and beyond

From the late 1970s to the late 1990s, the courts rationalised Indigenous offending in terms of prevailing criminological categorisations such as strain, conflict or cultural theories. This section addresses how these characterisations emerged in NSW and the NT. While this period of high and increasing custody levels for Indigenous people cannot be described as concomitant with Garland's penal-welfarism, it nonetheless saw an approach in sentencing that recognised that

Indigenous people were integrated into Indigenous communities. Garland stresses that penal-warfarism is characterised by the search for deep socio-economic causes of crime.

For twenty years from the late 1970s, NSW and NT Courts would reason that community was a legitimate factor in Indigenous peoples' lives, including that of offenders. Evidence of community ties was submitted and accepted to explain both causation and prospects of rehabilitation. A factor that may explain the legitimacy of the Indigenous community as a sentencing factor is the prevailing policy of self-determination. While there is no direct connection, it may at least be seen as an environment that condoned a judicial approach that saw an offender's membership of an Indigenous community as a potential mitigating factor in sentencing.

i. Developments Indigenous sentencing factors in NSW: socio-economic factors

A leading cases that influenced the development of Indigenous mitigating factors in NSW common law, was the High Court decision in *R v Neal* (1982). This case concerned a conflict between a non-Indigenous officer of the Department of Aboriginal and Torres Strait Islander Affairs and the Chairman of the Yarrabah community council. The Indigenous offender was convicted of unlawful entry and assault (through spitting). The High Court reduced the six month imprisonment term to two months. Two of the four judges (Murphy and Brennan JJ) held that the paternalistic and racist environment of the reserve should mitigate the sentence. Their Honours were concerned to highlight the tensions between the post-colonial system and the Indigenous community. The Magistrate, whose sentence was reinstated by the High Court, considered Neal's community as functional. His Honour stated that ordinarily, the Aboriginal people in the community 'live a happy life' (cited in *R v Neal* 1982, 315 per Murphy J). Nonetheless, the High Court accepted that within these communities was racist tension that could provoke 'violent' crimes against non-Indigenous state officers.

The case of *R v Neal* had was cited as authority by Justice Wood of the NSW Supreme Court when he laid down the Fernando principles. These influential principles recognised the strain caused in Indigenous communities by virtue of socio-economic disadvantage, dispossession, alienation and alcoholism (Omeri 2006, 76). In *R v Fernando* (1992), an Aboriginal man in Walgett – a community described as beleaguered with alcoholism and socio-economic disadvantage – stabbed his de facto partner to the neck and leg after excessive alcohol consumption. He was a semi-educated man, who had been removed by welfare and sent to an isolated property, and he had a criminal history for offences related to the excessive consumption of alcohol. This context mitigated his sentence to nine months imprisonment, with an additional three-year parole period.

In delivering his judgment, Justice Wood developed eight principles for sentencing Indigenous offenders from dysfunctional communities. Justice Wood emphasised that Aboriginality is not a mitigating factor but may 'throw light on the circumstances of the offence and / or offender' (*R v Fernando* 1992, 62). Justice Wood (1992, 62) emphasised the need to send a message to the community that domestic violence will not be tolerated. However, this was balanced with a contextual appreciation of the circumstances of the offender and the limited utility of a long prison sentence. His Honour (1992, 62) stated, 'For Aboriginal offenders who have come from a 'deprived background', including communities with alcohol abuse, or 'who ha[ve] little experience of European ways', a lengthy imprisonment term 'may be particularly, even unduly, harsh' and consideration should be to rehabilitation.

ii. Developments Indigenous sentencing factors in the NT: cultural factors

In the Northern Territory, the Fernando principles relating to community dysfunction have not been applied as commonly as in other states and territories across Australia. A stronger sentencing pattern emerged that accounted for Indigenous laws, cultural expectations and punishment. The regulatory impact of traditional societies was not privileged over Anglo-Australian law – in that it did not provide a defence for criminal liability – but could be a factor in sentencing. In this limited way for accommodating Indigenous laws, judges viewed Indigenous laws and community expectations as a legitimate factor bearing on the defendant.

The tendency to account for cultural factors in the NT gained momentum in the 1980s when 'traditional punishment' was treated as a mitigating factor in sentencing. Courts factored in traditional punishment to account for the Indigenous community's condemnation of the offence. It reflected recognition of the context of Indigenous people. However, its seeds were planted in Kriewaldt J's judgments in the 1950s (Rogers 1999; Finnane 2006). An early case that dealt with the issue of traditional punishment in reducing a sentence was *Jacky Jacky Anzac Jadurin v The Queen* (1982) (see Case Note 1982). There, the Federal Court stated that to acknowledge the community's 'retribution' is not to condone it but 'to recognise certain facts which exist only by reason of that offender's membership of a particular group' (*Jadurin v The Queen* 1982, 429).

A few years later, in *R v Charlie Limbiari Jagamara* (Unreported, Supreme Court of the Northern Territory, 28 May 1984; See Fisher 1985), a traditional Warlpiri man, aged 75, was convicted of manslaughter for unintentionally killing a man with whom his wife was associating. He speared the man in order to teach him a lesson for bringing shame to himself and the community by violating the community's laws relating to traditional marriage. The very 'traditional' accused, who had lived by his community's laws in Willowra and had not encountered a non-Indigenous person until the age of 30 years, was punished for the killing. The accused was banished

from his community, speared, cut, stabbed, beat with a nulla nulla and hit with a tomahawk.

In sentencing Charlie Limbiari Jagamara, Muirhead J took into account the background of the offender and the traditional punishment to reduce his sentence merely to the rising of the court (amounting to a matter of moments). Justice Muirhead held,

> If I impose a sentence of imprisonment, and in this case I have no wish to do so, the problems of the Aboriginal people would probably be exacerbated, and his withdrawal from Aboriginal society would increase the difficulties. ... This is truly a cultural matter which has been tackled energetically by the people. The accused has already suffered punishments far more severe than any that I would be authorised to inflict... (cited in Fisher 1985).

In *R v Minor* (1992, 181), the NT Court of Criminal Appeal held that Indigenous punishment should be taken into account where it 'can be shown to be of positive benefit to the peace and welfare of a particular community'. It would allow for the community to put the episode behind them and remove feuds arising from the defendant's actions (*R v Minor* 1992, 181 per Asche CJ citing the trial judge's remarks with approval). Justice Mildren (1992, 193) stated:

> In my opinion, a sentencing Judge is entitled to have regard not only to the interests of the wider community, but also to the special interests of the community of which the respondent is a member.

Finally, in *R v Jane Miyatatawuy* (1996), an Aboriginal woman stabbed her husband in the chest, thereby puncturing his lung. The offence was in breach of a recognisance to be of good behaviour, which had been imposed on the offender for an earlier conviction of assault upon her husband. There was evidence that a custodial sentence would destroy the marriage in the eyes of the Aboriginal

community and the offender had already been dealt with under customary law. The Court released the offender on a good behaviour bond. Martin CJ (1996, 575) stated:

> A most significant circumstance bearing upon the sentence was that concerning the resolution or settlement of matters within the relevant aboriginal community and the integral rehabilitation of the offender.

These Northern Territory judgments reveal that not only was the offender contextualised within the Indigenous community to explain the offending and punishment, but the community was also viewed as an effective site for dealing with crimes and offenders. The community's authority was important not only for restoration of the offender, but also restoration of the community. This is a dimension of punishment that is not accounted for in the penal welfare model, which is only focuses on the role of rehabilitating and reintegrating the offender within mainstream social relations.

Judicial reactions: refocus on morally corrupt individuals and communities

From the late 1990s, there was a notable retreat from an approach that privileged restoration of offenders and communities in judicial sentencing.[5] Viewing hopeless attempts to reduce crime – along with a broader ideology that perceived the failures of Indigenous policies – judges repositioned the Indigenous offender within the wider non-Indigenous community and its expectations. This stage aligns with Garland's late-modern turn, where offenders were condemned as morally corrupt and beyond reform, and the victim is elevated in sentencing considerations. However, for Indigenous people it also went hand in hand with a rejection of the offenders' Indigenous community and the validity of their Indigenous identity.

[5] As opposed to circle sentencing.

In the Northern Territory, judges began to view 'traditional' Indigenous communities as dysfunctional and giving rise to a crime phenomenon. They needed to dispense with cultural aspects that violated Anglo-Australian laws. In NSW, judges regarded Indigenous communities as no longer 'Indigenous enough'. Despite the fact that many members of Aboriginal communities around NSW consider themselves part of an Aboriginal community, judges viewed the breakdown of culture as so severe, Aboriginal factors would have no bearing on their lives. However, where culture was viewed as traditional enough, judges took the view that it shouldn't have a bearing on their lives – and have made sentences harsh to convey this message. So, in both jurisdictions, there is a growing judicial view that culture, custom or historical disadvantage are no longer legitimate contexts for explaining offending.

i. NSW: Downplaying the *Fernando* principles

In the early 21st century, the NSW Court of Criminal Appeal confined the application of the Fernando principles. Commentators have criticised the Court for presenting the offender or the community as not 'Aboriginal enough' (see Flynn 2005, 18 ; Edney 2006). The judges draw artificial lines between 'full' and 'part' Aboriginal people that are inconsistent with the legal definition of Aboriginality (see *Shaw v Wolf* 1999). Also, the Aboriginal community must be remote, it appears, to fit within the *Fernando* principles. The notable decisions of *R v Ceissman* (2001), *R v Walter & Thompson* (2004) and *R v Newman, R v Simpson* (2004) will be discussed below.

In *Ceissman* (2001), the NSW Court of Criminal Appeal rejects the application of the Fernando principles to an Aboriginal man from a disadvantaged background. Wood CJ notes the fact that the offender is not from a 'remote community' or even a 'particular local or rural setting' (2001, [30]). His Honour states that 'the fact that the respondent's grandfather was part aboriginal' would not 'attract special consideration' (2001, [33]). Not only is Aboriginality not enough to justify leniency because it would 'create a special class of persons' that would be discriminatory

(2001, [32]); but also this offender's Aboriginality was not enough to activate consideration of factors leading to leniency.

In dissent, Simpson J notes a number of factors that invoke the Fernando principles: the respondent 'grew up in extreme poverty'; he received little education; his parents were drug-addicts with a criminal history and he lived with his grandparents; he witnessed serious physical violence between his parents; his grandmother died at the age of 10 years and his parents both died within the next year; when he was 14 his grandfather died (2001, [55]-[56]). The offender was ultimately imprisoned to four and a half years (non-parole) for trafficking cocaine due to the guideline sentences in NSW.

Walter & Thompson (2004) was an appeal against sentences imposed on two Aboriginal men. They both pleaded guilty to robbery (of a pair of jeans, a baseball cap, mobile phone and $35) and actual bodily harm. They committed these offences after being refused to let them enter a local nightclub, allegedly because of the colour of their skin (Flynn 2005, 17). The offences were against a 'white' bystander waiting to enter the club. The offenders were under the influence of alcohol at the time of the offence.

An issue before the NSWCCA was whether the trial judge erred in applying the Fernando principles because Thompson 'did not come from a dysfunctional family' and did not have a 'history of deprived socio-economic circumstances or of alcohol abuse' (2004, [58] per Grove, Sully and Kirby JJ). This was despite the admission of evidence that Thompson was adopted into a white family at the age of three months and physically and emotionally abused by his step-mother who called him 'little black bastard'. However, the dysfunction was insufficient and the Crown appeal was successful.

In the judgments of *R v Newman, R v Simpson*, three offenders pleaded guilty to entering into a dwelling with intent to commit a serious offence. The offenders went

into the house of a 67-year old victim in Griffith, NSW. The offenders were intoxicated at the time and looking for money to buy alcohol. Justice Howie recognised that the Aboriginal defendants had a history of drug and alcohol abuse. However, his Honour went on to distinguish these Aboriginal defendants from defendants in 'a remote community' who are more likely to successfully attract the Fernando principles. The urban surroundings of Griffith were not sufficiently Aboriginal for the Court of Criminal Appeal. Edney (2006, 8) argues that these cases attempt 'to confine the reach of *Fernando* by fundamentally misapprehending the nature of Indigenous identity in a post-colonial society'.

ii. Northern Territory

a. Community dysfunction and downplaying the *Fernando* principles

Although the Fernando principles have not been relied on as often in the NT as in other jurisdictions, the principles have nonetheless been diminished in significance over the past decade. There has been an increasing reliance on the nature of the offence. Rather than the sentencing process pick up on the community context to lend leniency to the offender, the community's crime rate justifies the harsher sentence. The judgments of *Amagula v White* (1998) and *R v Wurramarra* (1999) reveal that being an offender in an Indigenous community may have become an aggravating factor in sentencing, and the offender is used as an example to stamp out violence, irrespective of factors of remoteness, alcoholism and dysfunction.

In *Amagula v White* (1998), a case where a man on Groote Eylandt was charged with aggravated assault on his wife, the Northern Territory Supreme Court did not to apply the Fernando principles to mitigate the sentence. Rather, the Court took the view that the 'seriousness of the offence' (a similar offence to that which occurred in *Fernando*) warranted a harsher sentence. The Court emphasised the need to 'send the correct message' to the community and overcome the 'fairly widespread belief

that it is acceptable for men to bash their wives in some circumstances; this belief must be erased'.

This approach was echoed in *R v Wurramara* (1999). This was another case at Groote Eyland, where a man stabbed his wife and neighbour. In that case, the Northern Territory Court of Criminal Appeal (1999, 36) held that 'the fact that an offender and/or his victim may come from an Aboriginal community which was deprived or dysfunctional and where alcohol abuse and violent crime may be more prevalent and more tolerated than in the general community, by no means ... should lead to a lower sentence'. The Court stressed that the victims were particularly vulnerable in deprived and dysfunctional communities, and are entitled to look to the courts for protection. 'Offences of serious violence call for condign punishment'. Finally, 'The courts have been concerned to send ... "the correct message" to all concerned, that is that Aboriginal women, children and the weak will be protected against personal violence' (1999, 26).

b. Traditional punishment

In the Northern Territory there has been a shifting emphasis in considerations of traditional punishment in sentencing. While traditional punishment continues to reduce a sentence, it is not so much because of its importance for restoring community relations, but rather because of the doctrinal principle of double jeopardy. In recent cases, such as *R v Riley* (2006) the courts have reluctantly provided traditional punishment as a mitigating factor due to double jeopardy alone.

Indicative of this trend is the hesitance in granting bail where there is a strong possibility that the offender will freely return to the community to receive traditional punishment: *Barnes* (1997) and *Anthony* (2004). In *Barnes* (1997), Bailey J refused to grant the defendant bail that would allow him to return to his community to be punished under Indigenous law. His Honour's reasoning was that 'the Court

cannot facilitate what would amount to a crime' and it would not be in the defendant's interest to facilitate his release 'to be unlawfully stabbed and bashed before submitting to such sentence as may be imposed according to law' (see McGrath 1997-1998). In *Anthony* (2004), Martin CJ did not allow the applicant to return to his community of Lajamanu because the Court 'cannot condone' traditional punishment as it was an 'unlawful act' under the Anglo-Australian law.[6] This may indicate a move towards prosecuting Indigenous people responsible for administering traditional punishment, despite consent on the part of those involved.

c. Customary law and promised marriages

Since 2003 there have been two major cases where first instance judgments have allowed promised marriage as a mitigating factor in statutory rape offences: *Hales v Jamilmira* (2003) and *The Queen v GJ* (2005). These controversial decisions were overturned on appeal. The appeal decisions have emphasised both the need to punish the offender and send a message to the community that promised marriage was not a mitigating factor in statutory rape. Part of the willingness of the first instance courts to allow a reduction in sentences for promised marriage cases is that until 2003, under Northern Territory legislation, it was lawful to have sex with a minor if the so-called offender was married to the victim under customary law.[7] Furthermore, until 2003 sex with under-aged promised brides (although occurring for many years) was not prosecuted (*Hales v Jamilmira* 2003 per Mildren J). Nonetheless, the appeal courts (including in the first case of its kind – *Hales v Jamilmira*) have been unwilling to consider promised marriage as a cultural context for mitigating a sentence.

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[6] (at [23], [25])

[7] S.129(1) Criminal Code, Northern Territory read with the definition of 'unlawfully' in s.126 and the definition of husband and wife in s1. This was noted in *GJ* (2005, [32]), *Hales v Jamilmira* (2003, [50]). As a result of amendments to the Code passed in 2004, it is no longer necessary for the prosecution to prove that the intercourse was "unlawful" in this sense. Further, the maximum penalty for statutory rape has been increased from seven to 16 years imprisonment.

Promised marriage in Northern Territory communities has been regarded as a feature of customary law in traditional Aboriginal society. It is still considered by some community members today as essential to the 'continuation of Aboriginal culture' and ceremonies (Kimm 2004, 62), and to the maintenance of traditional economies (2004, 66), although arrangements vary among communities. Generally, promised brides are a reward for initiates. Girls from appropriate skin groups were promised to men who had undergone initiation and provided food or payment to the promised wife's family. As such it 'safeguarded the transmission of the law' (2004, 62). Young girls may be seen as the foundation of society (2004, 66). Alternatively, girls are forced in the arrangement and harshly punished if they 'failed in their obligations of marrying older husbands without complaint' sometimes by a 'violent death' (2004, 62).

Sexual relations with girls that had reached puberty were allowed in many Indigenous cultures with customary marriage, but sexual assault was condemned. In the cases discussed below, the offenders were convicted of statutory rape on their promised wives. The offenders had were traditional men and custodians of traditional knowledge, with little contact with the non-Indigenous system (see *Halves v Jamilmira* 2003, [13] per Martin CJ). They were aware that the sexual intercourse was not required under customary law and in some instances that it amounted to an offence both under the Indigenous and non-Indigenous laws. It was also an offence in the eyes of the community. After the offences, some of the communities sought to impose traditional punishment on the offenders. While the offenders accepted the wrongfulness of the act, they did not consider the offence *as serious* as it may have been if the girls were not promised to them.

In *Hales v Jamilmira* (2003), a 49 year old Indigenous man from Maningrida, Jackie Pascoe Jamilmira, was convicted for statutory rape with a 15 year old girl who was his promised wife. He was also convicted of discharging a firearm likely to endanger others, which was seen as a threat to the 15 year old girl and her friends. On appeal, Jamilmira submitted that his sentence should be mitigated on the grounds that it

was customary practice to have sex with a promised wife irrespective of her age. Initially the sentence was 15 months, then on appeal to the Northern Territory Supreme Court, 24 hours.

On appeal to the Northern Territory Court of Criminal Appeal, the majority was unwilling to find that the act was necessitated by customary practice. It therefore held that the 24 hour sentence was manifestly inadequate. The Court allowed the Crown appeal. However, the Court was still constrained by the fact that Northern Territory legislation at the time allowed under-aged sex within customary marriage, and traditional punishment would be inflicted. The Court therefore handed down a sentence of 12 months that could be suspended after one month had been served.

The Court did not rely on customary law factors in mitigating the sentence because there was no evidence that the offender was *required* to do what he did – even if the offender believed it gave him certain rights (see Douglas 2005, 189). The Court held that its role was to protect Aboriginal women, deter others in the community and serve 'the public interest' (*Hales v Jamilmira* 2003, [34] per Martin CJ). The Court also sought to position the Indigenous offender within the context of the broader Territory community. Martin CJ (2003, [26]) recognises that for decades the average of first time mothers at Maningrida was 15 years, however, 'the perspective of the wider Territory community … [of these] breaches … is a good reason to reinforce the operations of the law'. His Honour goes on to note that the protection of girls under the age of 16 'is a value of the wider community which prevails over that of this section of the Aboriginal community' (2003, [26]).

In *The Queen v GJ* (2005), a 55-year-old man with no prior convictions was charged with 'unlawful assault' and 'statutory rape' of a 14-year-old girl in the Yarralin community who was his promised wife. The accused lived according to his Aboriginal laws, with little contact with the non-Indigenous society. English was his fourth language and had not met a non-Indigenous person until the age of 30. The circumstances of the offence were that the victim's grandmother had sent the

victim to be with the accused (her promised husband), as she believed it was the victim's obligation under customary law. The accused suspected that the victim was having a sexual relationship with a young boy, and went to the victim armed with two boomerangs (2005, [11]-[12]). The accused hit her and had anal intercourse with her (2005, [17]). From the outset GJ asserted that 'he had acted within his traditional rights' (2005, [12]). At first instance, Martin CJ imposed a sentence of 24 months (5 months for aggravated assault, 19 months for intercourse with a minor). The sentence could be suspended after serving one month's imprisonment.

The Northern Territory Court of Appeal allowed the Crown's appeal and rejected traditional law as a mitigating factor. The sentence was increased to three years and 11 months, which could be suspended after serving 18 months. The focus of the Court on the victim. This was projected in Riley J's observation. When taking submissions from the respondent about the right to preserve custom and tradition, his Honour asked, 'But what about the victim? Has anyone asked her if she wants to preserve customs and traditions?' (cited in Brown 2007, 14).

Deterrence to Indigenous people in the community who may seek to follow traditional laws in this way was also a significant factor in the sentencing of GJ. Mildren and Southwood JJ stressed the need to teach people in GJ's community to 'better understand these important principles' of the criminal law (*The Queen v GJ* 2005, [37], [67]). Southwood J (2005, [73]) stated:

> Where sentencing and the manner of sentencing has the purpose of educating both the offender and the community care must be taken to ensure that an offender is not seen to be doubly punished and is not made to shoulder an unfair burden of community education.

The accused sought leave to appeal the decision to the High Court of Australia. However, such leave was refused (*GJ v The Queen* [2006] HCATrans 252 (19 May 2006)). As such, the courts have ensured that promised marriage is not a context

that mitigates the severity of the crime. One factor is the elevation of the victim, as David Garland's late-modern framework reveals. However, Garland's suggestion that the offender is decontextualised is not realised. In the Northern Territory, there is regard to the Indigenous offender's context – but for the purposes of condemnation rather than acceptance or reintegration.

6. Some developments in sentencing legislation

One factor that influenced the harsher sentencing in The *Queen v GJ* was a legislative amendment that required sex offender to serve a longer custodial sentence than Jamilmira, as well as the illegalisation of under-age sex within customary marriage.[8] Another major policy change in the Northern Territory was the higher burden placed on the defendant in admitting cultural or customary evidence under the *Sentencing Amendment (Aboriginal Customary Law) Act* 2004 (NT).[9] However, this did not provide any barriers for the defence lawyers in *GJ*.

However, one of the clearest indications, that the sentencing Indigenous offenders has not just been about harsher penalties, which Garland's approach would suggest, but rather about diminishing the role of community context in sentencing is the *Northern Territory National Emergency Act* 2007 s91.[10] This Commonwealth statutory provision (which applies to the Northern Territory and overrides any conflicting Territory law) excludes the consideration of customary law or cultural practices when sentencing for Northern Territory offences. The provision means that these factors can neither serve as aggravating nor mitigating factors. Thus, the purpose is not only to make sentences harsher, but to remove the role of 'Indigenous' factors.

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[8] The maximum penalty for statutory rape increased from seven to 16 years.

[9] This inserted s104A into the *Sentencing Act*. The intention of the amendment was 'to prevent the introduction – by non-Indigenous lawyers in the main – of information to the courts that was ill-informed or incorrect in terms of customary law' (Calma 2007, 84).

[10] There is a similar provision that applies to Commonwealth offences under the *Bail and Sentencing* Act 2006 (Cth).

Indigenous offenders are to be conceived only as a member of the broader non-Indigenous community. Prime Minister Howard (2006) explained that these reforms were meant to overcome the courts' 'misguided notion of Aboriginal law or customary law, rather than Anglo-Australian law.'[11] The law serves to override the role of Indigenous communities in sentencing on the apprehension that these communities are dysfunctional and there declining role (as evidenced by the inter-generational conflict) and such decline should be hastened to conform with non-Indigenous post-colonial society.

7. Conclusion

David Garland's thesis in the *Culture of Control* (2001, 12) resonates with the sentencing of Indigenous offenders in terms of identifying the re-emergence of the urge to punish, to allocate blame, condemn and exclude and to avenge the victim and 'above all' protect the public. However, judicial approaches to Indigenous offenders is not simply part of a conception of the failed welfare state and penal-welfarism (see Garland 2001, 20). It is also part of a view that Indigenous communities are dysfunctional and give rise to morally corrupt individuals.

Indigenous communities are conceived as dysfunctional either because their culture has broken down or because their culture is too heavily expressed. However, judges seek to protect the Indigenous community at the same time that they condemn the Indigenous community for giving rise to a crime problem. The community needs to be protected from itself. Sentences are to deter the individual but also to deter the Indigenous community. Crime control therefore goes hand in hand with post-colonial control beyond the rationalities of late-modern urges to punish.

[11] The reforms were supported in February 2008 and by the current Federal government: Spokesperson for Jenny Macklin, Indigenous Affairs Minister, in Karvelas and Kearney (2007).

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A critical perspective on Mental Health Disorders and Cognitive Disability in the Criminal Justice System

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Introduction

The growing presence of people with mental health disorders and cognitive disabilities (MHD&CD) in criminal justice systems (CJS) worldwide is of public concern. Evidence points to widespread over-representation of such people in prisoner populations and more generally in the criminal justice system, both as victims and offenders (Belcher 1988, Aderibigbe 1996, Harrington 1999, Reed & Lyne 2000). The financial, personal, social and human costs of large numbers of people with MHD&CD being housed in the CJS are enormous.

Conceptualising the complex social processes, systemic responses and individual impairment experiences which combine to heighten the vulnerability of people with MHD&CD to coming into contact with the CJS and to their multifaceted trajectories within, out and often back into these systems is now more critical than ever. There is currently incongruence between systems dealing with such people, and the absence of shared data means that pathways through these systems cannot be identified. Thus individual and system interactions are obscure. One starting point is to map pathways through the systems themselves and to develop a picture of their key interconnections and disjunctions for this group of people. Undertaking such a project introduces a range of dilemmas which cross boundaries from the theoretical, methodological, ethical and political, to the institutional and personal.

This paper reports on the early insights emerging from an Australian study, which is mapping the criminal justice and human service trajectories of a cohort of people with MHD&CD who have been in prison. The study combines extant administrative data from a range of criminal justice, health and human service agencies to create a linked dataset of records relevant to individuals in the cohort. Importantly it aims to move thinking in the area beyond traditionally siloed disciplinary approaches seen in studies grounded in criminology or impairment to take account of insights from the newly emerging discipline of Critical Criminology and to integrate these with similarly innovative perspectives developing within the discipline of Critical Disability Studies. Bringing these parallel perspectives together opens up a new space within which to re-conceptualise the complex matrix of concerns relevant to an intensely marginalised group of people with disabilities and which suggests an interconnected and fluid continuum encompassing social, systemic, community, institutional and criminological processes with individual experiences of impairment, disability and social discrimination, disadvantage and exclusion.

Theoretical Frameworks and Key Concepts

In addressing the issues central to the experience of people with MHD&CD in the CJS this study explores the links between social exclusion, impairment and disability and the systemic impacts of criminal justice and human service paradigms. Underpinning this approach are the parallel and emerging disciplines of Critical Criminology and Critical Disability Studies. Critical Criminology seeks to locate and understand the reasons for crime within wider structural and institutional contexts. These contexts may be conceived of in various forms including socio-economic, class-based, cultural, racialised and gendered (Anthony and Cunneen 2008:1). It sees crime and social responses to it as deeply political, cultural and critically challengeable matters. Disability Studies is based on the premise that the disadvantage typically experienced by those who are disabled reflects primarily the way society defines and responds to certain types of 'difference'. Identified with this perspective is the social model of disability which makes a crucial distinction

between impairment as a condition of the individual body or mind (such as experiencing schizophrenia, intellectual disability or brain injury), and disability, which is the social experience flowing from the presence of impairment, including the range of barriers to full participation that exist in a society which privileges 'normalcy' and marginalizes difference (Oliver and Barnes 1998). This frame of analysis challenges the view of disability as an individual deficit or defect that can be remedied solely through medical intervention or rehabilitation by "experts" and ameliorated by service providers. Rather, it explores the social, political, cultural, and economic factors that define disability and shape personal and collective responses to difference.

In conceptualising the intersections of the social, systemic and individual dimensions which operate to structure the experience of people with MHD&CD in relation to criminal justice, the critical disability perspective provides two further important insights – that the impaired body or mind cannot be simply represented as a passive recipient of social forces (Paterson and Hughes 1999) and that disability must be moved from its peripheral status in the analysis of the difference, to a central position, re-theorizing it as a key organizing principle in the construction of an individual's identity (Erevelles 2000). Critical criminology makes an attempt to take account of race, and class and (less successfully) gender in a similar way while currently relegating disability to the status of an additional dimension of social disadvantage. The theoretical orientation of this study brings disability to the centre of the analysis and undertakes to combine these two perspectives, suggesting a new way to make visible the material structures, ideological discourses and experiences of impairment that fundamentally and differentially structure an individual's life course and experience of social inclusion/exclusion.

The concept of social exclusion is a useful one in linking the discourses of critical criminology and critical disability studies and provides a useful lens through which to examine the complex matrixes of exclusion and marginalisation experienced by people with MHD&CD and their interactions with social systems. The social

exclusion perspective combines a consideration of an individual's risk and protective factors with system and policy driven problems and accounts for what can happen when people experience a combination of linked problems such as unemployment, poor skills, low incomes, unstable housing, high crime environments, poor health and family breakdown (Social Exclusion Unit 2001). Life course studies demonstrate that childhood factors are not reliably predictive of criminal justice system involvement, nor are adolescent and adult personal risk factors (Bynner 2000). Both these perspectives though can be overly individually focussed at the expense of a critical analysis of the systemic policy drivers and this study seeks to address that tendency. This suggests the need for an iterative process of identifying, understanding and removing obstacles to resources combined with a deeper analysis of the dynamics of both impairment and disability. The way those dynamics structure an individual's interactions with the systems need to be recognised and a reflective analysis conducted of the way the system initially structures those dynamics. This approach is crucial to understanding people with MHD&CD's positioning in the social world and in developing strategies to assist them to stay out of the CJS.

Thematic Fields in the Analysis

Social Exclusion and Disability

People with disabilities are one of the most socially excluded groups in society. What makes social exclusion so pernicious for disabled people is the powerful way in which barriers interact to perpetuate exclusion (Howard 1999). For example poor education can limit the extent and opportunity for employment and thereby restrict access to money and housing. Such exclusion can, when combined with other disadvantages, funnel people into the criminal justice system. A recent study of levels of social and psychological disadvantage among a sample of NSW Court defendants conducted by the NSW Bureau of Crime Statistics and Research found that nine per cent of the sample had not continued school beyond year seven, thirty

per cent had not continued beyond year 10, nineteen per cent reported "difficulties learning new things" and twenty-one percent reported they had "difficulties reading and writing" (Jones and Crawford 2007:3). These rates are far above the national averages (Australian Bureau of Statistics 2005). This funnelling is more evident in the prison system where disadvantage is even more concentrated.

This issue is salient for people with mental health disorders, particularly those from lower socio-economic groups, given that these illnesses tend to emerge and be diagnosed in late adolescence/early adulthood (Kim-Cohen et al. 2003). Given the usually long lead time from the development of symptoms to the point of diagnosis and presumably intervention, it is very likely that young people with emerging mental health issues whose families have little in the way of social and economic capital to support them, are likely to have experienced disrupted schooling. This sets in motion a chain of events/exclusions that intensify their disadvantage. For people with cognitive disabilities access to educational opportunities is also compromised. In NSW the 1996 McCrae report found that only 30% of school aged children and adolescents with disabilities in NSW attended Government primary and secondary schools and that more than half of these children and adolescents were not receiving education in the classroom alongside their peers without disabilities (McRae 1996: iv). The subsequent Vinson reports of 2002 concluded that many teachers struggle to give students with disabilities enough opportunities in the classroom (Vinson 2002: iii).

The example of educational disadvantage highlights the 'pernicious' nature of social exclusion for people with MHD&CD. The disadvantageous effects of poor education flow on to employment, particularly in a society which values literacy and numeracy above other attributes and which is rapidly transforming from a production to a service and technology economy (Dowse 2007). In examining the impact of educational disadvantage and its relationship to criminal justice trajectories the impact of neo-liberalism and neo-conservatism on the lives of disabled people also becomes a feature, demonstrating that any conceptualisation of criminal justice

trajectories must take account of processes which extend from broad social and political processes to the specific individual experience.

Poverty has been noted by Hughes (2002:580), as having "always been the key factor in the modern constitution of disability". In relation to poverty such problems can include debt, housing and welfare benefits, forming a cluster of difficulties that have the tendency to develop into further problem spirals. The social exclusionary location of people with disabilities, often bound up with the vicissitudes and experiences of poverty, leaves them prone and vulnerable to experiencing a range of 'justiciable' problems, that is, those that have a potential recourse through law or the legal system (O'Grady et al. 2004:261). These examples also point to the central importance of integrating an analysis of both social and criminal justice policy in redressing the complex dynamics of disability, criminal justice and human services.

Conceptualising the disability experience for people with MHD&CD

The differentiation of impairment (the bodily experience) and disability (the social experience which ensues from having a bodily, sensory, cognitive or psychic constitution which deviates from so called 'normal') is one of the central debates exercising thinkers in contemporary disability studies. The arguments centre on the political expediency of recognising/accepting a unitary "disability" experience that connects with the social experience of marginalisation and oppression - echoing the phenomena of racism and sexism. This failure to distinguish between different impairment and disability trajectories results in the marginalising of some impairment groups and shores up the tradition of understanding disability only in a static sense (Burkhardt 2000).

The connection between impairment and disability is a critical point of distinction here. Someone may experience a severe impairment (e.g. mental illness such as schizophrenia) but not experience it as severely disabling due to a range of factors such as having the social and financial support of their family, while another person

may have what might be diagnostically only a mild impairment but experience extremely disabling consequences, again due to a range of factors such as experiencing poverty and abuse. Clearly a critical intervening factor in this relationship is 'community supports' which alleviate or attenuate the impact of impairment.

A snapshot of the study cohort

The cohort being investigated in the current study consists of 2093 people who have been in prison. These persons, some 2,700, are drawn from two data collections – the 2001 NSW Prisoner Health Survey and the NSW State-wide Disability Services of Corrective Services client database. The cohort is comprised of 28% with a mental health disorder, (defined as having any anxiety, affective or psychiatric problem in the past 12 months), 34% with an intellectual disability and 38% a borderline intellectual disability. 28% are Aboriginal or Torres Straight Islanders (ATSI). The majority of ATSI people are in the cohort due to intellectual disability (36% have an IQ < 70 and 43% are borderline ID), whilst the remaining 21% have a mental health disorder. Eighty-eight percent of the cohort is male. Females comprise 26% of the mental health disorder component, whilst only 7% of the ID cohort and 5% of the borderline ID are female. This is not necessarily representative of the rates of these different groups in the system itself but rather a consequence of the methodology for establishing the cohort of people with intellectual disability which has had to rely entirely on the identification of these factors in the prison population. The study is not intended to be representative of those with MHD&CD in the CJS but rather to provide a means by which to examine the pathways people who are known to have MD&CD take in, out and within the social and justice systems.

The nature of the disability experience in relation to criminal justice

Overall it is possible to claim that disabled people are more vulnerable than others to experiencing a wide range of justiciable problems, many of which have clear and defined links to issues of social exclusion. Disability is amongst the most influential predictors of problem experience in the justice system – more influential than other significant predictors such as family type, age and economic circumstance (O'Grady et al. 2004:265). Further evidence indicates that the experience of multiple problems in some cases indicates a spiral of justiciable problems – where the experiences of one problem that is unsolved then leads to another and another. These "multiplicative effects" act at two levels: the direct effects on individuals, that is to say that combining the effect of one impairment on an already impaired individual is not simply additive but exponential; and then at another level there are the exclusions from social and health support systems which narrowly define eligibility on specific needs/services and not on comprehensive assessments of the person's overall predicament. This demonstrates that while people with disabilities are more likely to experience a problem in the first instance, they are also more vulnerable to compounding of problems once one is experienced, a phenomenon described as a spiralling cycle of problem sequences (ibid:265). Previous research amongst those cycling in and out of prison (Baldry et al 2006) suggest that such cumulative disadvantage is likely to result in cascading negative effects more potent than each single problem or event might suggest – the viscous cycle phenomenon (Sterman 2000) – and highlights the dynamic, interactive and synergistic nature of the phenomenon.

This insight alerts us to the importance of not simply regarding an episode of CJ contact as an isolated incident, but that it is likely to be related to prior events and a preceding status of social exclusion. The importance of this insight is to sensitise us to recognise "clusters' of problems in those who experience multiple problems. O'Grady et al's research (2004) found, in analysing multiple problems, that these issues occur regularly together or in a sequence.

This focus on multiple problems as 'clusters', has been explored methodologically by Pleasence et al (2004), who derived the following four clusters as common to people with disabilities:

1. Family – divorce, post-relationship, domestic violence and issues with children.
2. Homelessness – homelessness, rented housing, unfair police treatment, problems where legal action was taken against persons.
3. Health and Welfare – immigration, mental health, welfare benefits, medical negligence
4. Economics – consumer issues, money/debt, gambling, neighbours, employment problem (adapted from O'Grady et al. 2004)

The cluster analysis detailed above is one of many ways of moving beyond or re-writing the categories and dichotomies that emerge in any analysis driven by the distinction between community and corrections. However we hope to capture the integrated dynamics which operate within and across each site (whether it be community or criminal justice) where these identified clustered issues interact to intensify and mutually constitute each other. In fact the above four clusters have been shown to not only occur singularly but to all co-occur for those cycling in and out of prison.

Several issues have been identified as salient to the experiences of people with MHD&CD in the early analysis of cohort data. It is suggested that, for this group the pattern of 'serial institutionalisation' is particularly powerful. Much of the previous research addressing the effects of institutionalisation has focused on those individuals serving long sentences. People with MHD&CD are however more likely to be serving shorter terms but these are likely to be more frequent. This different kind of 'serial institutionalisation' is likely to be thoroughly destabilising in a variety of ways particularly in its impact on ex-prisoner's ability to obtain and sustain stable housing, where incidence of frequent moving and bouts of homelessness have been found to be significantly associated with returning to prison (Baldry et al. 2006).

Serial institutionalisation and homelessness have also been linked with other associated dimensions of social disadvantage such as lack of employment or study opportunities, lack of family support, being located in disadvantaged communities and worsening drug use (ibid:30). Importantly this combination of stressful life events is also likely to be linked to the episodic occurrences of impairment for those with mental health disorders, in both a causative and consequential sense.

The distinction between forensic and non-forensic case status also appears a critical factor. In the New South Wales legal system forensic cases are administered under the Mental Health (Criminal Procedure) Act 1990 (NSW) and are reviewed regularly after sentencing in recognition of the fact that the act was committed while the person was under the influence of a mental illness. The review panel looks for improvement in the person's mental health before recommending release. People with cognitive impairment are regularly held under this Act on the basis of their legal incompetence or incapacity. This brings an additional level of complexity since a diagnosis of intellectual disability or cognitive impairment is unchanging, creating the potential for such people to be held for long periods. Forensic status is also an arbitrary categorisation in one respect: a person may have a mental health disorder and an intellectual disability but these may not be seen to be associated with the particular offence for which they are incarcerated. So although they may be experiencing an equal impairment as another who is categorised as forensic, they are not so categorised.

Further compounding problems are the increasing use of remand and of therapeutic services in the criminal justice system. The Australian remand population has more than doubled in the past two decades - from 12% of the total prison population in the late 1980s to 22% today (Australian Bureau of Statistics 2007). Remand is now more likely to be used to remove someone who has a serious behavioural issue or for those who have no support elsewhere and are therefore unable to move out of a custodial situation. People with MHD&CD are likely to be particularly vulnerable to being held in remand when, all other things being equal, they would not be usually

held there. The status of remand can mean that the individual looses housing, a benefit, any connection with community services and support and is exposed to violence and mistreatment in prison. The limited but increasing availability of therapeutic options such as mental health courts and units in prisons may be a mixed benefit with the CJS being used to provide services from which these persons may frequently be excluded in the community.

Methodological Matters

The study takes seriously the need to anchor the quantitative inquiry in a theoretically, socially and politically informed conceptual framework. The approach we have taken to meeting these demands is an interdisciplinary one, combining core constructs and theoretical dispositions from the disciplines of social scientific inquiry, critical criminology and critical disability studies.

A mixed secondary analysis, that combines inductive and 'life-course' style assembly of the participant's criminal justice and human service involvement with quantitative statistical techniques, is used. Both forms of analysis draw on the linked data and show the pathways people take through and between services such as juvenile justice, police, courts, prisons, health, mental health, housing, community and disability services.

This study attempts to develop and map new and emerging conceptual pathways from critical criminology and disability studies onto the real life trajectories of a cohort of people with MHD&CD who have been in prison. It will shed light on the dynamic ways that impairment and the nature of service systems interact to throw up barriers that prevent people accessing the help they need to negotiate their complex and often chaotic lives. This points to the importance of an in-depth qualitative inquiry as a critical next step. Moreover, we can expect that this next phase of the research can throw light onto the vexed question of whether the supports that are offered by these systems are a match for the complex social,

psychological, cultural and political needs of those they target. It appears that the interplay amongst the systems, and between the systems and the individual blurs the boundaries between the self, the community and these systems which must be engaged with in an effort to navigate a pathway from 'dysfunction' to 'function'. These interactions can also exacerbate and compound the initial problem or cause new and different and seemingly unrelated problems to emerge.

Conclusion

The social exclusion experienced by people with MHD&CD increases their vulnerability to a range of disabling experiences generated from within the treatment /management/ rehabilitation/ retributive paradigm itself. This experience in turn increases vulnerability in general and therefore increases an overall susceptibility to the forces of social exclusion. Solutions to this predicament cannot therefore be focussed only upon individual pathology, impairment or choice or on just the CJS but need to target systemic change at a wider community and societal level.

Missing from the current discussion, but embedded in the study itself, is any consideration of alcohol and other substance use disorders amongst people with MHD&CD. While a detailed analysis is beyond the remit of this paper, these are centrally important issues because in themselves their use can be defined as a crime. More significantly, they complicate almost every aspect of the areas explored in this paper. People with MHD&CD are indeed the most marginalised, the most stigmatised by service systems and have needs over and beyond those already implied here (such as the need for particular treatments and the risks of transmission of disease etc). In addition, the prevalence of physical health problems and associated needs contribute to the levels impairment experienced by individuals and to the range of services that are needed for them.

The way forward suggests itself as a need to move mental health/illness or cognitive impairment from a categorical or diagnostic attribute to a central location in the conceptualisation of the individual who presents to the CJS. MHD&CD operate as a defining identity position, conscious or not, from which social, economic, and cultural consequences flow. Importantly, the dynamics of impairment are bound up in diagnostics and medial models onto which the lived experience has almost no purchase. This is the terrain onto which new theoretical inscriptions emerging from critical criminology and critical disability studies urgently need to be written.

People with MHD&CD come to the CJS already shaped by their impairments, defined by their dimensions of difference from the 'normal' and the social imperatives which this difference carves out in their individual experiential lives-that is, the disabling impacts of their 'dysfunctions'. These differences play out primarily in their social context and through a set of social relations that shape their lived experience largely as one of social exclusion and disadvantage. These dynamics, together with an overarching cultural posture steeped in fear or indifference and an individual milieu of suspicion or frustration see them labelled in particular ways. These dynamics fundamentally shape the nature of the theoretical, cultural, social, policy, service and personal responses to such people. Critically this complex matrix of marginalisation and disadvantage all too often results in the incarceration people with MHD&CD, effectively rendering them invisible in the broader social and body politic.

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Women-centred corrections: A naïve view

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Introduction

Through first impressions and early interactions within two women-centred facilities, a Remand and Correctional Centre for Women (RCCW) and a Women's Transitional Centre (WTC), in New South Wales (NSW), Australia, obfuscated perceptions of their penality are gradually stripped away. As a naïve researcher (Gokah 2006) in penal settings, despite experience with other marginalised groups, my entrée into the penal environment was initially confusing and somewhat misleading. In line with the ethnographic methodology (Fetterman 1998) used to conduct this research, my experiential ignorance of penal settings metamorphosed into a valuable research tool (Spradley 1979). And although my view of both penal institutions remains partial, limited to a perception that Owen (1994) describes as a 'key-hole' view, I nevertheless gained valuable insights into the broader realities for both staff and inmates working and living within a penal facility.

As a result, this paper discusses the process of peeling away the veiled penality that Carlen and Tombs (2006) state dims the punitive purpose of corrective facilities for women from view. It was this obscured penality within both facilities that subsequently impacted upon the implementation of a horticultural therapy program; a research project whose initial aim was to explore holistic rehabilitative benefits of gardening for female inmates. Foundational to the holistic aim of the research project was a recognition of the role of marginalisation in social and economic poverty for women in line with the departmental incarcerative role of detainment, as well as its posited rehabilitative aims (N.S.W. Department of

Corrective Services 2000). However, due to the process of implementing this project, particularly in the RCCW, the focus of the research broadened to exploring the effects of the penal institution on rehabilitation programs for female inmates.

Research Design & Methodology

The research project was conducted in both the RCCW and the WTC for a period of five months each during 2006. The first project was completed in the RCCW prior to the commencement of the second project in the WTC. A total of thirty inmates participated in both research projects, eighteen in the RCCW and twelve in the WTC, with a core group of four to six participants in each facility.

Central to the research was a garden project founded on horticultural therapy principles that resonated with departmental holistic rehabilitative goals of restoration and well-being (NSW Department of Corrective Services 2005). Recognition of the benefits to well-being of natural environments, such as a small garden, for marginalised populations (Kaplan 1995; Lewis 1995) formed the theoretical background to the initial research project. In line with this approach, a small garden was designed after a period of collaborative consultation with inmates and staff, resulting in the concept of a kitchen garden. The holistic aims of the garden project included offering female inmates opportunities to participate and engage with horticultural activities commensurate with individual levels of interest and ability. As the garden project was implemented in each facility, the intersections of the penal institution on these principles for female inmates and staff broadened the research scope. Consequently, explorations of these effects upon the garden project and its rehabilitative aims became the ultimate focus of the research.

In line with the ethnographic approach undertaken in this research, thick descriptions (Geertz 1993) of the prison culture were detailed from interviews with inmates, semi-participant observations and reflective journal accounts. Analysis of

the data utilised an initial grounded theory (Strauss and Corbin 1990) exploration that allowed for an inductive development of themes throughout and beyond the data collection phase. These themes were then developed alongside a further drilling of the literature, resulting in a theory that stressed the role of the dominating, oppressive (Weber 1978; Foucault 1995) and totalising (Goffman 1961) effects of the penal institution.

Situating my 'self' within this research involved a process of acknowledging the different selves I brought to the field. These included that of being a mother, wife, sister, an educated woman, and so on. Other selves were also intrinsic, sometimes conflicting parts of the 'self' in this research, such as being compassionate and caring, as well as tired and often emotionally drained (Reinharz 1997). Therefore, I situated myself within this research recognising that I brought to the inquiry my own values and judgements.

For the purposes of this paper, early experiences of establishing the garden project in the RCCW, and later in the WTC, provided the context for the on-going implementation of the garden project in both facilities. After the initial phases of attempting to establish the garden project, particularly in the RCCW, the garden project was established through the development of a rapport with a cohort of inmates who ultimately engaged with the research project.

Entering the Warehouse – A Naïve View

My first impressions of the interior of the RCCW were highlighted by a façade of normality and seeming every-day-ness. This was sketched out by pleasant architecture and green-scaped areas that linked the residential and functional areas of the facility. The façade of orderliness invoked a sense of apparent calmness throughout an initial tour of the RCCW. The penality of this facility appeared to be obscured from view; phantom-like, hidden out of sight, but uncompromisingly present.

The landscape and architecture of the RCCW fit with Hannah-Moffat's (2004) description of women-centred correctional facilities with the clustering of residential 'cottages' designed to replicate domestic living arrangements. Their location situated apart from secured buildings appeared to veil and soften the more punitive realities of a facility purpose-built to incarcerate female inmates. That these residential cottages were locked and inaccessible to inmates for an extended period throughout the day was not immediately apparent as my observation of the cottages was limited to a cursory view of their exterior perimeter. As such, my guided 'tour' of the RCCW did not extend to various buildings visible towards the rear of the institution. Any knowledge I gained about the purpose of these buildings would be derived from anecdotal information gleaned through conversations with female inmates and some staff during the conduct of the research project. Through their comments I learnt that *"bad girls"* were housed in these high security quarters and locked in "*rooms*" where they were given *"everything they needed'*. The term, 'bad girls', was regularly used derogatively by both prison personnel and some inmates in reference to female inmates deemed to have transgressed the penal code of the RCCW.

During this initial tour, however, the RCCW appeared at first to replicate more benign institutions, such as a large educational institution. To the uninitiated or novice observer, the women-centred design of the RCCW appeared to blanket its penality. However, the purposeful architectural softening of its punitive role was exposed when a senior member of staff stated that the RCCW had been designed to resemble a university campus; a resemblance that I could not deny.

In line with Hannah-Moffat's (2001) observation that women-centred correctional facilities were often "architecturally beautiful" structures (p.4), the veneer of the RCCW was successful in partially disguising it's central punitive function of incarcerating female inmates. Indeed, the architectural attractiveness of the RCCW appeared to initially invoke an atmosphere of benevolence and calm, obfuscating its

primary intent of penality from my naïve view. As Carlen (2004) reminds us, the punitive role of women's prisons has been numerously obscured and it was this that had subsequent impacts on the implementation of the garden project in the RCCW.

Although the creation of women-centred prisons arose out of innovative reforms, such as Canada's *Creating Choices* initiative (Hannah-Moffat 2002), the punitive goals of imprisonment continue to underscore and aberrate any architectural softening of buildings and landscapes. It was this scene of visual orderliness made up of well designed buildings and grounds posing as a prison that had at first led me into an ambivalent state of 'calmness'. However, after initial visits to the RCCW I could not identify nor pinpoint an accompanying personal sense of disquiet. After exiting the facility in the early phases of my fieldwork, I brushed off this sense of disquiet as being due to my inexperience and lack of exposure to a secure prison facility.

As I continued to conduct the garden project in the RCCW, its inherent punitive function was gradually exposed as the following brief, spontaneous discussion with an officer illustrates. As I was escorted through the grounds of the RCCW at the end of a garden project session the officer and I discussed the garden project's progress. During this discussion, the officer commented about the pleasant environment of the RCCW for inmates.

> *The officer says "it's not really a jail".*
> *I say, "yeah, it seems like it isn't, but it is".*
> *The officer says, "it doesn't act as a deterrent".*
> *There's no time for me to respond to this statement as the security door opens and I have to exit quickly before it closes again.*

Two facets of this exchange appeared to me to re-iterate the penality of the RCCW. The officer's reference towards 'deterrence' acted to remind me of the RCCW's incarcerative role that appeared to be in conflict with its rehabilitative aims.

Equally, the automation of a security procedure that appeared to impede further exploration of the officer's comments acted to re-enforce for me the primary role of penal codes as though they were woven through the minutiae of every-day activities. This incident echoed the penal codes that continued to intersect with the establishment and facilitation of the garden project's rehabilitative aims.

After completing the first garden project in the RCCW, an underlying sense of disquiet continued to accompany my subsequent visits to the WTC. Female inmates in the WTC are housed in residential homes, or cottages, converted to accommodate approximately twenty women and their small children. Staff offices were disguised within this residential façade resulting in the WTC being indistinguishable from other residences and small businesses. Behind the WTC a small backyard and garden acted as a common meeting and activity area for female inmates. The WTC had no obvious security structures such as those I had observed in the RCCW with the only observable form of 'security' being a childproof gate that allowed access to the centre from the rear.

The streetscape accommodating the WTC at first appeared to have no connection to an adjacent prison complex. However, as I continued to conduct the garden project in the WTC its underlying penality was brought into sharper focus. Through a personal insight, the dominating and totalising effects (Goffman 1961) of a more obscured surveillance system on inmates and staff was revealed. This insight was gained during the course of a garden project session with female inmates conducted in the common courtyard behind the WTC. In a moment of inattention I glanced up from our activity and caught my breath in surprise as I realised that any individual in the WTC courtyard was clearly visible from the guard tower positioned within the adjacent prison complex. This incident served as a stark reminder of the reality that female inmates in the WTC lived every day; that despite its softer security all inmates were still subject to restricted confinement within a corrective institutional facility.

As a result of this observation, an apparently separate security feature for an unrelated prison facility gained steep prominence in its dual role as an omniscient surveillance mechanism within an apparently benign setting. Indeed, it was now clear that the normalising features of the WTC through the use of every-day domestic architecture had succeeded in obscuring my perception of its penal role. In line with Foucault's (1995) disciplinary continuum, the technologies of discipline employed to contain incarcerated women have become such normalised components of our criminal justice system that they appear to be normal and natural. This is reflected cogently by the imprisonment of women in softer environments that more discretely enact our society's perceived right to punish women ruled to have transgressed the law of the day.

Hierarchical Conflicts

According to Walklate (2001), the physical environment of prison accompanied by visible and more obscure security restrictions define the degraded status of female inmates. This is in line with degradation ceremonies defined by Garfinkel (1956), where inmates are reminded daily of their degraded status through the imposition of security restrictions that multiply intersect their daily lived experiences.

In attempting to establish and conduct the garden project in each facility these intersections of penal mechanisms became progressively less obscure through exposure to institutional hierarchy. As a result, penal codes were illuminated through the hierarchical interplay between corrective, management and specialist staff, including visiting 'specialists' such as myself, and female inmates. The degraded status of female inmates fits with Foucault's (1977) discussion around the 'indigent' individual, who's life path is determined as individual inmates are navigated through a continuum from poverty to institutionalisation. As such, female inmates fit within the lowest stratum of hierarchy within the penal institution, illustrated in the RCCW when certain inmates are referred to as 'bad girls'.

The role of hierarchy within the penal code of the RCCW became evident during initial attempts at establishing the garden project. This could be seen in how the garden project wrought conflicting negative and positive responses from various staff members situated within the chain of command. Continued attempts to establish the garden project in the RCCW led to a series of encounters with a hierarchical 'brick wall' that enacted security systems within the prison complex. A particular discussion with a staff member highlighting her pessimistic view of the garden project's contribution to prison programs exposed the impact of hierarchical expectations upon staff, as well as inmates. A Weberian (1978) obligation to follow orders regardless of personal motives and interests was apparently enacted by this staff member in response to hierarchically imposed orders that the garden project be accommodated and implemented. In other words, the validity of the existing penal codes, as expressed via the use of rules and regulations, became rationalised as a function of every-day procedures.

The normalising of hierarchical systems had become legitimated and bound within the framework of acceptance of authoritative power relationships between individual players within the chain of command. This aligns with a Weberian aspect of domination that Brennan (1997) explains as an imposition of an order on another individual without their "voluntary personal agreement" and to which they have "no alternative but to capitulate" (p.82). Weber (1978) clarifies this as a relationship of domination "by virtue of authority, i.e. power to command and duty to obey" (p.943).

Early Phases of Implementing the Garden Project in the RCCW

These hierarchical roles between individual staff members played a significant role in the early implementation phase of the garden project in the RCCW. This was evident when, despite a hierarchical expectation that the garden project be facilitated by staff members lower down in the chain of command, its smooth

implementation in the RCCW was not assured. Given that part of the holistic goal of the garden project was to involve inmates in a collaborative process of design, co-operation from individual RCCW staff members was integral to the garden's establishment. As such, the early phase of initiating the garden project was apparently moving ahead through staff facilitated collaboration with key inmates contributing to the concept of a kitchen garden.

However, this concept of a kitchen garden was turned on its head at the inception of the garden project in the RCCW when a staff member higher up in the chain of command intervened. The staff member indicated that *"growing rows and rows of vegetables"* posed a security risk. Vegetables such as tomatoes were deemed to be a particularly strong security risk. As growing vegetables was integral to the initial kitchen garden concept, the idea that tomatoes posed a 'security risk' was unexpected. Not at any stage during discussions with other RCCW staff involved in the initial collaborative process had the 'risk' to security of growing vegetables been raised.

The response of female inmates to this intervention who had been involved in the earlier collaborative phase was less than positive. As a result, the early stages of implementing the garden project in the RCCW were memorable for the lack of response from previously enthusiastic inmates. Although I had salvaged some of the kitchen garden concept by arguing that the proposed kitchen garden vegetables could be replaced with edible herbs, the arbitrary overturning of the initial concept for the garden was eventually exposed. After the eventual establishment of the garden project I discovered that tomatoes and other vegetables were later grown by inmates in a separate garden in the grounds of the RCCW. Although this was in apparent conflict with the edict that in line with security protocols vegetables could not be grown, no clear explanation was forthcoming regarding this development by prison management.

However, this later development may explain the earlier activism that ensued as a result of the overturning of the original kitchen garden concept. These last minute changes to the kitchen garden initially led to a form of covert activism where key inmates involved in the early collaboration boycotted and avoided the garden project. The exception to this silence was displayed when an inmate who claimed ownership over the original concept loudly voiced her disapproval at the changes that had been made, stating that growing herbs was not a suitable substitute for growing vegetables. From her expression of anger it was evident that this inmate regarded me as just another actor in the intransigent penal code of the prison.

As the garden project continued, the early response of inmates to the imposed changes increasingly appeared to be reflective of the coercive and intransigent penality of the RCCW. The arbitrary, yet uncompromising enactment of punitive rules in regard to inmate activities appeared to have a marked affect on individual agency. This was evidenced by inmates resorting to subversive and covert forms of expression, such as boycotting the garden project. As such, inmates redefined their situation through presenting themselves as the winner. Bosworth and Carrabine (2001) see this as a type of combative response by individual inmates to the penal environment. The distortion and magnified importance given to ordinary, every-day activities may equally be attributed to the totalising effects of the closed penal environment. Goffman (1961) sees this as an overwhelming of self, or a violation of territories of self, within the total institution that may be somewhat mitigated by employing individual acts of self agency as in covert forms of activism.

Confessions of an Activist

Towards the end of conducting the project in the RCCW, I too would engage in a form of covert activism. This was after I had viewed the vegetable garden in a different sector of the prison, replete with the prohibited 'rows and rows of vegetables'. A separate cohort of inmates now engaged in the garden project in the RCCW indicated they would like to grow tomatoes in the modified kitchen garden.

In defiance of the previous prohibition of tomatoes, we planted heritage tomato plants in the garden. Interestingly, these vegetables raised no queries of concern from any prison staff member now associated with the garden project.

While these details could be dismissed as petty and inconsequential they nevertheless impacted upon the rehabilitative aims of the garden project, halting access to the planned gardening activities for previously engaged inmates. Even in the less restricted environment at the WTC, I witnessed similar behaviours from inmate participants to those I had witnessed in the RCCW. Inmates in the WTC became possessive over various parts of the garden and would secretly remove plants provided for the garden project. Despite my empathy for inmates, I was not immune to feelings of anger and disappointment when their actions impacted upon my efforts in facilitating the garden project. Regardless of my position of relative power within the penal institution, I found that I too had responded to an institutional violation of my perceptions of self (Goffman, 1961) with alternate emotions of empathy and cynicism toward female inmates.

Conclusion

While the early establishment of the garden project in both facilities reveals my initial naiveté in dealing with the penal environment, nevertheless, the implementation of the garden project in both the RCCW and the WTC resulted in an erosion of layers of normality and 'domesticity' that had acted to partially disguise their penality from my view. As such the penal codes of both the RCCW and the WTC were exposed to reveal the primary penality of each correctional facility. This was played out through the early establishment phases of the garden project, particularly in the RCCW, with both staff and inmates acting within the constructs of hierarchy to minimise the totalising and dominating impacts of the institution on every-day activities. As I stumbled my way through the murky, contradictory mire of the prison environment the realities of living within a correctional facility for female inmates alongside the working realities for prison staff were gradually exposed.

The softening of architectural and landscape features of both women-centred correctional facilities reflects Carlen (1998) who states that the conflation of disciplinary processes with women-centric ideals continue to reflect historical penal concepts of degradation and humiliation. Despite the women-centred focus of the RCCW and the WTC, it was clear that the initial goals of the garden project were subject to the dominant penal constructs of hierarchy and totalisation. As such, the dominant codes of penality evident in both the RCCW and the WTC had acted to impact upon the holistic, rehabilitative aims of the garden project, in conflict with departmental rehabilitative rhetoric.

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The effect of terrorism and terrorist trials on Australian prison regimes

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Introduction

Australia's domestic criminal justice systems have recently witnessed a number of cases which illustrate the distorting effects of a hyper-politicisation of criminal justice enacted under the spectre of terrorism. I am thinking here in particular of the *Hicks* and *Thomas* 'trials' and control orders and the cases of *Haneef*, *Ul Haque* and *Benbrika*.

That politicisation of criminal justice processes is evident in various ways.

- Politicisation of the law making processes by, to mention but a few examples, exerting tight executive control over the process, minimising legislative input; the extraordinary attempt to keep draft legislation secret and to minimise the opportunity for public comment, followed by the attempt to strong arm the States into passing complementary legislation precisely in order to evade potential Constitutional challenge.

- Politicisation of the content of criminal law offences introduced which (a) include reference to political motives, and (b) drive potential culpability back in time well before the existing law of attempts and conspiracy, towards what Lucia Zedner calls "pre-crime" (2007:262).

- Politicisation of investigative processes, illustrated in the *Ul Haque* case where fairly early on, ASIO and the AFP, knowing Ul Haque had been in a Lashkar-e- Taiba training camp, nevertheless decided he was no risk, and only charged him with terrorist offences some eight months later when he refused to cooperate with the AFP requests to become an informant against Faheem Lodhi. In short the charge was brought as leverage or reprisal, in the context of conduct on the part of ASIO officers which Adams J in the NSW Supreme Court found to constitute the criminal offences of kidnapping and false imprisonment.

- Politicisation of the trial process in a variety of ways, including the requirement for exceptional circumstances to exist for bail to be granted in terrorist cases; the holding of remandees in oppressive conditions which affect their ability to participate in their own trials; the choosing of judges designated to be appropriate to sit in security cases; the political vetting of lawyers through requiring security clearances; withholding information from defence lawyers; and as revealed in the *Benbrika* case, subjecting the accused to what Bongiorno J found to be "an unfair trial because of the whole circumstances in which they are being incarcerated at HMP Barwon and the circumstances in which they are being transported to and from court" (*R v Benbrika and Ors* [2008] VSC 80 20 March 2008 para 91).

- Politicisation evident in executive responses to judicial decisions adverse to the government, including Minister Andrews' response to Haneef being granted bail - revoking his visa – and the government's response to Jack Thomas's acquittal on appeal –applying for a control order – as well as the control order brought against Hicks after a politically negotiated guilty plea (which seems to be currently in the process of unravelling (see http://www.news.com.au/heraldsun/story/0.21985.23860726-661.00.html)

- Politicisation in the form of judicial submission to the claims of terror, security and risk, illustrated in the readiness of the federal magistrates to grant control orders in the *Hicks* and *Thomas* cases, where the evidence was arguably weak. In the *Hicks* case it seems especially ludicrous to suggest that Hicks is in any mental state after prolonged pre-trial detention in Guantanamo Bay under solitary confinement to represent any credible threat. In Thomas's case the evidence seemed thin and the application based more in face saving than well founded fears. Following this was the judgment of the High Court in *Thomas* where the majority was prepared to overturn well established limits to executive powers.

- Politicisation of correctional processes, in the *Benbrika* case effecting an unfair trial through oppressive prison and transport conditions, and in the *Ul Haque* case in a form of 'political theatre', illustrated by Ul Haque's arrest on terrorist charges and highly publicised trip to Goulburn HRMU supermax on an AA "terrorist" classification (despite ASIO and the AFP having earlier decided he did not present a threat, indeed that it was safe for him to be catching the train between Bankstown and the University of NSW to continue his medical studies).

Events surrounding these cases illustrate the way that the spectre of terrorism and the technologies of risk and the politics of fear it engenders, have distorted domestic criminal justice processes through a profound hyper-politicisation, overreaching claims of executive sovereignty, lack of respect for the separation of powers, political trumping of judicial decisions and the use of the criminal process, the courts and the correctional system, as a form of political theatre.

In this paper I would like to concentrate on the effects of the spectre of terrorism and of terrorist related trials on Australian domestic prison regimes. The paper is more of a future research program or wish list than a reflection of work already done. It is but a small part of the "Australian penal cultures project' being conducted

with an ARC grant by a team of colleagues including Chris Cunneen, Eileen Baldry, Alex Steel, Melanie Schwartz, Maggie Hall and myself at UNSW and Mark Brown and Diana Johns at Melbourne.

Effects on Penal regimes

The likelihood here is that the prospect of having suspected and convicted terrorists in prison will intensify tendencies to :

- Classification –NSW has a specific AA (men) and Category 5 (women) terrorist classification in the *Crimes (Administration of Sentences) Regulation* 2001 Reg 22

  > "the category of inmates who, in the opinion of the Commissioner, represent a special risk to national security (for example, because of a perceived risk that they may engage in, or incite other persons to engage in, terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment."

- Separation and segregation –either in separate sections, wings or pods, or in separate facilities such as Goulburn HRMU.

- Design and regime features which minimise human contact, limit exercise and time out of cells, limit association between prisoners.

- The introduction of specific techniques and practices such as more frequent and intrusive strip searching, the use of orange jumpsuits (which NSW CCL argues is "degrading and humiliating "and therefore contrary to UN Standard Minimum Rules for Treatment of Prisoners), the use of body belts to which foot shackles hand shackles are attached, a significantly greater restriction on movement than traditional handcuffs.

Further research will hopefully establish when these practices were introduced in various jurisdictions and the extent to which they have been copied either from US supermax facilities or from Guantanamo Bay practice.

- Significant upgrading of security and installation of high tech security devices. Carlton and Minogue suggest this is happening at Barwon in Victoria with the effect that supermax conditions are being introduced and 'normalised' in the mainstream prison system.

- Restriction on access to communications, visitors, reading matter and increased concern about mobile phones, already somewhat of an obsession.

- Prison design -the research will look for evidence that the concern to "target harden" prisons or sections of prisons against potential external attack, internal revolts, hostage taking and escapes can be demonstrated.

- An increased militarisation of prison regimes and prison officers, strengthening of special armed sections or units, increased liaison with police and military,

Certain of these practices came to light recently in relation to the current Melbourne trials of 12 suspects around the central figure of *Benbrika*. In *R v Benbrika and Ors (Ruling no 20)* [2008] VSC 80 (20 March 2008) Bongiorno J, joined David Dyzenhous and Raynor Thwaite's "judicial coalition of the willing" – "judges prepared to uphold the rule of law in the face of executive claims about national security" (20076:10). He upheld a defence submission for a stay on the basis that the conditions of imprisonment in the Acacia unit at Barwon were such that a fair trial was not possible. The defence argument was that

> the oppressive conditions in which they are currently incarcerated and transported is having such an effect on their capacity to attend to their own interests in defence of the charges against them that the trial they are currently engaged in is unfair and will become more so as time passes. *R v Benbrika* [2008] VSC 80 para 80.

Bongiorno J ruled that

> The minimum alterations to the accuseds' conditions of incarceration and travel which would be necessary to remove the unfairness currently affecting this trial are as follows:
>
> 1. They be incarcerated for the rest of the trial at the Metropolitan Assessment Prison, Spencer Street.
> 2. They be transported to and from court directly from and to the MAP without any detour.
> 3. They be not shackled or subjected to any other restraining devices other than ordinary handcuffs not connected to a waist belt.
> 4. They not be strip searched in any situation where they have been under constant supervision and have only been in secure areas.
> 5. That their out of cell hours on days when they do not attend court be not less than ten.
> 6. That they otherwise be subjected to conditions of incarceration not more onerous than those normally imposed on ordinary remand prisoners, including conditions as to professional and personal visitors.
>
> (para 100).

An adjournment was granted to enable these changes to be made, following an earlier ruling that Screens in the court had to be removed. Here then we see the utility of the notion of a "fair trial" in challenging oppressive prison conditions under

which suspects on terrorism related charges are held on remand. While welcoming this development it is important to point out that such scrutiny is tied to the on-going trial, so that once prisoners are convicted, other avenues for contesting oppressive conditions have to be pursued.

How has the spectre of terrorism 'revalorised' the role of the supermax prison?

Roy King provides a very useful review of "supermax" prisons in 'The rise and Rise of Supermax: An American Solution in Search of a Problem?' *Punishment and Society* 1(2) (1999) 163-186. He traces the origins to the lockdowns at Marion prison in Illinois in 1983 after two prison officers were killed on the same day. The events at Marion are drawn on for the Australian film *Ghosts of the Civil Dead.* In the US something like 25,000 prisoners are in designated supermax facilities whereas their take up in Europe has been minimal. Arguably Australia is more akin to Europe, with still small numbers of prisoners in designated "supermax" facilities.

A key difficulty here is that the notion of "supermax" has taken on a cultural and political life which obscures the long history of "secondary punishment", "trac", "punishment" and "segregation" sections and conditions in Australian prisons from the penal colonies on. To the extent that "supermax" is presented as something completely new this is highly misleading. The emergence of "supermax" must be put in the context of the particular Australian history of punishment sections, of the 'prison within the prison', from places of secondary punishment like Morton Bay, Norfolk Island, through Grafton, Katingal, the HRMU, Pentridge, Jika Jika, Barwon Acacia unit, and so on.

The argument is that it is important to recognise and acknowledge our own long traditions of "super –punishment" regimes, on to which "supermax" has grafted particular practices such as shackling, jump suits, lockdowns, etc. Similar argument over practices such as strip searching, which as Debbie Kilroy in the Queensland context and Jude McCulloch and Amanda George in a chapter in forthcoming book

on Prison Violence edited by Jude and Phil Scraton, point out in the Victorian context, has been going on very aggressively and in large numbers for at least 25 years. A danger is that in turn these practices at the 'hard end' of the penal system will spread more deeply into the whole maximum security sector.

An insight into 'supermax' practices and into a major avenue of potential monitoring is provided by the NSW Council for Civil Liberties in its *Shadow Report prepared for the UN Committee against Torture*, 27 July 2007 and the Concluding observations of the Committee against Torture in relation to Australia , 15 May 2008. In its Shadow Report the NSW CCL recommended that "the State party (Australia) invite the Special Rapporteur on Torture to visit the 'supermax' prison within a prison (HRMU) at the Goulburn Correctional Centre". In an Addendum to the Shadow Report the CCL later considered the HRMU in greater detail and after setting out a brief history of the HRMU it argued:

- That "the conditions in the HRMU are having an adverse impact on the mental health of its inmates;

- That mentally ill prisoners are being placed in the HRMU under segregation conditions rather than in the specialist acute psychiatric wing of the prison hospital at Long Bay as illustrated in the Scott Simpson case where a clearly mentally ill accused was held in segregation on remand at the HRMU for almost 12 months, and given anti –psychotic medication but no therapeutic treatment. When later placed in a cell at the MRRC he killed a cell mate within 15 minutes. Two years later he was found not guilty of murder on the grounds of mental illness. Two weeks after the verdict he hanged himself in a cell at Long Bay.

- That the system of a hierarchy of sanctions and privileges used in the HRMU closely resembles the flawed and discredited system used in

Katingal and that the "lessons of the Nagle Royal Commission have been forgotten" (p13 para A42).

- That those held on terrorism related charges are not permitted to see the Official Visitor.

- That there is no mechanism for HRMU inmates to challenge their placement and continued detention in the facility. The courts have no power to intervene and the NSW Commissioner of Corrective Services has suggested that some HRMU inmates will remain in the facility for the term of their natural lives.

- That there have been allegations of political interference in the running of the HRMU and a constant stream of selective government and departmental leaks from the HRMU to the popular media.

The UN Committee Against Torture in their Concluding Observations in relation to Australia the Committee stated that it was : "concerned over the harsh regime imposed on detainees in "supermax" prisons" and in particular "over the prolonged isolation periods detainees, including those pending trail, are subjected to and the effect such treatment may have on their mental health." (p8, para 24) The Committee recommended that the "State Party should review the regime imposed on detainees in supermaximum prisons , in particular the practice of prolonged isolation" (Rec 24). And that the Aust government should advise on what they done about this within one year

Prisons as 'incubators' of terrorism: prison 'conversion'

There has been some rather sensationalist media coverage of the issue of 'conversions' of prisoners to Islam prisoners to Islam and potentially to terrorist

sympathies (especially in relation to Goulburn HRMU). The tenor of some of the media concerns can be seen from the headings of articles:

- 'Hard Men Turn to Islam to Cope With Jail, Goulburn's super mosque', Stephen Gibbs *SMH* Nov 19 2005.
- 'Inmates studying al-Qaeda manual' *SMH* Dec 2007
- 'NSW Corrective Services and the super-max jihadis' *Crikey* 23 April 2007.
- 'Authorities fear prisoners plotting jail break during prayers' *ABC* 23 April 2007.
- 'Prisons 'terrorist breeding grounds' *The Age* July 2006.

Similar stories in UK include:

- 'I see Richard Reids in jail every day' *Telegraph* 30/12/2001
- 'Muslims tried to convert me in jail' *Telegraph* 30/12/2004
- 'Our prisons are fertile grounds for cultivating suicide bombers: Why convicts are susceptible to the lure of radical Islam' *The Times* July 30 2005.

There is some limited international journal literature on prison 'conversions' to Islam, with reference particularly to the US and UK. (See eg Spalek and EL-Hassan (2007); Rupp and Erikson (2006); and France: Siegel (2006).)

Some of the more alarmist accounts (eg Mark Hamm, 2006) argue that there have been 175,000 Islamic converts in the US since 11 Sept 2001, with annual conversion

running at 35,000 constituting 18% of the US prison population. Particular instances are given of inmates who 'converted' and later committed terrorist oriented offences, such as Jose Padilla of the 'dirty bomb plot'; Jamal Ahmidan, 2004 Madrid bombings; Muktar Ibrahim, London bombings; Richard Reid, shoe bomber; and several Christian Identity figures subsequently convicted of hate crimes or terrorist offences. Testimony along these lines has been given to the US Senate Committee on the Judiciary, Sub Committee on Terrorism, Technology and Homeland Security in 2003, see Statement of Dr Michael Waller, 14 October 2003. See also Silverberg, 2006.

In the US context this has led to a major debate about the role of religion in prisons, restrictions on access to the Koran in various states and a moratorium on the hiring of Muslim chaplains in some. (*Columbia Human Rights Law Review*, 2005-6). Charles Colson (of Watergate fame) kicked this attack on Muslim chaplains in prison along in 'Evangelizing for Evil in our Prisons' June 24 2002 *Wall Street Journal* and it has been taken up strongly by the neo-cons and Christian right.

The issue of 'conversion' is emerging as an issue which is likely to become more significant, but at the moment is being picked up at a local level under concerns about the "radicalisation" of prisoners. One response, according to the NSW Commissioner of Corrective Services, is "target hardening of staff", which may include "24-hour protection and security for their homes and families" (Woodham, 2005:58).

Conclusion

1. The spectre of terrorism has produced a distorting hyper –politicisation of a range of criminal justice processes, judging by recent Australian trials.

2. It has had and is likely to increasingly have effects within prisons in terms of classification, prison conditions, prison practices –greater segregation, isolation, security etc, possibly prison design, although there are considerable dangers here in seeing all these developments as new as against tracing the long history of secondary or super punishment regimes and practices.

3. It seems likely that the presence of charged or convicted of terrorist offences will strengthen political and public support for high security/segregation/"supermax" sections, although again, there is a long history of their justification with reference to notions of (ordinary 'criminal) "monsters", "worst of the worst", "intractables" etc

4. The notion of prisons as terrorist incubators and the issue of conversion to Islam within prisons is becoming of increasing concern in the international context, especially in the US, but also in Europe (France, Spain), and to a lesser extent in Australia. In the US especially, religion in prison is becoming somewhat of an ideological battleground while in Australia increased security and intelligence concern is being devoted to the 'radicalisation' of prisoners.

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Isolation as Counter-Insurgency: Supermax Prisons and the War on Terror

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This paper critically examines the treatment and conditions experienced by the Victorian Pendennis defendants and specifically the coercive use of isolation within high-security and its intended effects. Indefinite isolation applied in combination with other brutalising practices has been the ongoing focus of much concern and criticism in the context of the post-9/11 treatment of unconvicted detainees in US run off-shore military prisons such as Guantanamo Bay and the now closed Abu Ghraib Prison in Iraq. While the current saturation of critical commentary in this area characterises indefinite detention without trial and other brutal excesses as 'new' 'emergency' or exceptional responses deployed in times of crisis, this paper contends that such features are in fact fundamental cornerstones of civil high-security regimes in western democratic states. Isolation, sensory deprivation and overload, exposure to temperate extremes, 24 hour lockdown and total surveillance, shackles, strip-searches, behavioural modification initiatives and 'mind games' are frequently deployed in high-security in response to a string of officially constructed threats and 'crises'.

In this respect recent efforts to combat terrorism merely provide renewed legitimacy to the ongoing project of prison securitisation and other draconian initiatives, which underpin a series of responses to officially constructed and perceived risks and crises (Sim, 2004). In reality the coercive application of isolation in conjunction with other brutalising excesses and deprivations is not a new phenomenon. There is a long history involving the coercive use of isolation to instil

total psychic and bodily control over prisoners designated 'threatening', 'non-compliant' or 'high-risk' within civil systems (Rodriguez 2006; Churchill and Vanderwall 1992). In acknowledging these continuities, this paper situates conditions experienced by the Pendennis defendants in Victoria in the historical context of isolation as a form of institutional counter-insurgency or weapon of war in western state domestic and military prisons.

Isolation as Counter-Insurgency in Australian Prisons: Past and Present

Australian states are currently witnessing the escalation and intensification of the coercive use of isolation in the context of supermax confinement. This proliferation must be understood within the historical context of the use and abuse of controversial and experimental hi-tech prisons such as the Katingal Special Security Unit in NSW and the Jika Jika High-Security Complex in Victoria (Carlton, 2007, Funnell, 2006).

In May the United Nations Committee Against Torture (UNCAT) condemned the harsh conditions in Australia's 'super-maximum prisons', and in particular the prolonged isolation imposed on prisoners, including those pending trial, and the effect such treatment may have on their mental health' (UNCAT, 2008). The UNCAT report speaks to a range of concerns in Australia including the impact of anti-terrorism legislation on prisons (specifically the increasing militarisation of prison culture and practice), the AFP's proposed program of de-programming' and 'de-radicalisation' in prisons (Australian Federal Police, 2006; ABC Online, 22/4/06; AAP, 22/4/06), the construction of 'super-prisons' with increased systems of surveillance, security and control, and the development of an exclusive high-security classification rating reserved for those already held in restrictive high-security regimes for terrorist related offences in all Australian states (NSW Parliament General Purpose Standing Committee, 2005; Human Rights Law Resource Centre, 2006).

Enforced isolation in the context of institutional military and civil contexts continues to serve as a powerful counter-insurgency measure or weapon of war to pre-emptively punish and break those targeted as 'combatants' post-9/11 (Gordon 2006; Davis 2005). In Guantanamo Bay isolation has been used by the US Government to break the silence of detainees like Jose Padilla and elicit information and confessions (Beyerstein 22/8/07; Richley 14/08/07; Begg, 2006). The public emergence of confessions such as Padilla's provides enormous legitimising power and provides weighty justifications for anti-terror operations and the pre-emptive punishment of suspects. This is also relevant to the experiences and effects of isolation for terror suspects detained in civil high-security prisons.

The experiences of the Victorian Pendennis defendants in the Barwon Acacia High-Security Unit provide powerful illustrations of the coercive imposition of isolation in Australian civil prisons. In spite of being charged with non-violent offences the twelve had until recently been subject to the A1 security rating, the highest that can be allocated to a Victorian prisoner. The Victorian Justice Department provided little information to justify these extraordinary circumstances and the classification decision itself was said to be informed in large part by a file of newspaper clippings (*The Australian,* 22/3/07). This is typical of the processes surrounding prisoner segregation, which are commonly inconsistent, arbitrary and lacking transparency. For the Pendennis defendants, the A1 rating translated into draconian security stipulations including 23 hour lockdown in sensory deprived conditions, constant surveillance, the use of shackles and strip-searches and the removal of privileges (*R v Benbrika and ors* pp. 9-11 paras. 28-38). Until recently, the men had spent more than two years confined to their cells for 20 plus hours every day and only allowed one box visit with their families per week and one contact visit per month.

An A1 security rating also resulted in stringent security procedures for the transportation of the defendants from Barwon in Geelong to court in Melbourne. These involved frequent strip-searches at each point of transfer between van, court cells and the courtroom:

> The vans in which the accused travel are divided into small box-like steel compartments with padded steel seats. Each compartment holds one or two prisoners…The compartments are lit only by artificial light. They are air-conditioned by a unit controlled by one of the prison officers who travels in the driver's compartment. The accused are under video surveillance at all times…The door of each compartment opens only to the outside of the van and is kept securely locked from the outside when any prisoner is within (*R v Benbrika and ors* p 10 para. 35).

The conditions attracted adverse publicity during bail hearings in March 2007 when the air-conditioning unit in the van malfunctioned on a trip from court to Barwon Prison. The men travelled in 50 degree temperatures because security protocol would not allow a transfer to another van. One of the men, Shane Kent, collapsed and another, Ezzit Raad suffered asthma (*Herald-Sun*, 26/3/07). The others who believed they were dying banged on the doors and screamed for assistance. After the trial commenced prisoners regularly reported experiencing disorientation, travel sickness, fatigue and confusion subsequent to their time in the van which impacted on their ability concentrate in court and thus to take part in their own defence. In March 2007 Supreme Court Justice Bongiorno ruled that the conditions in Acacia could compromise the defendants' access to a fair trial. In short, Bongiorno ruled he was:

> Satisfied that the evidence before the Court establishes that the accused in this case are currently being subjected to an unfair trial because of the whole of the circumstances in which they are being incarcerated at HMP Barwon and the circumstances in which they are being transported to and from court (*R v Benbrika and ors* p 25 para. 91).

In light of this he ruled that:

> Removal of the source of unfairness in this trial requires either that the accuseds' conditions of incarceration be drastically altered or that they be released on bail (*R v Benbrika and ors* p25 para 92).

Bongiorno's ruling is unprecedented in Australian legal history. Previous Australian High Court cases have recognised the right not to be tried unfairly (*Dietrich v R*; *Barton v R; Jago v District Court of NSW; Glennon v R*; *Carrol v R*). This is the first time, however, that the conditions of incarceration and treatment of prisoners have been linked to that right (Carlton and McCulloch, Forthcoming). Bongiorno's ruling has now resulted in the transfer of the defendants out of high-security and into the Metropolitan Remand Centre.

The intention of this paper is to highlight the continuities between penal practices deployed in military and civil systems, specifically the use of isolation as a coercive measure used to remould behaviours or 'break' individuals into a state of conformity and compliance. It is vital to acknowledge that the present use of military prisons in the 'war on terror' also represent distinct experiences and contexts that are in many respects removed from the domestic realm of civil imprisonment and penal practice. Military prisons such as Guantanamo Bay and their associated practices are justified as temporary 'emergency' measures deployed in wartime. In contrast, while coercive force deployed in civil and particularly high-security prisons it is not strictly countenanced, it is normalised or disregarded on the basis of the violent and dangerous criminal identities caged within (Rodriguez, 2006). This is an interesting point because while there is willingness to critique the conditions experienced by unconvicted people detained in association with terrorism related offences whether in Australia or in Guantanamo Bay there is a not the same level of interest or outrage extended to imprisoned individuals impacted by the same practices in the civil system.

Modern high-security (in the 20th century) has formed the basis for the application of pseudo-scientific principles and practices of 'behavioural modification' and

'adjustment'. These rose to prominence through an era of disturbing psychological experimentation and strategies designed for the purposes of counter-insurgency, interrogation and political imprisonment in the cold war period (McCoy, 2006; Gordon, 2006; Physicians for Human Rights, 2005; Lucas, 1976). During this time, research in the fields of psychology, particularly cognitive science, revealed the powerful potential for manipulating human behaviour (McCoy, 2006). In the 1950s and 1960s, studies uncovered the devastating impacts of sensory deprivation and prolonged isolation on the human psyche (McCoy, 2006; Physicians for Human Rights, 2005). Other research highlighted the impact of sleep deprivation, the administration of psychotropic drug and electroshock treatments, 'special' behavioural adjustment incentive programs and social isolation (McCoy, 2006; Ryan, 1992: 83-109; Fitzgerald, 1975). Much of this research and 'expertise', gleaned from the imprisonment and interrogation of political dissidents in Northern Ireland, South Africa, Russia, East Germany and Korea, was applied in domestic prison systems in the 1960s and 1970s to deal with prisoner subversion and non-compliance (See Ryan, 1992; Fitzgerald, 1977; Lucas, 1976: 153-167). In 1970, US psychologist Dr James McConnell stated in his paper titled 'Prisoners can be brainwashed now':

> It goes without saying that the only way you can gain complete control over a person's behaviour is to gain complete control over his environment ...I believe the day has come when we can combine sensory deprivation with drugs, hypnosis, and astute manipulation of reward and punishment to gain almost absolute control over an individual's behaviour. It should be possible then to achieve a very rapid and highly effective type of positive brainwashing that would allow us to make dramatic changes in a person's behaviour and personality (cited in Ryan, 1992: 95).

During this time domestic prisons came to serve as a laboratory for the experimental application of a range of behavioural controls described above. Primary examples include graded attitude and behaviour adjustment programmes

within New York's 'Adirondac Correctional Evaluation and Treatment Centre' set up in the aftermath of the Attica riots (Fitzgerald, 1975); the controversial deployment of the Special Training and Rehabilitative Training (START) behavioural modification programs in Marion Federal Penitentiary Illinois and the involuntary administration of painful drug aversion therapies in Vacaville, California (Ryan, 1992: 83-109). The phrase 'behavioural modification' in this context fails to convey the full extent of institutional violence enacted through enforced isolation, sensory deprivation, use of shackles and the forced administration of drugs amongst a raft of other controversial 'treatments' (Ryan, 1992).

These practices are officially neutralised as painless spatial and psychological methods to achieve prisoner control. They are bound up in and legitimated by sanitising professional terminology and discourses associated with security, punishment and incarceration (Rodriguez, 2006: 148-149). But regardless of how such measures are represented or whether the methods used are overtly physical or psychological the point is that the 'the intent is to apply stress to the individual in such a way that normal psychological functioning and defence mechanisms break down and the victim becomes amenable to behaviour manipulation' (Lucas, 1976: 156). In this sense psychologically geared methods of control are devised to curb independent thinking, 'break' and 'remould' difficult or recalcitrant prisoners into a state of conformity and compliance (Rodriguez, 2006; Ryan, 1992). Such a project is synonymous with the exertion of official torture and violence and this can only contribute to the infliction of physical and psychic pain and harm (Haney, 2003).

Prisoner psychological and physical breakdown and despair in response to indefinite periods spent in isolation and sensory deprivation, extreme forms of prisoner resistance and corresponding official use of 'legitimate' yet abusive force, self-harm and suicide are some of the documented harms associated with supermax (Human Rights Watch, 1997; Haney and Lynch, 1997; Rhodes, 2004). Aside from the violent and abusive cultures fostered by conditions, severe psychological and physical detrimental effects wrought by the damaging combination of sensory deprivation

and isolation are well documented in reports by prisoners, studies and clinical experience (Haney and Lynch, 1997). These include depression, anxiety, hypersensitivity to external stimuli, hallucinations, perceptual distortions, temporal and spatial disorientation, deficiencies in task performance, impaired motor coordination, paranoia and problems with impulse control (Physicians for Human Rights, 2005: 60-61; Haney, 2003: 130-132; Haney and Lynch, 1997). Such effects have been likened to those experienced by survivors of torture (Haney, 2003; Physicians for Human Rights, 2005: 62-63).

While perennially advocated by officials to house 'worst of the worst' or 'high risk' offenders, trends in western prison systems such as the UK, Australia and particularly the US where the supermax model predominates, suggest these prisons are becoming increasingly normalised (Funnell, 2006: 70-74; Davis, 2005: 124-125). In reality, the supermax is used to house a range of prisoners for various reasons including those considered disruptive, those concerned with their rights, women and the mentally ill (Human Rights Watch, 2003). Reporting on supermax conditions in the US state of Indiana, Human Rights Watch observed that once these institutions are opened there is a tendency to fill them and 'standards for selecting prisoners for whom harsh conditions are warranted get diluted in practice' (Human Rights Watch, 1997: 11). In addition Human Rights Watch report that once disruptive or difficult prisoners have been transferred to high-security there is a tendency to keep them there for extensive periods in the interests of 'security', thus threatening their physical and mental wellbeing and enhancing the likelihood of repeated criminal or disruptive behaviour and longer periods in high-security (Human Rights Watch, 1997: 11).

The adoption of draconian practices to combat perceived risks, threats and crises within prison is an ongoing historical phenomenon (Carlton, 2007; Churchill & Vanderwall, 1992; Scraton, Sim & Skidmore, 1991). The changing shape of these risks and threats are derived in and bolstered through imagery and enemies

associated with wartime, whether it be 'war on crime', 'war on drugs or 'war on terror' (Gordon, 2006). As Gordon (2006: 53) observes:

> What is distinctive in the post-war period is the invention of perpetual wars, general wars without end, made on false promises of security and waged against ever shifting spectral enemies, driven by ideologies of order and counter-insurgency and by policies to contain and quarantine the effects of global poverty.

The punishment of immanent threats to order and security, whether they are real or imagined, serve as the justificatory basis underpinning the realisation of reactive state power and the exertion of force in high-security more generally. Rodriguez argues 'here terror itself becomes the moral of the story – prisoners ought to live in fear, in return for the fear they have wrought (as retroactive threats to a presumably civilised order) and continue to extract (as caged, violent quasi-people always on the cusp of returning to freedom or overtaking the facility)' (Rodriguez, 2003: 186).

In Barwon's Acacia Unit in Victoria and Goulburn's HRMU, those facing terrorist-related charges, some of which are non-violent, have nonetheless been constructed and othered as 'enemy' and 'terrorist' prior to their conviction. The figure of 'terrorist' has been deployed in post 9/11 times in a manner that 'mobilises collective fear in ways that recapitulate and consolidate previous ideologies of the national enemy' (Davis, 2005: 119). In the civil context prisoners are cast through the strategic construction of stigmatising stereotypes associated with criminality, dangerousness, violence and unmanageability (Scraton & Chadwick, 1987). High-security institutions and coercive practices associated with such regimes are officially denied or justified on the very basis of such discourses of dangerousness. It is an ongoing trajectory that underpins a system subject to continual revision and posturing in response to perceived crises and threats.

Conclusion

This paper has sought to highlight continuities and distinctions between the current treatment of unconvicted terror suspects and other prisoners in civil systems. Moreover, it has outlined the manner in which isolation has been administered as an institutional form of counter-insurgency or weapon of war. Ultimately this paper has argued that coercive practices associated with punitive isolation are central to the institutional operation of power and punishment within high-security and the official project of behavioural modification and control. The brutal treatment of civil prisoners buried in isolation, however, is rarely countenanced because prisoners are considered 'beyond redemption and rehabilitation' (Scraton and Moore, 2005). Their punishment is quietly regarded as defensible, a form of natural justice necessitated by their criminality and dangerousness. On the other hand the treatment of unconvicted terror suspects and the Pendennis defendants more specifically operates as a strategic official performance on two levels. First, it serves as a powerful legitimising exercise for officials. Second it inspires critical commentary and outrage focused around human rights, the lawfulness of conditions and treatment imposed upon those who are unconvicted and potentially innocent. While such contributions have made considerable gains for individual cases, there remains a need to confront and question more comprehensively the extent in which conditions that give rise to abusive excesses in prison are systemic. The examination of individual abuse cases and conditions can never produce the systemic reform needed because they are premised on the assumption that high-security institutions are governed by law, transparency and accountability when the documented reality is that they are not.

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Colonial genocide and state crime

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Introduction

When Kevin Rudd delivered the long overdue apology to members of the Stolen Generation in February 2008[1], he pointedly avoided any reference to the term 'genocide'. For someone as instinctively conservative as Rudd, adopting the controversial terminology applied to the forced removal policy by the *Bringing Them Home* report (HREOC 1997) was never on the agenda. So, when asked by the ABC's Lateline program why he had avoided using the term Rudd replied: "the term has a specific definition in international law, and I don't believe it is either appropriate or helpful in describing the events as they occurred – or in taking the country forward" (ABC 2008).

Appropriate or not, Rudd's approach was subsequently endorsed by the conservative commentator Gerard Henderson (2008), a trenchant critic of the use of the term, who argued that describing forced removal as genocide 'make(s) the resolution of long-standing problems more difficult than they otherwise might be.' Henderson did not spell out what form the resolution might take but it seems clear that compensation is not one of them. When Senator Bob Brown moved an amendment to the apology speech motion calling for 'just compensation to all those who suffered loss', all but Brown's fellow Greens senators voted against it.

While the use of the term 'genocide' might continue to be entwined with the lingering legal, political and moral issue of compensation, this paper seeks to

[1] The full speech can be accessed at http://www.pm.gov.au/media/Speech/2008/speech_0073.cfm

address some of the broader criminological questions raised by the concept of genocide in Australia. Given the prominence of the genocide debate within the 'culture wars' and the scale of discrimination against Australia's indigenous population, criminologists, unlike historians, have written surprisingly little about this topic. Yet much of what criminologists have written about, such as the policing of Indigenous people, has colonialism as its broad social and historical context.

Moreover, colonial genocide has not been the subject of recent criminological literature on genocide and state crime. For example, Green and Ward's only discussion of the theme in their 2004 book on state crime is to dismiss in three sentences the notion that the forced removal of children comes within a criminological definition of genocide. Instead, they label forced removal as 'institutionalised child abuse' (Green and Ward 2004: 165-166), which apart from being an inadequate description of the assimilationist intent and devastating social impact of the policy, leaves out the whole issue of settler and frontier violence against Aboriginal people and how that might relate to the various removal practices.

Nevertheless, Green and Ward's criminological definition of state crime – 'state organisational deviance involving the violation of human rights' (Green and Ward 2004: 2) – does provide a starting point for examining the crucial role of various state institutions in a range of state practices that I suggest constitute colonial genocide.

Some of what I will argue is still in a very rudimentary form and will require testing through much further research and debate. It also forms part of a wider exercise following on from my PhD (Grewcock 2007) that looks at the various systems of exclusion historically implemented by Australian state institutions. While this is still very much a work in progress, the core argument that I am developing is that exclusion was one of the fundamental functions of Australian state institutions and that it operated in relation to both internal and external frontiers.

The criminological implication of this is that the deviance that can be attributed to abusive exclusionary practices rests in part on the nature of the state itself, rather than aberrant departures from putative Australian democratic norms or the rule of law.

What I will be putting forward is that the processes of colonisation were responsible for colonial genocide in Australia and that colonial genocide arises from a continuum of abusive practices, conducted over lengthy periods of time and with varying levels of direct state support. In some situations, the policy rationales for these practices have been quite different and the stated intentions behind some of the policies benign. But as a whole, these practices have resulted in the dispossession, marginalisation, cultural destruction, social fragmentation and widespread killing of Aboriginal people.

An important distinction to make at the outset is that colonial genocide is not directly comparable with the concentrated, systematic, state controlled mass killing that characterised the Holocaust. But while the absence of gas chambers is a significant point of difference, I would argue that colonial genocide *is* systemic and cannot occur without state acquiescence or complicity.

Fundamentally, colonial genocide is a by-product of the overall project of creating a Western colonial settler state and as a consequence raises important questions about the nature of that state; the various measures used by the state to legitimise and legalise the seizure of land; the legitimacy of nationalist narratives that construct a largely peaceful history of progress and development; and contemporary approaches to indigenous people that minimise or deny histories of disruptive and violent state intervention, compounded by long term neglect.

So, how can this be placed within a criminological framework?

Conceptual issues

From a criminological perspective, colonial genocide raises two main conceptual challenges.

The first is the definition of genocide. As Green and Ward (2004:166) note, there are at least 13 different definitions of genocide but the term is generally attributed to the Polish jurist, Raphael Lemkin (1946), who in the immediate aftermath of the Holocaust, was seeking to describe 'a crime without a name'.

Lemkin was one of the key architects of the 1948 Genocide Convention which described genocide in Article 2 as 'any of the following acts committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.'

The Australian government ratified the Convention in 1949 but without any acknowledgement that it might be relevant to Australia. During the parliamentary debate on the Convention, for example, one Liberal MP commented: 'No-one in his right mind believes that the Commonwealth of Australia will be called before the bar of public opinion, if there is such a thing, and asked to answer for any of the things which are enumerated in this convention' (Archie Cameron, Member for Barker, cited in Tatz 1999)

However, the *Bringing Them Home* report's finding that the intentional removal of children for the purposes of 'absorption or assimilation' violated Article 2(e) 'because it aims to destroy the "cultural unit" which the Convention is concerned to

preserve' (HREOC 1997: part 4) raised the issue of to what extent the Convention also covered 'cultural genocide' and by extension, colonial genocide.

While there is some evidence to suggest that Lemkin did contemplate the inclusion of cultural genocide in his framework, the relationship between forced transfer of children and mass killing remains ambiguous and has been central to the critiques of the Human Rights and Equal Opportunities Commission's use of the term. I suggest that reliance on forced removal as set out in Convention an insufficient basis for a criminological definition of genocide and to that extent, I agree with Green and Ward. However, a more fundamental issue for criminologists is the extent to which intentional destruction or mass killing of a particular group should be central to definitions of genocide.

In *Bringing Them Home*, it was argued that intention could still be implied, even though the relevant state practices were 'not solely motivated by animosity or hatred'. But for those who take the requirement of intent literally (referred to in the literature as 'intentionalists'), the absence of any stated policy to destroy a particular group may be sufficient to remove the impact of frontier violence from the orbit of genocide because it was not the result of a co-ordinated state policy.

This is particularly relevant to the colonial experience in Australia, where, over many years and in different regional contexts, low level conflict between white settlers and the indigenous population was punctuated by outbursts of intense and lethal attacks by settlers and a variety of state agencies. In some isolated instances, most notably following the Myall Creek massacre in 1838, the state intervened to punish some of those responsible by in this case hanging seven stockmen. But this was not the norm. Typically, if there was not direct state involvement, there was acquiescence or varying levels of state complicity.

This raises the second main conceptual issue – state deviance. If we adopt Green and Ward's definition of state crime, this is conceptualised largely in terms of

organised human rights abuses. Within this framework any definition of genocide would constitute state crime when measured against the formal human rights standards of the twentieth century.

But how are such norms to be applied to the 18th and 19th centuries; especially if formal colonial policy was not to destroy the Aboriginal population? Furthermore, how can they be applied to the assimilation policies of the 20th century, which, although they implicitly denied the legitimacy of Aboriginality, were in formal terms justified as improving the conditions of life of those targeted by policies such as forced removal?

The short answer to these questions is that if human rights are to be understood as universal, then to deny their application to earlier periods renders them hostage to historical and cultural relativism. Moreover, despite the degree of hegemony historians have often attributed to dominant ideas such as colonial racism, there was some direct resistance to its impact. Primarily this came from indigenous people themselves, who in the most basic way fought to maintain their rights to land and community. But there were also critics within the political establishment; divisions between the Colonial Office in London and local authorities here and substantial regional differences in levels of violence and the methods used to enforce white rule. In other words, there were points of opposition to state policy and opposing moral frameworks through which the state could be viewed in 18th and 19th century terms as deviant and abusive.

Historical contexts

The subjugation of Australia's indigenous people cannot be understood as a fluid transition from one form of society to another. Rather it is characterised by dislocation, violence and the imposition of complex forms of state authority that were central to denying to Aboriginal people the rights to which the settler population were formally entitled. Nevertheless are two broad and overlapping contexts in which conceptual issues such as intention and deviance must be considered.

The first is the battle for land and the processes of colonisation and frontier violence that occurred largely during the late 18th and 19th centuries; the second is the shifting terrain of official state policies that ranged from peaceful co-existence to protection to assimilation and included practices such as forced removal.

Colonisation

The initial colonisation of Australia was a staggered and convulsive process, which had a devastating impact on the Indigenous population. Between 1788 and 1911, it is estimated that the Indigenous population declined from a pre-colonisation estimate ranging from 300,000 to over one million down to 72,000 by 1921 (Year Book Australia 1994).

Notwithstanding the variation in the pre-settlement estimate, this was a decline of genocidal proportions and was the product of deliberate killing, kidnapping, diseases such as small pox, dispossession and marginalisation. It represented the wholesale disruption, if not elimination, of an estimated 400 tribal groupings.

This process was particularly acute in Tasmania, where a population estimated at between 4,000 and 9,000 in 1803 declined to less than 200 by 1835, all of whom had

been captured and deported to Flinders Island in Bass Strait. By 1847, this population had further declined to 46 (Reynolds 2001: 78).

Such a profound population decline was compounded by the prevailing ideology amongst the colonial administration that the Indigenous population would die out. But this raises the question of whether that prevailing belief can be equated with an intention to eliminate the indigenous population. The answer to this is not straightforward. The original instructions from the Colonial Office in London to Governor Phillip were to treat the 'natives' with 'amity and kindness' (Reynolds 1996: 34) and it was widely expected that the Indigenous population would drift away from the newly colonised areas and that contact would be largely peaceful and on the colonists' terms.

But colonisation, which had been far from peaceful in other parts of the world, inevitably posed the question of control of land and unless the Indigenous population offered absolutely no resistance, frontier conflict was inevitable. Historian Henry Reynolds (1996 and 2001), who argues that what occurred during the colonial period is better understand as a series of genocidal episodes rather than the product of genocidal state policy , documents how notwithstanding official policy, punitive raids quickly became an established method for intimidating and driving away the indigenous population in the Sydney area.

The leader of one of these expeditions, Marine Captain Watkin Tench, described in his journal how the NSW Governor sought to 'strike a decisive blow' against a tribe in the Botany Bay area 'in order, at once to convince them of our superiority, and to infuse an universal terror, which might operate to prevent further mischief' (quoted Reynolds 1996: 33).

Once the settlements began extending inland and into Van Dieman's land, settlers rather than organised state agencies played an increasing role in enforcing control of the land which on the basis of the legal fiction of peaceful settlement had

become the property of the Crown. The methods used included killing; kidnapping and rape; isolating populations; denying access to land; and breaking up traditional patterns of land-use.

Collectively, these were systemically violent practices. Reynolds (1996:4) quotes the ethnographers Fison and Howitt who wrote in 1880:

It may be stated broadly that the advance of settlement has, upon the frontier at least, been marked by a line of blood. The actual conflict of the two races has varied in intensity and duration, as the various native tribes have themselves in mental and physical character…But the tide of settlement has advanced along an ever widening line, breaking the tribes with its first waves and overwhelming their wrecks with its flood.

Tracing the direct role of the state in creating and maintaining 'the line of blood' requires focused historical research, particularly to test and further develop the following propositions.

First, regardless of formal state policy, frontier violence was prolonged and widespread with state intervention to punish perpetrators of violence against Aboriginals rare and deeply unpopular within the political establishment.

Second, distinctions between the state and the settlers are not necessarily clear-cut. Leaving aside issues such as who organised and authorised punitive expeditions, squatters and large land-holders were economically and politically powerful; often exercised legal authority through the magistracy; and in many cases came from military backgrounds.

Third, the imposition of state authority through the establishment, for example of courts, prisons and a military and policing presence in the more remote areas was

important to the legitimisation of the seizures of land underpinning frontier violence. Ie state institutions were drawn in behind the settlers.

Fourth, the emergence from the mid 19th century of 'protectors' with extensive policing powers and the right to control where Aboriginal people lived, who they associated with, who they could have sexual relations with etc provided the infrastructure for the systems of punitive welfarism that were later to institute forced removal.

Such general trends point in the direction of state complicity for what happened to Indigenous people. That this could be defined as deviant even by the prevailing standards of the time is indicated by some of the critical voices that were raised.

Many of these were missionaries influenced by early 19th century 'Christian philanthropy', which was an important element of the campaigns against slavery and influential within the Colonial Office in London.

With their limited messages of racial equality and divine vengeance for the treatment meted out to the blacks, these people were met with considerable official hostility on their arrival in the colonies and were often ostracised and isolated. But it seems clear that the visible decline in the Indigenous population was an issue about which there was vocal and vehement dissent.

However, two notes of caution are required.

First, the view that 'god created all men as brothers' did not necessarily challenge the notion that Europeans were superior to Aboriginals. It was often little more than code for the view that Aboriginals should be allowed to die out in peace.

Second, those such as the missionary G.A. Robinson, who was a driving force behind the establishment of the Flinders Island settlement for Tasmania's

Aboriginals, equated protection with the isolation and removal of Aboriginal people from areas which had been colonised by the whites.

So, while the opposition of Robinson and others to the routine acceptance of frontier violence provides an important insight into the ideological battles of the time, it is also an indicator of how policies formulated in terms explicitly opposed to violence and mistreatment could nevertheless play a part in problematising the existence of Indigenous people and institutionalising their separation and differential treatment from whites.

In this sense, the notion of 'protection' provided an important link between overt frontier violence and the various social policies developed at a state level.

Protection/assimilation/forced removal

While the protection policies that developed during the latter part of the 19th century were still largely based on the notion that the Indigenous population would die out, the assimilation policies that developed during the 20th century were partly an acknowledgment that the previous assumptions about inevitable extinction were wrong.

Like protection, the assimilation policy was conceived as a vehicle for maintaining white Australia. It was underpinned by racist beliefs based on notions of European cultural superiority and included 'scientific racist' ideas such as eugenics. The forced removal policies that were institutionalised as part of this shift in official approach were based on the rationale that 'mixed race' children could be assimilated/socialised, while 'full bloods' could be isolated on reserves or in remote settlements.

While forced removal was justified in benign terms as a policy aimed at rescuing Indigenous children from backward primitivism, and in many areas was driven by

state officials previously responsible for 'protection', the policy was ultimately reliant upon force and designed to deny the very legitimacy of Aboriginality.

This was an intentional, highly organised policy that deliberately sought to break up families and community ties, destroy cultural practices, and strip away any sense of Indigenous identity.

By implication it sought to remove any prospect of claims to traditional land or wider challenges to the impact of colonialism. It was also to be pursued with unremitting bureaucratic endeavour. According to the Chief Protector of Aborigines in Western Australia, A.O. Neville (1947: 80-81),

The native must be helped in spite of himself. Even if a measure of discipline is necessary it must be applied, but it can be applied in a way as to appear to be gentle persuasion…[T]he discipline we propose here is only akin to that which we usually impose upon ourselves. Let us try it for a generation or two, and we need not fear the outcome. But when I say try it, I mean that every agency now in force and to be employed for the betterment of the native people must look upon the pursuance of the accepted united policy as paramount. There must be complete and enthusiastic co-operation between those charged with its initiation and conduct without reservation, and no backsliding, changes or let-down behind Authority's back must be permitted. Political influence must keep out. There will be difficulties and failures, but the end in view will justify the means employed – to wipe out forever an existing blot upon Australia's escutcheon, and succeed in the ultimate elevation of a minority of our people to social equality with the majority and, what is equally important, to give them the ability to think for themselves.

In the light of such comments, the extensive research associated with the HREOC Inquiry and the ongoing testimonies of those who were the victims of these policies, establishing that forced removal was both intentional and deviant is not as problematic as it is for the initial colonial period. The abuses forced removal inflicted

upon Indigenous people clearly brings the policy within a criminological definition of state crime. But is it genocide?

Towards a criminological framework

The main purpose of this paper has been to set out some of the key elements of a criminological definition of colonial genocide. Such a definition would not draw directly on the Genocide Convention, with its immediate origins in the Holocaust, but would use it as a marker of the seriousness of genocide as a category of state organised or sanctioned abuse.

While 20th century genocide can be characterised as an extreme and deviant departure from previous forms of rule, generally occurring in periods of conflict over relatively short time spans, colonial genocide has its roots in the nature of the colonial process and can occur over much longer periods of time. Moreover, while the colonial state can play a central role in directing and legitimising genocidal policies, it also owes its existence in part to their success.

Colonial genocide is not unique to Australia but it does have significant local dimensions. The framework I propose is consistent with the 'structuralist' approach to genocide and draws partly on the definition of 'indigenocide' formulated by historians Raymond Evans and Bill Thorpe (2001), although I see no particular reason to invent a new word.

It has six elements: (i) the intentional invasion/colonisation of land; (ii) the subjugation, forced movement and separation of the Indigenous population; (iii) the removal from the Indigenous population of their traditional means of existence; (iv) the killing of the indigenous population to the extent necessary to allow total imposition of the economic and political relations enforced by the settler state; (v) the classification of the Indigenous population as racially and culturally inferior to

the settler population; and (vi) the systemic denial of Aboriginality through the destruction of family, kinship and social ties.

While much work needs to be done to refine this framework, I suggest it provides a starting point for a criminological analysis of the lethal, abusive and discriminatory relationships between Australian state institutions and the Indigenous population. It also establishes a foundation for looking at more immediate issues such as the impact of the criminal justice system in Indigenous people and the deeply entrenched institutional prejudices and practices that operate within it.

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Extreme Transport: Custodial Transport in Western Australia & Beyond

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The present decade has seen a rapid development in the application of human rights standards to custodial transport systems and in mechanisms to enhance compliance with such standards. This was perhaps timely due to global shifts towards privatised prisoner transport that distanced service provision from traditional government accountability mechanisms and towards use of pod-style transports that maximised not only security but sensory deprivation and discomfort of detainees.

Both trends became manifest in Western Australia with the commencement of custodial transport services on 1 August 2000 of the Court Security & Custodial Services (CSCS) Contract by AIMS Corporation, which had commissioned a fleet of 39 pod-style vehicles (DoJ 2000).[1] The Liberal Government had also been forced by the Democrats to establish an Inspector of Custodial Services, in order to get its privatisation legislation through the Legislative Council, which created a significant new mechanism for enhancing public accountability. The publication of the CSCS Contract by government and of CSCS Annual Reports was also an important reform for public accountability, in direct contrast to the Kennett government approach, in which such contracts were subject to "commercial in confidence".

[1] The contract was with the Corrections Corporation of Australia Ltd, which was jointly owned by the Corrections Corporation of America and French catering conglomerate Sodexho. However, the company was rebadged as AIMS Corporation, after which Sodexho bought out the interest of its American partner.

After nearly a year of operation, the Inspector, Professor Richard Harding, completed his first inspection on CSCS transport services (OICS 2001). He noted in his report that the contract had been poorly scoped or underbid. Indeed, while Cabinet had been told in April 1998 that a full year's operation would cost $8M, its actual cost in 2000/01 was $16.17M.[2] The report, however, mainly focussed on issues of safety, duty of care and quality of service. Vehicles were found to lack safety restraints, natural light, airflow, dignified toilets, views, seat padding and were, even then, prone to breakdown. Restraints were over-used, especially for women and minimum security prisoners on medicals and funerals. It found that: *transportation for those in custody is inconsistent in quality and, at its worst, unacceptable.*

It was concluded that deficiencies in demand management, contract management, and in cooperation of the parties, especially in regard to vehicle safety, were such that *the hazards to this point, have offset the benefits.* This was not to overlook significant advantages for Police, Courts and custodial managers under the CSCS Contract, but it did signal the Inspector's concern with outcomes for people in custody, and in particular in how their human dignity is respected.

History suggests that contract management in itself cannot be relied upon to safeguard human dignity and safety. The second and subsequent fleets of convict ships to Australia were privatised transports. The Second Fleet, operated by slave traders, was a disaster for its convict passengers, of whom 24% died on the journey, and many more soon after arrival, compared with only 3% on Govt Phillip's First fleet. Chaplain Johnson who observed the embarkation said: *Great numbers were not able to walk nor to move a hand or foot … they were filthy and covered in their own nastiness (Shaw 1977, 108).*

[2] These costs included both custodial transport and court custody and security operations which were inseparable parts of the CSCS Contract.

Gary Sturgess, of the Serco Institute has argued that it is a myth that the widely differing outcomes between the first and second fleets was due to one being public and the other privately operated (Sturgess 2005). He has found that the First Fleet was also operated by way of private contract, just one with a far more sympathetic operator, the evangelical Williams Richards. Nevertheless, one presumes that the leadership of Captain Philip, the extra resources he obtained for colonisation and dispersal of marines throughout the fleet rather improved the prospects of the original fleet.

Human rights in Australia today are safeguarded variously by common law, by state and commonwealth legislation that gives force to international human rights covenants, by human rights and other public accountability agencies which educate the Australian community and investigate breaches, and by assent to voluntary codes which elaborate the application of human rights in particular sectors. The *Standard Guidelines for Corrections in Australia (2004),* assented to by the respective Ministers for Corrections in each jurisdiction is an example of the latter.

Some of the most basic human rights standards apply directly to custodial transport operations as they do to any other custodial operations. For example, Article 5 of the Universal Declaration of Human Rights (UN 1948) says that: *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*. However, it was the *Standard Minimum Rules for the Treatment of Prisoners (UN 1957)* that first made specific provisions relating to custodial transport. These are presented in the first column of the table, with those from Australia's Standard Guidelines in the second for comparison:

Standard Minimum Rules (UN 1957)	Standard Guidelines for Corrections (Australia 2004)
	1.81 Transportation of prisoners should take place in a **safe** and **efficient** manner, under conditions appropriate to the level of **security** for those prisoners
45 (1) Prisoners being transferred are to be **protected from insult, curiosity** or **publicity**.	1.82 Prisoner transport should not be **afflictive** or subject prisoners to **unreasonable hardship** or unnecessary **exposure to public view**.
45 (2) Conveyances which subject prisoners being transferred to **unnecessary hardship** shall be prohibited.	
45 (3) Transport is to be at the **expense of the prison administration,** and **equal conditions** shall obtain for all prisoners.	1.83 Prisoner transport should be carried out at the **expense of the Administering Department, unless** an approved arrangement exists between the Administering Department and another agency. The Administering Department is **not required to meet the costs** in circumstances such as where a prisoner is granted special leave **to attend a funeral**.

The Standard Minimum Rules on prisoner transport have been reaffirmed and expanded to a limited degree in subsequent UN Instruments, including for juveniles.[3] But what do such human rights standards signify, how should they be

[3] See for example: *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (United Nations 1988), Principle 16, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (United Nations 1990), Rule 22. UN Human Rights instruments can all be viewed at: http://www2.ohchr.org/english/law/.

regarded? Should we make-do with minimum universal standards, or do they need application and elaboration in different cultures and societies, under new economic conditions and with new technologies?

For so-called "first world" nations of Europe, North America and Australasia, it was Lord Ramsbotham, the Chief Inspector of Her Majesty's Inspectorate of Prisons (HMIP) just prior to his retirement in 2001 who showed the way, publishing the first version of *Expectations - Criteria for Assessing the Conditions in Prisons and the Treatment of Prisoners* as an Appendix to that Inspectorate's 1999-2000 Annual Report.[4][12]

Expectations was intended to provide standards against which custodial institutions and services in England and Wales could be inspected. These standards were tested in subsequent inspections and refined through two further editions and referenced against international human rights instruments. The Thematic Review: *Prisoners Under Escort* (HMIP 2004a), demonstrated the relevance of these standards (HMIP 2004b). The following, table shows a few of the review findings against these Expectations.

[4] *Expectations* for prisons is now in its third edition; there are also versions for juveniles and immigration detention. See: http://inspectorates.homeoffice.gov.uk/hmiprisons/.

Some Expectations	Findings: Prisoners Under Escort
Minimise time in cellular vehicles	Prisoners disliked cellular vehicles
Comfort breaks at least every two hours	Average time to court 2hrs 10min, many much longer without breaks
Vehicles should be safe, secure, clean and comfortable	Prisoners feared for their safety in the event of an accident.
Maximise use of video-link	Average time away for Court 8hrs 26min
Give 24 hr notice of planned transfers	Insufficient info given on moves
Transport men & women separately	Women felt unsafe due to abuse & intimidation
Treat according to individual needs	Special needs not anticipated & arrangements made.

Returning to the Western Australia context, by 2004 the contractual relationship between the Government and AIMS was looking decidedly bruised. The new Labor Government had a policy opposing privatisation of correctional services, CSCS costs had continued to escalate despite reducing prisoner numbers and the Department CEO had stated in his 2003 Annual Report that *... the level of trust in senior AIMS management, which continued to transfer operational risk to the Department and take little responsibility for service issues had deteriorated (DOJ 2003, 2).* There was a death in custody in an AIMS van on 6 May 2003, and 9 prisoners escaped from the Supreme Court Holding Rooms on 10 June 2004, prompting the Hooker Inquiry (Hooker 2004).

The death-in-custody was quite extraordinary insofar as Charles Raymond Gamble managed to take his own life by hanging using his own shoelaces during a five minute journey from the Watch-house to the Central Law Courts. The Coronial inquiry found issues of inter-system sharing of at-risk information between Police, Corrections and the contractor, and a need to remedy poor camera surveillance and hanging points in the cell of the vehicle (Hope 2004). This prompted video-camera

upgrades throughout the fleet and the covering of grills on inner cell doors by impervious lexcen screens to prevent potential hanging points. There was also an effort to increase passenger comfort by covering metal seats, but this stalled after only two of the four long-haul vehicles were upgraded.

As well as funding these minor vehicle upgrades, the Department took ownership of the fleet from the contractor's financier for its residual value of $300,000, despite AIMS having in 2004, a much-needed fleet replacement plan. More positively, responsibility for metropolitan juvenile transport was transferred back to the Department, as were medicals and funerals to metropolitan minimum-security prisons, to ensure better service quality in these areas.

But it was an incident in the Federal sphere on 17-18 September 2004 that showed just how crucial human rights considerations can be in custodial transport operations in Australia. According to the Hamburger Inquiry, in the course of a transfer from the Melbourne Immigration Detention Centre, Victoria to the Baxter Immigration Detention Facility, South Australia over two days by GSL contractors, detainees experienced use of force that may have caused injuries, failure to provide medical care, inadequate rest, food or access to toilets, sensory deprivation, humiliation, disregard to appeals for assistance and inhumane and degrading treatment (Hamburger 2005). Interestingly, the vehicle used was a prisoner transport vehicle borrowed from the Victorian prisoner transport fleet.

The OICS delayed its follow-up custodial transport due in 2004 to allow the Department to respond to the findings of the Hooker Inquiry which had sharply criticised its supervision of the CSCS Contract. Inspection work for the *Thematic Review of Custodial Transport Services*, for which the present author was lead researcher and writer, commenced in November 2005 (OICS May 2007).

However, in the period following completion of field work, and before publication of this Review, two significant incidents came to light. The first of these was the death

in a Chubb Transport van in Auckland, New Zealand in August 2006 of 17-year old Liam Ashley. The Department was prompted to publish the report of its internal Inspectorate by the investigation and publication of a broader report by the Office of the Ombudsmen, and these two documents together make illuminating reading (Belgrave & Smith 2007, and MacDonald 2006). The obvious point was failure to separate a juvenile from adults, contravening long-standing international human rights conventions. However, the inquiries also documented a drift between legislation and practice, monitoring failures, failure to pass on at-risk and segregation information to contractors and inadequate surveillance by Chubb staff.

Interestingly the Ombudsmen concluded that: *we consider staff opportunity to keep prisoners under surveillance is unsatisfactory due to the design of many prisoner transport vehicles*, yet stopped short of recommending blanket video surveillance as the Department had indicated it could not afford this! The Commissioner of Corrections responded to his Department's failures in policy, procedures, contract management and vehicle design by announcing a trial, with an intention to normalise the use of hand-cuffs linked to body-belts for all prisoners under escort. He said this was *not undignified*, nor would it *cause pain or discomfort* to prisoners (Rowe, Louise, Media Coordinator, Department of Corrective Services, Press Release: *Prison Van Death Prompts Trial of Restraints,* Perth, Western Australia, July 2008).

Back in Western Australia, on 17 October 2006, an inter-prison transport van left Broome Prison at 8.15 am for a nine hour journey to Roebourne Prison. Just 3 hours into the journey, some six to seven kilometres past the Sandfire Roadhouse, it broke down in 40.5 degrees heat. AIMS organised recovery vehicles from Roebourne, which arrived only at 08.15 pm that night. Confined to their cells on the transport and lacking air-conditioning or any effective air-flow, prisoners experienced dangerously suffocating and distressing conditions in their metal cells in the heat of the day. Air-flow was especially constrained by the presence of lexcen over the grills of the inner-doors, excepting a small strip lower down.

They eventually arrived at Roebourne Regional Prison at 4.15 am the following morning, having been confined in small cells for some 20 hours, except during their transfer to the substitute vehicles, and a brief toilet stop at South Hedland Police lockup. While the Minister requested that the Department *scrutinise existing procedures to ensure that similar incidents do not occur in the future*, no inquiry was undertaken, nor any specific reforms announced (Quirk, Margaret, Minister for Corrective Services, Hansard, Parliament of Western Australia, Legislative Assembly, page number: 8153b - 8153b/2, 2/11/06).

The Thematic Review was tabled in Parliament the following July. The Inspector stated in the report that:

> *The Report that follows is the most comprehensive account of the challenges and problems of custodial transport to appear in the literature to date. It should set a plateau for discussion of these issues and the development of operational standards in all jurisdictions, particularly those where long-haul land transport is a prominent aspect of the required services (OICS May 2007, 19).*

The report was certainly supported by thorough field work, analysis of available data, consultation with all parties and reviews of literature and best practice in other jurisdictions. It noted that Western Australia, is perhaps the largest sub-national jurisdiction in the world and that a high level of risk attaches to escort journeys in regional areas due to extreme temperatures, vast distances, vehicle breakdown, remoteness from help, stock and wildlife on roads, driver fatigue, poor road conditions and flood events.

The report also drew attention to the reality that the majority of prisoner transfers, some 57%, involved a transfer between a metropolitan prison and a regional prison or between regional prisons and that the prisoners involved in such long-haul transports were overwhelmingly Aboriginal. As at 31 March 2006, 24.7% of prisoners

were displaced from their home regions (OICS May 2007, 53). This reflects a trend of increased displacement of Aboriginal prisoners from their home regions, due to failure by successive governments either to prevent Aboriginal imprisonment or to provide adequate prisoner accommodation and services in the regions.

Despite significant disruption caused by Western colonisation, Western Australian Aboriginals, and especially those from remote regions, retain strong cultural sensibilities which tie them to particular areas and extended family groupings living in those areas and to particular frames of cultural reference (See LRCWA 2006, Chapter 3). Yet Aboriginal people in custody are disproportionately required to bear the burden of risk from long-haul custodial transports as they are shunted from institution to institution around the state. Custodial transport in Western Australia, therefore, is an integral component of a justice system tainted by systemic racism (LRCWA 2005, Part 5, 94ff).

The Thematic Review made 42 recommendations to the relevant Departments and transport contractor, including:-

- Unified operational & vehicle standards including for long-haul vehicles - toilets, redundant air-conditioning, standing room, views;
- Government to consider alternative means eg air-transport, coaches for long-haul travel;
- Safety restraints to be provided for all passengers;
- Comfort breaks at least every 2.5 hours;
- Increase video-links to reduce transports;
- Release at minimum with cash & ID's/assist with journeys home;

- Ensure provision (and reserves) of food/water/medicine & nicotine lozenges;

- Provide for infirm/pregnant & disabled;

- Spurn use of substandard police lockups to accommodate prisoners on transport journeys;

- Changed escort arrangements for juveniles.

However, while the Department of Corrections (as the administering Department) had notionally agreed to twenty of the recommendations, little new action was triggered, although in-principle adoption of vehicle standards for new vehicles, including the installation of passenger safety restraints was an important advance. Fifteen others had qualified agreement and seven were disagreed. The Review had also contributed to development of new Western Australian standards, with the publication in April 2007 of the first version of the *Code of Inspection Standards (OICS April 2007)*. These were added to more recently by the *Inspection Standards for Aboriginal Prisoners* which includes a number of standards of relevance to custodial transport of indigenous prisoners (OICS 2008).

Professor Harding also warned the CEO of Global Solutions Limited (GSL), as Government considered novation of contracts with AIMS through purchase by GSL, of the logistical challenges of custodial transport in WA, and of the parlous state of the fleet and disgraceful Police lockups (Harding, R: Media Release, 26/11/07, downloaded from www.custodialinspector.wa.gov.au).

Sadly, Mr Ian Ward, an Aboriginal elder on remand, was found deceased in a GSL van at Kalgoorlie Prison on 27 January 2008, following a 450 km journey in hot conditions from Laverton. Amidst significant public anger and concern, the Minister ordered a Departmental inquiry which gave particular attention to remote area

vehicle & operational standards and fleet replacement and revisited some of the recommendations of the Thematic Review (DCS 2008).

The Department has since energetically pursued reforms in its management of the CSCS Contract. Heads of jurisdiction in WA, led by the Chief Justice have also been meeting to attempt to leverage reforms aimed at reducing unnecessary transport of adults and juveniles for court and remand purposes. However, enormous challenges remain in updating the vehicle fleet, in implementing operational standards, in attracting new staff during a resources boom, in extending effective monitoring of services, in reforming the performance management requirements of the contract, in reducing cancellations of medical appointments and in changing legal practices. It also remains to be seen whether the Government has the appetite for the additional expenditures that a safer and more decent custodial transport system will require.

In the meantime, the Supreme Court in Victoria, on the 20 March 2008 made a pivotal judgement that touched on custodial transport conditions. This concerned an application for a stay of trial by alleged terrorist Benbrika and others on the basis that conditions of confinement and transport prevented defendants from participating effectively in their trial due to their deteriorating mental state (R v Benbrika and ors (Ruling No. 20) - VSC 80: 20). They had been held in adverse conditions in the supermax unit at Barwon for an extended period and experienced an arduous 2.5-hour daily transport to Melbourne for their trial.

The Supreme Court foreshadowed upholding the stay if the Department failed to comply with changes including that they be held at Melbourne Assessment Prison, that they have direct transport to court restrained only by hand-cuffs and without extra strip-searches, that they have 10 hours out-of cell each day and normal access to visits. Notably, the judgement did not reference the Victorian Charter of Human Rights, nor other human rights instruments, but solely the common-law right to a fair trial.

Returning to WA, the reform efforts of the Department of Corrective Services culminated in a Custodial Transport Forum, held in Perth on 7-8 August 2008, which sought develop national custodial transport operational and vehicle standards. This involved representatives from all Corrections and Police Departments in Australia and New Zealand, private sector representatives from Australia and the UK, and local participation from the Aboriginal Legal Service and the Office of the Inspectorate of Custodial Services. It is certainly the first time such a forum has been held in Australia and certainly indicates that custodial transport has emerged as an important area of attention for justice administrators. It is certainly worthy of closer attention by researchers.

The Rudd Government has declared an intention to sign the United Nations' *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). The Human Rights and Equal Opportunity Commission is currently investigating how best to establish the National Preventive Mechanisms (NPMs) that will be required to fulfil our obligations under this Protocol. This means independent inspections of all closed facilities whether controlled by police, corrections, immigration, health and welfare officials or their contractors.

The OICS in Western Australia and the cycle of continuous improvement in which it is engaged with the department and government is therefore a harbinger of things to come, at least in this nation. Specialised and genuinely independent custodial inspection is an essential component in systems to ensure that human rights are properly codified and observed in custodial transport operations and overcome short-term political cycles that drive so much of public corrections discourse. And as Damien McLean, the Warburton Aboriginal Community adviser in the wake of the Ian Ward death commented:

> *If you've got the benefit of being able to appoint an independent inspector of prisons and say that you've got one, the flip side is you actually need to listen to*

*them (sic) (*McLean, Damien, quoted in *The West Australian*, February 27, *2008, 7*).

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Using a Flashpoints model of Public Order Policing in Indigenous communities to explore the structures and practices of internal colonial power relations in Australia

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Introduction

Throughout the 1960s many former colonies of metropolitan powers (such as Britain & France) achieved independence, frequently due to the efforts of anti-colonial liberation movements. They became the periphery countries of the international system of power while the metropolitan countries remained at the core. Indigenous peoples who formed small domestic minorities in independent settler states, such as Australia, remained in an internal colonial relationship with the ruling power group, the 'whites' (Moreton-Robinson 2007), they lived at the periphery and white rulers at the core (Rowley 1972a, b). Despite attempts by Indigenous activists and their supporters to alter the balance of power in Australian society by making claims against the state (Werther 1992, Jennett 1991; Lippmann 1981); and the emergence of an Aboriginal middle class (Howard 1982); there are still many Aboriginal people who remain concentrated in the structural periphery of Australian society, experiencing low-incomes, high rates of unemployment, poor health and high rates of crime and intra-community violence (Memmot et al. 2001; Jennett & Greer 2001).

In this paper, first it is being argued that now, nearly half a century later, an internal colonial model of power relations is still relevant to explain the situation in which

many Aboriginal people find themselves. Second, the Flashpoints model will be applied to a public order policing event at Wadeye, which is a particularly dysfunctional peripheral community in which N.T. Police are charged with the task of keeping the peace.

Internal Colonialism

Throughout the 1960s and 1970s there was much discussion about the concept of internal colonialism, i.e. the sort of colonial relationship which continued to exist between the settlers and the Indigenous or 'aboriginal' (Werther 1992) peoples when the settler state achieved independence from the metropolitan colonial power. There were several models of internal colonialism offered by various authors.

Blauner (1969: 393), discussed the concept in relation to Black Americans who, while they are not Indigenous peoples, have been used and abused in the interests of whites (Lacey 1972). He analysed the ghetto revolts which took place in the 1960s in the USA seeing them as 'collective responses to colonized status'. He noted the use of the discourse of colonialism by ghetto protestors as they tried to articulate their experience of being controlled by outsiders and their identification with anti-colonial liberation movements which were operating at that time (Blauner 1969: 394). Blauner distinguished between 'colonisation as a process and colonialism as a social, economic, and political system' (Blauner 1969: 393).

Blauner (1969: 394) argued that 'colonialism' describes 'a *process* of social oppression' common to both classical colonial and internal colonial situations. He therefore viewed the situation in the USA as 'a special form of colonialism outside the context of the colonial system' (Blauner 1969: 393) and identified four basic components of 'the colonisation complex'.

1. 'Colonisation begins with a forced, involuntary entry'.

2. 'The colonising power carries out a policy which constrains, transforms, or destroys indigenous values, orientations, and ways of life'.

3. '... colonisation involves a relationship by which members of the colonised group tend to be administered by representatives of the dominant power'.

4. Racism is the 'final fundament of colonisation'. Blauner notes that 'racism generally accompanied colonialism'. Noting that 'racial prejudice can exist without colonisation, he argues that, nevertheless, ' racism as a system of domination is part of the complex of colonisation' (Blauner 1969: 396)

In a more developed conceptual treatment of internal colonialism, Hechter (1975) argued that such a situation exists when there is a *culturally allocated division of labour within a state*. According to Hechter:

> *National development* is a process which may be said to occur when the *separate cultural identities* of regions begin to lose social significance, and become blurred. In the process, the several local and regional cultures are gradually replaced by the establishment of *one national culture* which cuts across the previous distinctions. The core and peripheral cultures must ultimately merge into one all-encompassing cultural system to which all members of the society have primary identification and loyalty. (Hechter 1975: 5; emphasis added).

Noting the existence of separatist political movements in such societies as Canada, Belgium and the United Kingdom (all liberal democracies) Hechter (1975: 5) argues that this *ethnic persistence* suggests that 'successful incorporation of peripheral

groups occurs only under certain conditions'. Hechter offers two alternative models of national development, the *diffusion model* and the *internal colonial model*.

The diffusion model of national development predicts that, following industrialisation, the peoples of the periphery will eventually become acculturated to the culture of the core, that is, the culture of the ethnic/racial group which dominates the State. Interactions between the core and the periphery will, in the long run, bring about a common set of economic, cultural and political institutions and practices, and the foundations for a separate ethnic identity will disappear (Hechter 1975: 6-8). This is the view of national development upon which the policy of assimilation was based.

By contrast, in the internal colonial model of national development 'the core is seen to dominate the periphery politically and to exploit it materially' (Hechter 1975: 9). The fact that racial/ethnic conflict persists is related in his view to a cultural division of labour in which economic disadvantage prevails in the periphery.

Noting the literature which argues that the periphery remains culturally isolated from the core in developing (Third World) countries, Hechter (1975: 26) says '[i]t is difficult to argue that peripheral groups in industrial societies are economically, politically and culturally isolated from the core'. However, because the peripheral group is 'suffused with exploitative connections to the core ... it can be deemed an *internal colony*' (Hechter 1975: 32). This economic dependence which promotes 'backwardness' in peripheral groups is reinforced through juridical, political, and military measures'.

> There is a relative lack of services, lower standard of living and high level of frustration ... Among members of the peripheral group. There is national discrimination on the basis of language, religion or other cultural forms. Thus *the aggregate economic differences* between the

> core and the periphery are *causally linked to their cultural differences*. (Hechter 1975: 34)

In Hechter's study, the penetration of the cultural institutions of the core 'narrowed socialisation differences' between the core and peripheral collectivities. In face of these pressures for acculturation the persistence of a distinctive culture in peripheral areas could not be explained by the periphery's isolation from the core culture. 'Instead, the persistence of peripheral culture' suggested for Hechter (1975: 27) a virile 'pattern of resistance to assimilation'.

On the issue of suffusion of the peripheral group with exploitative connections with the core, Blauner (1969: 404) noted that, in the USA, outside of some areas of the South, there was no Black economy and that most Black Americans were 'inevitably caught up in the larger society's structure of occupations, education, and mass communication'. He observed that, as a result of contradictory pressures, similar to those noted by Hechter, Black Americans had both an '*ethnic nationalist orientation* which reflected the reality of colonisation' and an '*integrationist orientation* which corresponded to the reality that the institutions of the larger society were much more developed than those of the incipient nation' (Blauner 1969: 404; emphasis added).

Other influential models of internal colonialism were put forward by Latin American writers such as Casanova and Stavenhagen. According to Casanova (1965: 32) the new nations which emerged after gaining independence from a colonial power preserved 'the dichotomous character and contradictory types of relations similar to those found in the colonial society'. Stavenhagen (1965: 64) maintained that the city becomes the core of the new nation and the rural areas the periphery.

In Australia, with its federal system of government, we can see the national government in Canberra as constituting a political core, which has driven policy in Aboriginal Affairs since the 1967 Referendum enhanced the Commonwealth's

powers in this area. However, State governments, with their control of land and policing in particular, continue to operate as a secondary level of the political core which also generates policies and institutions which affect Aboriginal peoples. Capitalist businesses, especially large scale ones, tend to have their headquarters in the major cities, and even in metropolitan countries and the USA (the one settler state which is an international superpower), and drive the framework of economic structures from the economic core.

Aboriginal peoples live their lives in structures of political and economic power dictated from the core. These are the 'exploitative connections to the core' identified by Hechter (with reference to the Celtic fringe in the UK). Nevertheless, it must be acknowledged that the reality of Aboriginal settlement in 2008 is (a) mostly urban and (b) shows characteristics of integration into the Australian economy in ways predicted by Blauner, even if this has been largely through the public sector, non-government agencies and the 'Aboriginal sector' rather through mainstream businesses.

Police, as agents of the core, do the best they can to administer the laws of the core in local environments, some of which are significantly at variance with assumptions upon which policymakers in the core developed the laws. Economic and political dominance does not necessarily translate into cultural acceptance in the periphery of core-driven laws and policies.

Public Order Policing

Disturbances to public order take place along a continuum from disorderly street behaviour to large scale organised protests or riots and terrorist bombings. They may be static, such as a football match, or mobile, such as marches and parades. Human rights instruments which Crawshaw, Devlin and Williamson (1998) identify as relevant to policing public order events are the UNHDR, ICCPR, Hague Conventions, Geneva Conventions, the UN Code of Conduct for Law Enforcement

Officials, and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

The key human rights which are relevant in public order situations are:
1) *the right to life* which is guaranteed by UNHDR Article 3; ICCPR Article 6.1. While no one should be arbitrarily deprived of life, the right to life is not absolute in the way the right not to be subjected to torture or to slavery are protected absolutely. For example, the death penalty is not prohibited by these instruments but it should only 'be imposed for the most serious crimes after a competent court has imposed the sentence' (Crawshaw et al. 1998: 91). Not only must states prevent assaults on their citizens' rights but they:

> ... must adopt positive measures to protect the right to life, to prevent acts of mass violence, to prevent arbitrary killings by their own security forces. (Crawshaw et al. 1998: 91)

Crawshaw et al. (1998) note that these obligations on states have significant implications for policing. They say that 'policing policy, strategy and tactics for dealing with conflict and disorder must be informed by: the requirement to protect the right to life; and the prohibition of arbitrary deprivation of life [i.e. officers must not take a life unnecessarily]'. They must also be informed by: the requirement to take positive steps to protect life; to prevent disorder from occurring; and to ensure proper investigations into deaths caused by state officials. (2) *Freedom of Assembly* is another key human right which is relevant to public order situations – Principle 12 of the UN's Basic Principles on the Use of Force and Firearms by Law Enforcement Officials – Lawful and Peaceful Assemblies. (3) People who are detained have the *Right to Humane Treatment* (Article 10 ICCPR); the prohibition of torture is absolute (UNHDR Article 5; CAT; ICCPR Article 7. (4) *Right to a Fair Trial* has implications for police behaviour in relation to early stages of an investigation, gathering evidence, treatment of alleged offender(s). (5) *Right to Presumption of Innocence* – i.e. from

the earliest stages of the investigation. These latter two Rights are embodied in Articles 10 and 11 of the UNHDR and in Article 14 of the ICCPR.

An important consideration in respecting these rights is the *use of force* which, in order to prevent the arbitrary deprivation of life must be governed by the *principles of proportionality and necessity*. The only acceptable reasons for police action which results in death are: personal defence (i.e. their own life or that of another person must be in danger); to effect an arrest or prevent an escape. Quelling a riot or insurrection is included in the European Convention (Crawshaw et al. 1998)

Here, policing of public order events which are described in the press as *riots* will be the focus of discussion. A riot is a disorganised public order event. The specific case to be examined is the remote Aboriginal community of Wadeye. King and Waddington (2005) provide a flashpoints model for analysing public order occurrences. The model was devised by David Waddington to explain why some potentially disorderly incidents (flashpoints) fail to ignite, while other ones which appear to be similar, trigger off an explosive reaction.

The Flashpoints model for analysing public order occurrences looks at six integrated levels of structuration as follows: *structural* – material inequalities which lead to collective grievances; *political/ideological* – the way key political and ideological institutions react to demands and activities of protesting groups; *cultural* – contrasting ways of life and thought; *contextual* - macro-outer edge; dynamic communication processes in the build-up to an event (eg. prediction of violence leads to violence taking place); s*ituational* – actual social setting of the relevant social interaction, presence of targets of derision; *interactional* – at the micro/core level; quality of social interaction between police and protestors; the way each party 'reads' the other (King and Waddington 2005: 257).

King and Waddington (2005: 256) argue that to explain riotous behaviour we need to look at *the precipitating incident* and *wider contextual factors* as Lord Scarman did

in his report on the Brixton Riots (UK 1981). Central to the wider contextual factors is the internal colonial relationship that continues between the state and these peripheral communities, such as Wadeye.[1]

Public order policing of a riot at Wadeye (Northern Territory)

In October 2002 a police officer shot dead a young Aboriginal man and wounded another during a violent confrontation between two rival gangs, the Judas Priests and the Evil Warriors.[2] Much destruction of houses, cars and public property followed. The police officer, Senior Constable Whittington, was subsequently charged variously with committing a dangerous act causing death, then murder, later manslaughter, and eventually in the NT Supreme Court in 2006 he was charged with committing a dangerous act (ABC 2007: 1). However, Justice Mildren ruled that because the charge was not laid within two months, as required under the NT Police Administration Act, the indictment was quashed (NT Supreme Court 2006: 5).

If we apply Waddington's Flashpoints model to the original riot and shooting we find that the precipitating incident was a situation where a large group of people were heading for the oval amid talk that weapons were circulating. Whittington, acting officer-in-charge, and two other officers, followed the group and began confiscating weapons. Whittington spread the word that no weapons were allowed and that fights had to be evenly matched. Then someone called 'gun, gun' and the shootings took place.

Six days after Senior Constable Robert Whittington arrived at Wadeye he experienced someone waving a shotgun at him for the first time in his career (NT

[1] Wadeye is geographically peripheral as well as economically and socially so, but even a community such as Redfern, which is located at the centre of Australia's most populous city, is peripheral in many ways as was demonstrated in the 2004 riot (Ridgeway 2004; Jennett 2008).
[2] In parts of Australia it is the practice, out of respect for the relevant Aboriginal community's beliefs, not to use the personal name of a dead person for some years after their death. That is the situation with this member of the Jongmin family.

Magistrate's Court 2007: 24), judged that lives were in danger, drew his pistol and accidentally killed a 18 year old man, who had been struggling with the gun-wielder, teenager Tobias Worumbu, who Whittington also shot and injured. Worumbu said that he had been waving a shotgun in the air to scare the group which was beating his brother - in what, in his view, did not constitute a 'fair go' fight (NT Magistrate's Court; *Australian* 13/10/17). These 'fair go' fights, organised by elders and supervised by police, were a safety valve for letting off steam before feelings 'exploded' and they were an indicator of the *interactional structuration* of the events which led up to this particular 'riot'.

At the *structural level of structuration* Wadeye is a colonised, deprived community, people have very low incomes, and unemployment is very high. During the Howard years when the mass media wanted 'scary footage' of Aboriginal communities 'out of control' they often trotted out scenes from Wadeye of young wild eyed men, waving very nasty looking weapons about at each other. Prime Minister Howard and Minister Mal Brough used images of such dysfunctionality to 'sell' their N. T. Intervention, through which they literally 'brought in the troops' rather than respond to Aboriginal service organisations requests to have their funding restored or increased so that they could address the problems about which the Government was expressing concern just prior to an election and about which these organisations had been voicing concern for many years (Altman & Hinkson 2007).

One police officer who had worked there described Wadeye as being characterised by 'a seemingly permanent state of hostility between certain family groups'. Often such hostility has its roots in displacement by white spatial managers (Hage 1998; Jennett & Heller-Wagner 2001) or internal colonial rulers of Aboriginal families onto the land of one group. Under Aboriginal law other groups do not have a right to be there unless as guests of the land owners and managers (Maddock 1982) and certainly not because white administrators had decided that it would be a good idea.

Political/Ideological level of Structuration

Overlaid on and intertwined with the structural situation are colonial institutions of 'self-determination' – usually consisting of a locally run council on which those who can communicate with whites, read their letters etc. sit in an uneasy relationship with traditional owners and elders who have status under Aboriginal law (Maddock 1982). Whites 'see' what they can 'see', Blacks 'see' their system, unrespected. All the administrative and economic performance indicators are 'white' and this leads to frustration, which is exhibited as lack of respect for the elders, lack of respect for either the white or the black systems of status and power and, hence, spills over into communal chaos (or 'riots') at times.

Structural and cultural factors emphasise difference and inequality

The main rival gangs at Wadeye are the Evil Warriors and the Judas Priest Boys (it was formerly Port Keats Mission). There were 3 Police and 2500 Indigenous residents at the time of the shooting. Police in the N.T are aware that the communities with which they are dealing do not necessarily fit neatly with the communities which the lawmakers of the political core had in mind when the law was conceived. This is due to cultural differences coupled with multi-deficit community characteristics, such as very high levels of unemployment, and low levels of education. In the early 2000s elders and the police had their own way of defusing hostility. Instead of waiting until it built up and there was a riot, with rocks, spears and axes, they would sanction 'one on one fist fights' at the local oval, the interactional structuration previously noted.

When a problem arose a 'fair go' fist fight would be arranged to settle the dispute and police would supervise, i.e. they would provide crowd control. They would ensure the fighting did not get out of hand and that no weapons were used. They were referees of community hostilities (*Australian* 13/10/07; N.T. Magistrate's Court 2007).

Senior Constable Carmen Butcher, who had been in the community for some time, said that she rarely carried her gun at Wadeye because it would have been seen as a sign of aggression and distrust. When people got 'out of control' she 'talked them down' (*Australian* 13/10/07). This is how police managed their side of the interactional factors in order to avoid becoming targets of derision and, hence, hostility. Senior Constable Whittington, having just arrived in the community and with no significant experience of policing in bush communities was unlikely to have appreciated these interactional subtleties. As the Coroner noted '[h]e had not had time to establish any close relationship with the Aboriginal community' (N.T. Magistrate's Court 2007: 6).

Whittington's actions were scrutinised by the Coroner who concluded that police might have broken the law by sanctioning the fights. The Coroner said that they were condoning violence by their mere presence at the fights. He was critical of Whittington's judgement on the day and the fact that he had not followed the procedures in which he had been trained, i.e. 'to scan the area prior to discharging his pistol' (N.T. Magistrate's Court 2007: 23). The Coroner considered that Whittington had panicked while acting 'under considerable stress' and made 'a serious error of judgement' (N.T. Magistrate's Court 2007: 24). The Coroner found that 'a crime ... may have been committed ... where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done the act' (N.T. Magistrate's Court 2007: 29).

Since then, dispute resolution at Wadeye has changed: elders no longer organise 'fair go' fights; police have officially ruled out sanctioning them; the dead man's father is reportedly feeling disillusioned with the white legal system; Senior Constable Whittington refuses to work in Aboriginal communities due to the under-resourced conditions.

This example of a young man's death at Wadeye in 2002 demonstrates the extent to which structural, cultural and ideological factors are often outside of police control, i.e. determined largely by the exploitative internal colonial connections previously described. These connections involve a division of labour in which Indigenous people at Wadeye are largely excluded from mainstream opportunities but unable to live a viable alternative lifestyle. The political, economic and cultural systems of which they are 'on the periphery' are administered from elsewhere.

On the other hand, it is possible for police to influence the contextual, situational and interactional factors identified by the Flashpoints model but this is usually only with support from local authority figures and the community leaders. However, if these are operating in a system controlled by another cultural group (representatives of the White Australian State) on the one hand, and divided over what community interests are, on the other, then police have to work very creatively indeed and require adequate resources to do so. The people do not want the 'kids out of control' (Jennett & Greer 2001; Memmot et al. 2001) but they do not want them to be shot either!

During the coronial hearing the Coroner, Greg Cavanagh, told the Jongmin family (to whom the dead man belonged) 'that he wanted them to have faith in the coronial process and to understand that this was "not just any courtroom scene of the white man"' (*The Daily Telegraph* 2/10/07). The DPP wrote to the family saying:

> My office carefully looked at all the evidence and concluded that there was no reliable evidence that Robert Whittington had murdered your son. There was evidence that he should not have fired his pistol when he did, that he should have known when he fired that there were two men close together and that he might have hit either one of them. (ABC 5/04/07)

Ambrose Jongmin, father of the dead man, said '[t]the police actually shot my son, but he was a hero. ... what he did there ... save[d] many lives' (ABC 5/04/07). Mr. Jongmin was at first inclined to settle the matter using traditional Aboriginal law said 'but I thought I'd best give it to the white man law so they can handle that. But what did they give me? Nothing.' (ABC 5/04/07). We can see from the father's reaction that the cultural and power differences between the police officer, acting as an agent of the N.T. State, and the Aboriginal family, caught between two systems of law and power, are vast.

Conclusion

Aboriginal communities of the periphery of Australian society experience Australian administrative systems largely as the power system of the coloniser but as these are the most powerful institutions in the society they have no option but to be integrated into them in many ways. Police operate at the boundary of the two systems of power and understanding, trying to enforce the laws of the colonial power in as acceptable a way as they can. It is inevitable that situations such as the one in which Senior Constable Whittington found himself will happen from time to time unless the frustration and alienation levels in some of the more dysfunctional communities are addressed constructively. Waddington's Flashpoints Model of public order policing provides a framework through which the interacting factors involved in events such as the shooting at Wadeye can be examined and the limits to police effectiveness can be identified.

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Victims as Survivors

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Introduction

Woman as victim continues to be an iconic image within society, and within criminology. The stereotypical portrayal of a passive female, helpless to resist a male attacker, dominates media accounts, suggesting that to be female is to be afraid. This perspective has been vigorously challenged by some feminists and victims themselves (eg. Burton, 1998; Kelly, 1988; Lamb, 1999), yet the debate has tended to present women who have been raped or beaten with two oppositional positions: to see themselves, and be viewed by others, as either victims ***or*** survivors. Implicit in this construction is the assumption that a victim becomes a survivor over time, with this often being referred to as a journey from victim to survivor.

In this paper I want to explore the nuances of this debate by drawing on interview material obtained with 15 women, all of whom were attacked by the same serial rapist in New Zealand (see also Jordan, 2008). I argue that these women's accounts of how they were simultaneously impacted upon *and* provoked to act provide a more complex lens through which to explore the significance of a shift from seeing victims *or* survivors to viewing victims ***as*** survivors. I also canvass some of the implications arising from this shift in perception.

What is a victim?

A dictionary definition of a victim includes the following descriptions:

1. One who is harmed or killed by another: *a victim of a mugging.*
2. A living creature slain and offered as a sacrifice during a religious rite.
3. One who is harmed by or made to suffer from an act, circumstance, agency, or condition: *victims of war*

(*The American Heritage Dictionary of the English Language*, 4th edition, published by Houghton Mifflin Company.)

The emphasis is on what is done to another person – they are made a victim by the actions of an offender. Criticisms of the victim construct have therefore emphasised the passivity it denotes, along with notions of submission and surrender (Bart, 1985; Kelly, 1988). The impression conveyed is of helplessness, of persons unable to engage in their own self defence.

In this paper I want to use the women's narratives to present an expanded version of what self defence means, and argue that the positions of victim and survivor need to be applied in ways that fit more closely with the complexities and contradictions contained within victimisation experiences. Firstly the research context and methodology used in this study is summarised. A brief synopsis follows of the nature of the attacks these women had to survive, before examining two related questions regarding the ways they defended themselves against both victimisation and secondary victimisation.

Research context

As a result of earlier rape research I had conducted in New Zealand, I was introduced by a detective involved in a large serial rape case to one of the victims/survivors and, following discussions with her and some of the other women, embarked on a major research study with them (see Jordan, 2005 and Jordan, 2008 for further details).

This resulted in my interviewing 15 women in total; this number included 14 of the 27 women whose cases were heard in the 1998 trial of Malcolm Rewa, plus a woman whom Rewa had been convicted of raping in 1975 who was called to appear as a witness in the later trial. Key concepts arising from my previous earlier research (Jordan, 1998, 2001) were used to inform the initial interview schedule, which was adapted to reflect the issues emerging from discussions with the women. I endeavoured, through my questions and the interview environment I established, to put each woman at her ease and minimise the power differences inherent in the interviewing dynamic. The interviews were typically long, lasting from two two-four hours and sometimes over more than one session.

With the women's permission, the interviews were recorded and later transcribed to facilitate analysis. A separate file was created for each of the women containing my interview notes, the transcript, and notes from her police file (obtained with her permission). This material I then analysed using a grounded theory approach (Glaser and Strauss, 1967) to identify themes and issues arising from the women's narratives and experiences. From these, ideas were formulated and examined for their ability to demonstrate patterns and uniformities in the women's responses, while striving to ensure 'unique' experiences were not lost from the analysis.

Epistemologically, I accepted the women's narratives of their experiences as legitimate sources of knowledge in their own right. In interpreting and presenting these accounts, however, I am aware of the possibilities both of my influence in how these were framed and told, as well as the impact of time on how each woman articulated her experience. It is possible that the accounts presented by the women reflected the positive responses and interventions they had experienced from earlier retellings, and that these may have contributed to an increased sense of personal agency. These, after all, were women whose stories were believed, whose offender was convicted, and who themselves had been publicly commended (for example, by the judge at sentencing) for their strength and courage. On the other hand, many made comments suggesting this interview was the first occasion where they felt

they were given the space to present their own version of events and to stress what was important to them, as supposed to satisfying police requirements or reassuring family members.

The next section provides a brief overview of the women's attacker and what they had to survive.

Background to the attacks

Malcolm Rewa was born in Northland, New Zealand, and raised by relatives following his mother's death in a car accident when he was a baby (Williams, 1998). He committed his first known sexual attack in 1975 when, after dropping his wife at the maternity ward of Auckland Hospital, he headed for the nurses' home and sexually attacked a young nurse. He was subsequently arrested and pleaded guilty, receiving a four and a half year prison sentence for this offence. The years following his release indicate extensive involvement in a biker gang, as well as a growing record of burglary offences. By the next time he was to stand trial for rape offences, it was 1998 and he was being tried on 45 counts relating to 27 different women attacked between 1987 and 1996. He was convicted on the majority of these charges and sentenced to preventive detention with a 22 year minimum non-parole period.

Rewa was identified and convicted in large part through the distinctive attack pattern he developed. He targeted women alone in their homes, or those with only young children present. He would typically break in while they were asleep and overpower them in a blitz-style attack, subduing them quickly through the use of gags and binds. Often he positioned their bodies so that they draped over the side of the bed, and would remove their clothing from the waist down. He sometimes shone a torch on their genitals, and engaged in various masturbatory activities as he sought to manage his erectile dysfunction problems. After raping or sexually assaulting the woman, he would often leave them bound and gagged while he searched the house for valuables to steal, sometimes returning to rape them again

before leaving.

Profile of the women

Rewa tended to favour middle-higher socio-economic areas in Auckland city. His victims were aged 15-43 years, with most in their thirties. The majority were Caucasian women, most of whom were well-educated and holding professional jobs. For most this attack signalled their first experience with the police/criminal justice system. The high court trial ran for 3 months and was one of the longest and most publicised in New Zealand, with the police and prosecutors making special efforts to look after these women and prepare them for the court case. In part they received such positive input because they fitted the stereotype of the 'perfect victim', unable to be criticised for doing anything to 'get themselves raped.'

I want to use the narratives from the women to explore two related questions associated with self defence:

1. How to defend the self against victimisation?
2. How to defend the self against secondary (re)victimisation?

How to defend the self against victimisation?

Traditional views of self defence have stressed the importance of acquiring the physical skills required to fight off a would-be assailant. While many endeavor to promote attitudinal change as well, and can be confidence building and empowering, the emphasis is often on acquiring the physical skills and tactics. Such courses can obviously be useful in teaching survival techniques and strategies (Heyden et al, 1999). When comments are made about using self-defence knowledge, the examples given are typically of the eye-gouging, nose-breaking, ball-kicking variety. Thus although women are socialized against being aggressive and expected to be submissive in their relationships with men,

The irony is that when confronted with a rapist who is physically stronger and may be armed, a woman is suddenly expected to struggle, fight, and resist to a degree not otherwise expected. (Burgess, 1999, 8)

Such a view reflects in part a perception that the attack is physical and so the resistance and defence must also be physical. Accordingly, the emphasis has been on enhancing potential victims' abilities to defend themselves physically.

While accepting that the physical component can be an important part of self defence, the women's comments reflected a much broader conception of what defending the self means. In part this was necessitated by Rewa very quickly demonstrating that he was not the kind of attacker who would be deterred by attempts to resist him physically. He communicated his determination to succeed very forcefully through such means as his physical aggression, through the ways he disabled his victims, and how he responded to any attempts on their part to resist him physically. Rewa displayed what several of the women referred to as a 'don't mess with me' attitude; if the women screamed or even talked to him, he would hit their faces, gag them, and shut them up.

Not surprisingly, his actions instilled huge and often disabling fear in the women. Some said they were scared he was going to kill them – they did not think they would emerge from this experience alive. If the women had children sleeping in the house, Rewa would make threats against them to obtain his victim's co-operation. He did all he could to secure his victims' compliance.

Some of the women described their hurt when those around them queried why they had not employed self defence techniques against Rewa. Suzanne[13], for example,

[13] All names used are pseudonyms or names chosen by the women, as used in the book *Serial Survivors: Women's Narratives of Surviving Rape* (Jordan, 2008).

felt others blamed her lack of self-defence knowledge in ways that implied she should have avoided being raped:

[P]eople afterwards were saying, 'Well, why didn't you do this, why didn't you knee him between the legs?' and things like that.... I couldn't knee him between the legs because I was in bed when he came in. He was expecting me but I wasn't expecting him. (Suzanne, quoted in Jordan, 2008, p.27)

It was also evident from the women's accounts that physical self defence may **not** always have been the best option. In Rewa's case he responded even more aggressively towards any woman who tried to physically resist him, prompting some to quickly devise other ways of responding. Raquel, for instance, was attacked while getting into her car late one night, and was scathing about assumptions that self defence techniques would have 'saved' her:

If someone comes up from behind you and if you've not seen them, not heard them, the first thing you feel is a hit, a whack to the back of the head - no amount of self-defence is going to save you. If you turn around and try and fight somebody who's a bit taller than you, a bit heavier than you, who is stronger than you and who has also got a weapon, you're an idiot. (Raquel, quoted in Jordan, 2008, p.17)

What Raquel suggested was a quick appraisal of the situation to determine what the best option might be for her, in that specific environment, and with that particular attacker. She said:

You really just have to work it out at the time and that's the hard part, whether to fight or not.

What she decided to do was to pretend the blow to the head had knocked her out.

The way I was attacked was to completely have total domination and total power over

my body. Basically, I'm an object. I'm not a person - I'm an object. I was tied up, it was like, 'Don't try and fight back.'... There's no way that he would have attacked with that level of violence if he wasn't absolutely, totally intent on raping me. I thought, this is not a guy that you mess with, what he wants he will get, talking to him is a waste of time.

I thought, he's hit me really hard on the back of the head - I could quite conceivably be unconscious or half-unconscious. If he thinks I'm unconscious he won't hurt me, because there's no reason to because I'm not going to fight back, so self-preservation... It worked. He was very, very careful with me and that's what I found fascinating, the way he was really quite gentle with me, the way he really treated my body. I suffered no further injury after that, no further physical injury. (Raquel, quoted in Jordan, 2008, p. 21)

Raquel was still raped, and suffered the effects of rape, but what she did was for her a means of self defence. She found a way that kept a part of herself defended against Rewa's control, beyond his reach, and this played a key role in her survival and recovery. The very fact that she successfully fooled him into thinking she was actually unconscious was hugely satisfying:

I fooled him, and that came out in court too - it was like, I won!.... The fact that I'd fooled him, the fact that he really believed that and that I got the better of him. He didn't like it and that made me feel so good, it's like my little triumph, it's like, 'You didn't have complete control over me.'... I had control over him mentally in the sense that I fooled him, I don't know how to describe that - it's really amazing. (Raquel, quoted in Jordan, 2008, p. 22)

Many of the other women also described ways in which they too created and strategised in the situation when physical self defence seemed impossible as an option. Some quickly adopted the role of observer and recorder, thinking ahead to the level of description they would pass on to the police – these women found a way

to stay present but with a purpose. Others chose to dissociate, to leave Rewa their body and mentally remove themselves – one said that her sense of humour even kicked in at this point as she looked down on her bound and gagged body and found herself asking: *What would MacGyver do?* (Kathleen, quoted in Jordan, 2008, p. 23)

Another woman Gabriel described clearly the sense of fear and powerlessness these women experienced. She described her initial panic and then finding herself lying there in classic victim mode, waiting to be further harmed:

This guy had me strewn over a bed half naked, bound with blankets over my face, in position, just totally ready to rape me and he's going through the knife drawer, coming back into the room.... I thought, 'What can I do, what can I do to protect myself?' So I closed my eyes really hard and I decided to just fill up the entire room with myself so that as much of that room had me in it, so that there was no room for him in there, and it was a really hard process because I didn't have much time....

I just closed my eyes to try and think about me and how big I could possibly make myself in this room without moving. Bigger and bigger and bigger and bigger, and not focusing on what he is doing out there, and bigger and bigger and bigger and bigger. And he comes back in and he tries to rape me and he can't. (Gabriel, quoted in Jordan, 2008, p.25-26)

Gabriel's example illustrates the power of mental self defence when physical defence is impossible, and also how victimisation and survival can co-exist. Thus even at the same time as she was being victimised, Gabriel was, like Raquel, actively resisting Rewa's control, searching for some means to limit his power over her.

Although much feminist literature on rape has documented women's vicitmisation, some writers have explored the concept of survival (e.g. Gregory and Lees, 1999; Kelly, 1988; Lamb, 1999). There has been considerable debate regarding the 'right' terminology to describe those who have been raped, arguing whether they are most

appropriately described as 'victims' or 'survivors.' The passivity of the concept, victim, was rejected in favour of a term that more appropriately recognized and affirmed women's abilities to manage, survive and integrate their experience of sexual assault through the recovery process. Both labels have been criticised for the way in which they may distort women's perceptions of their experiences, forcing them to be viewed through a particular, and possibly alien, lens. Thus Spry observes of rape:

The pain and confusion following the assault is further complicated by having to structure and make sense of her experience within the assailant's language. She is already and always held in relation to the phallus; she is victim to it or survivor of it. (Spry, 1995, 27)

Whether they saw themselves as victims or survivors was something some of the women attacked by Rewa also consciously thought about. Gabriel said she wrestled for some time as to how best to describe herself and finally approached the debate this way:

You know what, that transition from victim to survivor, I think that the victim and the survivor can be parallel. That you are never, that you don't switch from being victim to survivor. You choose to take the path of the survivor, which is still the path of the victim, but it is different....

I don't think there is a shift in what happens, I think there is a shift in consciousness.... I do think, I was a victim of sexual abuse and I have survived it. (Gabriel, quoted in Jordan, 2005, 551-552)

What I see reflected in her resolution to this question is the importance of not losing sight of the either side of the equation. To only stress the harm of victimisation ignores the very act of survival and all the ways a victim may try to reduce or manage the effects of victimisation; while to place all the emphasis on survival can shunt

victims prematurely into feeling they have to be 'over it' , they have to be strong, in ways that can ignore the very real harms they have experienced and the needs these may engender. In terms of the polarised options drawn between being a victim or a survivor, these women demonstrated how they could hold both positions together - they were simultaneously victims **and** survivors. At the same time as they were being physically/sexually victimised, they were mentally and psychologically acting in their own defence. Their bodies may have been passive, through fear or from being physically bound and rendered immobile, but they still described ways in which they actively sought to limit Rewa's control of them even at the very time of the attack. It was important for them to know there was a part of them he could not reach, that they could resist him mentally and keep a part of themselves separate from his control.

This, I would argue, is also self defence. It demonstrates that even when physical self defence is impossible, women can and do defend themselves psychologically. This is significant when viewed in the context of much of the literature addressing rape resistance. Traditional police advice to women urged them not to resist if they were attacked, implying submission was a safer route to take. Such a view was challenged on the basis that, firstly, it interpreted physical compliance as submission, and equated a lack of physical resistance with the absence of mental resistance. Liz Kelly is one of the few writers to have observed:

Women resist by refusing to be controlled, although they may not physically resist during an actual assault. Resistance, therefore, involves active opposition to abusive men's behaviour and/or the control they seek to exert. (Kelly, 1988, 161)

Secondly, the advice not to resist reflected a view of rape as simply unwanted sex. It assured women that if they gave in they would be okay. As Betsy Stanko has argued, the violation of rape cannot be avoided by 'submission' (Stanko, 1990). To suggest this possibility reflects a lack of understanding of what rape means, for both the victim and the rapist. The very essence of rape makes it impossible to 'submit' to –

rape by definition implies being taken 'against' one's will, in a context where the will and power of the rapist prevails. He invades her body, in an attempted act of colonisation.

As the examples provided above show, the women attacked by Rewa actively resisted him. Although he may still have raped and violated their bodies, they were engaged in active resistance nevertheless. Such measures played an integral role in their abilities to survive and move on following the attack. The women's need to keep on surviving extended far beyond the initial rape attack. They had to survive police processes, the medical examination, and the trial, as well as manage how others close to them reacted. In all of these situations it was clear that the potential for revictimisation existed. This brings me to the second question:

How to defend the self against secondary (re)victimisation?

Secondary or revictimisation can arise in contexts where the systems and agencies a victim/survivor interacts with treat her in ways that recall her initial rape experience. This has been expressed particularly in relation to the potential for rape trials to feel like a 'second rape' (Freckelton, 1998; Lees, 1997; Orth, 2002; Scutt, 1997). As one rape researcher concluded after following 150 crape cases through courts in Australia:

This is state-sanctioned victimisation. (van de Zandt, 1998, 125)

While there is accuracy in such depictions, I would also argue that it risks portraying victims as passive pawns in the hands of the justice system. Undoubtedly some of the women felt like this at times, but what was evident was the ways many chose to manage court processes in order to limit the potential negative impacts. They actively resisted being pawns – again, they found ways to defend themselves and survive.

One way this was evident was when some took steps to assert their control over the physical space of the courtroom, a hard thing to do given how rigid and unyielding court structures can be. One woman asked for permission to sprinkle glitter before she took the stand, and was granted it.

With this friend of mine the box where I was going to be, we glit up, with the glitter of courage. We also put it into his [MR] box. We went over there and so we showed it my strength - this was my room, this was my space. So a lot of that was very much, 'I am the Goddess of Justice', very much setting it up for myself.... It's great to know that he [MR] probably wouldn't know what the hell all this glitter was on the floor or around his box! (Helen, in Jordan, 2008, 95)

So while Helen still found the court experience 'horrific' and 'degrading', while it still revictimised her to some extent, she also found ways to help her take back some sense of control in what is otherwise such a disempowering environment.

Others refused to be treated like pawns in the system and actively urged police and prosecutors to see them as individuals. For example, Gabriel, reacted angrily when she went in to court expecting an initial briefing with the prosecutor only to discover she might be required to take the stand that same day. When she objected, he explained:

'But we've found that for most women it is better to be briefed in the morning and then go in the afternoon.'

Gabriel responded:

I said, 'Well I'm not most women, I'm myself! And my support person needs notification so that she can get time off work and I'm so not happy about you just assuming that everything will fit into place and I will go in there. This is a really important time for me and I'm really pissed off with you.'

He was shocked. This is the second time I've met him and he just kept talking, kept talking and put his foot in his mouth and talked about procedure and all the rest of it until I said, 'I'm not interested in the procedure right at this second, I'm more interested in my mental state of well-being then your procedure actually.' Then he said, 'Oh God, of course you're upset and who can blame you.' And then he was very understanding about it.... And he apologised for that and said that he now knows to do that differently. (Gabriel, in Jordan, 2008, 82)

What these examples indicate is when the women asserted their own rights within the system, some individuals at least were willing to acknowledge their needs and adapt their procedures accordingly. This enabled the women to benefit from greater support and consideration and also provided criminal justice practitioners with valuable learning opportunities. Several of the police officers involved later told me that these women taught them a lot about how to be more responsive to victims' needs and to acknowledge that these might differ, given that not all victims are the same.

Conclusion

I would argue that these women's accounts are important on a variety of levels, but particularly for the ways they challenge conventional approaches in a range of areas.

Firstly, they challenge traditional accounts that portray victims as passive and only impacted upon.

Instead we are confronted with needing to attain a balance between acknowledging the very real and damaging impacts of victimisation while also validating the diverse and varied ways in which victims act to defend themselves and ensure their survival. Their accounts reveal the importance of acknowledging and recognising victims *as* survivors, and how important resisting an attacker's control psychologically can be in contexts where little possibility for physical resistance exists.

Secondly, they alert us to the ways in which surviving rape is not a one-off event but an on-going process. It was physically living beyond the event and it was also so much more than that.

In the aftermath of rape there are multiple situations victims must face that can trigger feelings of fear, vulnerability and disempowerment. There are many ways that revictimisation can occur, each bringing with it the challenge of needing to be managed and survived. The narratives provided by these women show how surviving rape also means surviving telling others, surviving each anniversary of the rape, surviving the trial, surviving all the many life events that can potentially plunge them back into the feelings associated with the rape itself. Their lives after rape suggest an on-going series of survivals.

Thirdly, the women's narratives challenge those working in the criminal justice system to recognise the potential for criminal justice processes to cause secondary victimisation, and to be willing to listen to the voices of survivors and hear what they need. From their accounts it is clear that victims of rape are not a homogeneous group, and that while some needs may be held in common, different women will be impacted on differently. This necessitates appreciation of individuals' concerns and their need to be validated as individuals, rather than treated according to a 'one-size-fits-all rape-victims' package deal.

The final point I wish to make is that a woman facing a man intent on raping her will do what she can in the moment and must always be validated for that - there are no right or wrong ways to survive. What I am wanting to show from these women's accounts is that a large repertoire of possible responses exists, many of which may not be directly observable by others because they are occurring on a mental or psychological level.

These women may have been better placed than many in terms of being able to ask for what they needed and obtain support to help them survive. There were many of them, and the police were willing to listen and learn from them in part because they needed these women on-side to get Rewa finally put away. This makes this group of rape victims unusual, but I would argue they are not unique. Rather, the different circumstances of this case enable us to see more clearly how the justice system can still revictimise even when trying its hardest to support victims and win cases.

Moreover, the women's articulateness and capacities for reflection provide us with clear examples of all the varied and diverse ways that survival can occur. Whether it was finding the most appropriate person to support them or sprinkling glitter around the box, the women chose these measures to provide at least some sense of personal empowerment in the midst of a highly controlled and controlling system.

ALL survivors of rape need to be validated for doing what they knew to do at the time to survive. At the same time, we need to continue to break the silence and shame around rape and encourage greater discussion around rape resistance, rape prevention and ways of surviving rape. We need to research and develop more sophisticated understandings of the complex connections between victimisation and survival and, most importantly of all, do all we can to reduce the levels of victimisation so that there is no rape to survive.

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The Growth of Victim Agency in Australian Jurisprudence: Limitations and Challenges

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Victim rights have been inserted into the law in three distinct ways. Most jurisdictions now offer a charter or declaration of victim rights detailing the rights and obligations of government agencies in their treatment of victims; modes of criminal injuries compensation which provides standard amounts of compensation for prescribed injuries flowing from an alleged criminal offence; and the ability to adduce into sentencing proceedings a victim impact statement to detail the harms occasioned as a result of the offence, after conviction but before sentencing. While debate ensues as to the extent to which a charter of rights and compensation appropriately restores the victim following an offence (Mawby, 2007: 209-239), the tenure of victim impact statements in sentencing proceedings remains the most contentious. While the use of such statements remains controversial throughout the common law world, it is in NSW where the judiciary has assumed greatest resistance to their use in sentencing. The arguments for or against such resistance will be canvassed in light of a growing national and international movement toward the encouragement of victim participation in sentencing.

Since their inception into NSW law under the *Victim Rights Act 1996* (NSW), victim impact statements have provided victims of crime increased opportunity to participate in the sentencing process.[1] Prescribed under s 28 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), both primary and family victims have the

[1] The *Victim Rights Act 1996* (NSW) inserted the current provisions concerning victim impact statements into the *Criminal Procedure Act 1986* (NSW) Pt 6A (ss 23A-23E). These sections were later transferred to the *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 3 Div 2.

ability to tender an impact statement following conviction.[2] Family statements may be tendered where the primary victim dies following an offence. A sentencing judge will generally consider the impacts of an offence through the information tendered in evidence, usually at trial. Recognition of the impacts of an offence upon the victim is a long serving rationale of punishment that is specifically relevant to the formation of an appropriate sentence. It is out of the need to constitute such impacts objectively, however, that victim impact statements have tended to be poorly received by sentencing courts. This is because such statements are not always seen to be consistent with the established doctrines of punishment that require a sentence to be objectively proportionate to all circumstances of the offence and offender (Kirchengast, 2007: 127-154).

Given the tendency to take crime personally, victims have been identified as poor sources of information from which to constitute the objective seriousness of an offence. Rationalising a sentence proportionate to the multiple ends of punishment, which as *R v Veen [No 1]* (1979) 143 CLR 458 and *R v Veen [No 2]* (1988) 164 CLR 465 suggests, involves the task of balancing various objectives such as the need to recognise harm done to the victim and community, the need to protect society, the rehabilitation of the offender, and the need for general and specific deterrence, is thus not a task to be expected of victims themselves.

Where an impact statement is produced by a primary victim following a non-fatal offence, a court will usually consider it so long as the evidence presented explicates the harm in question, in an objective way. Where tendered, impact statements may inform the sentencing court of trauma and loss not otherwise before the court in evidence, or provide a fresh perspective on those harms already in evidence. Problems have been identified, nonetheless, where family impact statements are tendered following the death of the primary victim.

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[2] Primary victims include persons or witnesses to an offence that have suffered personal injury as a result of an offence. Family victims include members of the primary victim's immediate family. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26.

Due to the principle that punishment be objectively proportionate to the assessment of the harm occasioned, *R v Previtera* (1997) 94 A Crim R 76 rules that sentencing courts must exclude any consideration of family impact statements where the primary victim dies. This is because, as Hunt CJ at CL states, death is the ultimate harm, such that a sentencing court must not, by reference to a family victim impact statement, 'value one life as greater than another' (*R v Previtera* (1997) 94 A Crim R 76 at 86). This, as indicated below, emphasises the need to consider the death of the primary victim in terms of the immediate circumstances of the offence. It is thus reasoned that no opinion on the victim, from family members or others, be allowed to influence the assessment of harm unless that opinion is specifically relevant to the immediate circumstances of an offence. Considering such perspectives on the loss of the victim would, under *Previtera*, allow the possibility that the primary victim was more valued than another. *Previtera* thus supports the sentencing principle that all life is of equal value. Hunt CJ at CL indicates this in the following terms:

> A problem arises, however, in those cases – such as the present – where the crime involves the death of the victim. The consequences of the crime upon the victim (death) has already been proved (or admitted) by the time the offender comes to be sentenced…
>
> The law already recognises, without specific evidence, the value which the community places upon human life… (*R v Previtera* (1997) 94 A Crim R 76 at 86)

Hunt CJ at CL indicates that victim interests can be more suitably administered as a matter of victim's compensation than in the context of a sentencing hearing, which requires an objective assessment as to offence seriousness and offender

culpability.[3] In terms of this objective assessment, Hunt CJ at CL argues against the notion that the views of family victims not directly injured in the homicide may be able to contribute to the assessment of the offence without diminishing the principle of the universality of the value of human life.[4] Harm, arguably, needs to be limited to the immediate circumstances of the death of the victim out of respect for this principle.

Hunt CJ at CL also recognises the associated issue of establishing family impact evidence on the persuasive burden, beyond reasonable doubt, given its tendency to introduce facts in aggravation of the offence (Kirchengast, 2007: 143-159; also see *R v Slack* [2004] NSWCCA 128). *Previtera* has now been supported by a number of leading decisions, which consequently affirm the view that harm be specifically assessed through the factual circumstances of the case, particularly in terms of the immediate circumstances of the offence, and not the subjective experiences of victims traumatised by the loss of the deceased.[5]

Under s 28(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) a court must receive a family impact statement, making any comment on it that the court thinks appropriate. *Previtera* rules that despite the requirement that family impact statements be tendered, courts not consider them when sentencing an offender. This has led to problems where impact statements are cited in a sentencing report, where the judge fails to distinguish the reference as not impacting on sentence. Sentences are appealable where a sentencing court acknowledges receipt of an impact statement in this way. Out of its direct relevance to the exploration of the consequences of an offence, the New South Wales Court of Criminal Appeal

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[3] Also see recommendation 3 of the New South Wales Law Reform Commission, *Sentencing*, Report No 79, (1996). Hunt J advocates the treatment of family impact statements in homicide cases along similar lines to those proposed by the NSWLRC.

[4] The one exception recognised by Hunt CJ at CL may be where the primary victim dies a slow, lingering death. The circumstances of the offence would thus come to encompass family victims, who may come to care for the primary victim before death. See *R v Previtera* (1997) 94 A Crim R 76, 86.

[5] *R v Bollen* (1998) 99 A Crim R 510; *R v Dang* [1999] NSWCCA 42; *R v Newman; R v Simpson* [2004] NSWCCA 102; *R v King* [2004] NSWCCA 444; contra *R v Birmingham (No 2)* (1997) 69 SASR 502.

('NSWCCA') will quash a sentence where an impact statement is not sufficiently distinguished as irrelevant, deeming this not to be an appropriate matter for the application of the proviso.[6] The usual result where a statement is not clearly delineated is the re-sentencing of the offender to some lesser term.

Issues of sentence construction notwithstanding, the NSWCCA has indicated that the *Previtera* rule may now need to be revisited in the context of s3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Section 3A(g) prescribes that a court may impose a sentence on an offender to recognise the harm done to the victim and the community. Considering this new section, Spigelman CJ indicates in *R v Berg* [2004] NSWCCA 300 at [43-44], that family impact statements may be able to influence sentence where the content of the statement may appropriately inform the court as to the harm done to the community.

This argument for reform was again addressed in *R v Tzanis* [2005] NSWCCA 274. In this instance, the NSWCCA was convened as a panel of five judges to determine the issue of the admissibility of family statements. Though declining to consider it on this occasion, the court did indicate the gravity of this issue by suggesting that 'no suitable vehicle has emerged for the purposes of the grant of special leave by the High Court' (*R v Tzanis* [2005] NSWCCA 274 at [16]).

The issue of the status of family impact statements in homicide cases has evidently emerged as one of consequence, especially in terms of the weight of sentencing principle requiring that punishments be objectively proportionate to all factors that present as relevant to the determination of an appropriate sentence.

Integrating Family Victims: The States and Territories of Australia

[6] For an example of such errors, see *R v Dawes* [2004] NSWCCA 363, [30]; *R v Dang* [1999] NSWCCA 42, [15].

Various jurisdictions have resolved the problem of the consideration of family impact statements by recognising that family victims may present information relevant to sentence so long as that information accords with an objective assessment of the seriousness of the harm occasioned to the victim.[7] The use of family statements as a source of objective evidence relevant to sentence emerges in the Victorian case of *R v Willis* [2000] VSC 297. In this instance, the Victorian Supreme Court suggests that victim impact statements may inform the sentencing process where evidence is presented that phrases the impacts of the offence on family members in the broader context of the offence. This broader context is significant to any sentencing court when considering the seriousness of the offence in an objective way. *Willis* indicates that this provides the means by which victim impact statements given by family members may be of some relevance to the sentencing court:

> What they do is to introduce in a more specific way, factors to which a court would ordinarily have regard in a broader context. They constitute a reminder of what might be described as the human aspect of crime and draw to the attention of the judge who would of necessity have to consider the possible and probable consequences of criminal behaviour, not only its significance to society in general but the actual effect of a specific crime upon those who have been intimately affected by it. Victim impact statements provide an opportunity for those whose lives are often tragically altered by criminal behaviour to draw to the Court's attention the damage and senseless anguish which has been created and which can often be of very long duration. (*R v Willis* [2000] VSC 297 at [16])

[7] Each state and Territory allows for the consideration of family impact statements. Only NSW provides a different power for the consideration of primary and family statements. See *Sentencing Act 1991* (Vic) s 95A; *Children and Young Persons Act 1989* (Vic) s 136A; *Sentencing Act 1995* (WA) s 24; *Crimes (Sentencing) Act 2005* (ACT) s 53; *Sentencing Act* (NT) s 106B; *Criminal Law* (*Sentencing*) *Act 1988* (SA) s 7A; *Sentencing Act 1997* (Tas) s 81A; *Crimes* (*Sentencing Procedure*) *Act 1999* (NSW) s 28; *Criminal Offences Victims Act 1995* (Qld) s 14.

Willis deals with questions as to the utility of victim impacts statements raised in *R v Penn* [1994] 19 MVR 367. *Penn*, a case involving culpable driving causing death, held that the extent that a sentencing court may consider evidence of the impact of the offence upon family members in the context of community sentiment may be limited. Due to the need interpret harm objectively, in terms of the community's reaction against the needless waste of life caused by motor accidents, the Victorian Court of Criminal Appeal ('VCCA') suggests that the specific consideration of the impact of an offence on family members may go beyond what may be considered an "objective" assessment.

R v Miller [1995] 2 VR 348 went on to reject *Penn* out of changes introduced by the *Sentencing (Victim Impact Statement) Act 1994* (Vic). This Act modified Victorian sentencing law to allow a sentencing court to consider the 'injury, loss or damage' that occurs as a result of an offence. This Act also amended the *Sentencing Act 1991* (Vic) s 5(2), directing a sentencing court to consider the impact of the offence together with changes in the personal circumstances of any victim, as a result of an offence. This includes family as well as primary victims. The VCCA in *Miller* also explained how the 1994 Act envisages the use of impact statements as a means by which evidence of harm may be established as relevant to sentence, while also emphasising how evidence of victim trauma, injury and loss not provided by impact statement may also continue to be material.

Miller rules that where impact evidence is consistent with community sentiment then it should be considered as reflecting that sentiment. Family statements may thus be particularly useful where they present information relevant to sentencing principles that require the court to specifically consider the community's attitude toward the offence. Family impact evidence would therefore be relevant where there is a genuine need for general deterrence and denunciation. Despite these principles not being specifically at issue in *Miller*, the VCCA rules that family perspectives will continue to be generally relevant to the task of sentencing offenders:

> We are not persuaded that the judge misdirected himself by referring to, and taking into account of, the effect on the Bendigo community of this crime, or the anguish of her family. Commonsense would allow inferences to be drawn in respect of these matters, in the absence of direct evidence. (*R v Miller* [1995] 2 VR 348 at 354)

Miller is authority for the proposition that offence seriousness and offender culpability may continue to be construed objectively despite the views of family victims. It would only be where a family statement is inconsistent with community sentiment that exclusion is warranted. Such statements may include those seeking a sentence based on vengeance or revenge, where the harm spoken of is unrelated to the offence, or where the forgiveness of the victim is entirely unjustified. *Miller* reiterates the point that family impact statements should not be seen as inherently prejudiced against the ends of sentencing but seen as potentially useful, especially where they are consistent with the community's attitude toward an offence.

Integrating Family Victims: International Decisions

The Canadian experience also indicates that family impact statements may be relevant to the determination of offence seriousness. Victim impact statements are admissible in sentencing proceedings under s 722 of the Canadian Criminal Code. Interpreting this provision, the Ontario Superior Court of Justice ruled in *R v Gabriel* (1999) 137 CCC (3d) 1 that, irrespective of the notion that no one life be valued above another, that courts include the views of family victims to show respect for their significance to and connection with the primary victim. Courts also need to show respect for the fact that family victims may also appropriately reflect community views and perspectives. It was noted that sentencing tends to focus on the offence and the offender, to the exclusion of the victim. In this way, most victims would be reduced to obscurity in legal proceedings dealing with their offence. For the Ontario

Superior Court of Justice, victim impact statements thus provide a unique tool for the balancing of interests in the sentencing process:

> The victim was a special and unique person as well - information revealing the individuality of the victim and the impact of the crime on the victim's survivors achieves a measure of balance in understanding the consequences of the crime in the context of the victim's personal circumstances, or those of survivors. (*R v Gabriel* (1999) 137 CCC (3d) 1 at 11-12)

Similar to Hunt CJ at CL in *Previtera*, the Ontario Superior Court of Justice also indicates that victim interests can be accommodated elsewhere, through victim's compensation and alternative assistance schemes. However, the court also emphasises that inclusion the of family statements may allow for the balancing of the interests of justice, specifically including the victim where they would otherwise be excluded, to better inform the sentencing court of community attitudes and expectations following an offence.

Against the tenor of *Gabriel*, however, the Criminal Division of the Provincial Court of British Columbia has taken a more restrictive view of the utility of s 722 in *R v Readhead* (2001) BCPC 208. This court ruled that private perspectives ought not inform the sentencing process, which must be manifestly concerned with the public interest. It is for the sentencing judge to thus consider the harm occasioned to the victim, who must instead turn to civil for private redress. Despite taking this view, the sentencing judge does acknowledge the utility of victim impact statements tendered in homicide proceedings. His Honour recognised that:

> What, then, is the purpose of a victim impact statement? First, the words of the victim of a crime might well serve to educate the offender as to the effects of his or her criminal behavior, with some potential rehabilitative effect. Second, victim impact statements may provide

> some sense of catharsis for victims, particularly those who choose not to pursue any form of redress in the parallel stream of the civil law. Third, the inclusion of victim impact statements in the materials presented during a sentencing hearing may serve to assure the public that sentencing judges, while bound to sentence in accordance with the principles discussed earlier, are always keenly aware of the unique and intensely personal response of each victim harmed by the criminal conduct of another. (*R v Readhead* (2001) BCPC 208 at [14]).

The 'principles discussed earlier' are those that seek to phrase the sentencing process as an independent one; an objective assessment of offence seriousness and offender culpability through the removed, independent assessment of the court. This, however, is entirely consistent with the principles outlined in *Gabriel*, which does not seek to introduce a private perspective into sentencing proceedings. Despite the impact statement being drafted by the victim personally, it is for the sentencing court to infer from the material presented the facts relevant to the determination of an objectively proportionate sentence. The later decision of *R v McDonough and McClatchey* (2006) CanLii 18369 in the Ontario Superior Court of Justice, despite also acknowledging the limited basis upon which a court may use impact statements tendered in homicide proceedings, nonetheless reiterates this point:

> In explaining the harm done by and loss suffered as a result of the commission of an offence, it is often necessary to give a brief outline of the character of the victim or deceased, to explain the impact of the crime. As Hill J. expressed it, the judge learns of the "individuality of the victim": *Gabriel* at para 19. (*R v McDonough and McClatchey* (2006) CanLii 18369 at [29])[8]

[8] As to a case in point regarding the relevance of victim impact statements in the sentencing of homicide offenders, see *R v Hayden* (2001) CanLII 13694 at [8-14].

This is entirely consistent with the notion that it is for the court itself to construe sentence by *inter alia* reflecting of the harm occasioned to all victims relevant to the offence. This point was first emphasized in *R v DMP* [1999] AJ No1085. In this case the Alberta Court of Appeal explained:

> … Parliament makes it clear that a victim impact statement is something which a sentencing judge *may and should consider, and (if appropriate and convincing) give significant weight*. This trial judge quoted almost all of this victim impact statement, and referred to Parliament's directive. In our view, he did as Parliament told him to. What is more, he cited authority allowing him to take judicial notice of the likelihood of the same thing. (*R v DMP* [1999] AJ No 1085 at [15]) (emphasis added)

The reasoning supporting the Canadian decisions is similar in this respect to the ultimate finding of the United States Supreme Court in *Payne v Tennessee* (1991) 115 L Ed 2d 720. The issues raised in *Payne v Tennessee* were first addressed across two earlier decisions of the United States Supreme Court, namely *Booth v Maryland* (1987) 96 L Ed 2d 440 and *South Carolina v Gathers* (1989) 104 L Ed 2d 876. In *Booth v Maryland* the court held that the Eighth Amendment to the United States Constitution stopped a sentencing jury in a capital trial from hearing victim impact evidence regarding the personal characteristics of the victim, which also included the extent to which family members were also traumatised by the death of the victim. *Booth v Maryland* was reasoned on the assumption that impact evidence limited the defendant's right to a fair trial, in that an impact statement was likely to inflame a jury against the defendant given the emotive nature of the content of a statement. *South Carolina v Gathers* extended this prohibition by limiting how the use of impact statement by the prosecutor. Again on the basis of the capacity for impact evidence to rouse the jury against a defendant, *South Carolina v Gathers* limited the prosecutor's ability to refer to the content of impact evidence when addressing the jury, particularly in terms of personal attributes of the victim that

may not be material to liability. *Payne v Tennessee*, however, overruled these earlier decisions, holding that the Eighth Amendment does not prevent a jury from taking account of the personal characteristics of the victim in capital trials nor from a prosecutor arguing similar evidence during sentencing.

Payne v Tennessee made this change on the basis of the need for an expanded assessment of the harm of the offence, inclusive of the victim's perspective on the impacts occasioned by the original offence. The majority took the view that the harm caused to the victim has long been a concern of the criminal law. The court also noted the fact that trial judges experienced great difficulty excluding reference to the harm to the victim during sentencing in accordance with the two earlier decisions. Prosecutors would often refer to the impacts of the offence on the victim, or their family, and in so doing risk the sentence being overturned on appeal. Victim impact statements are, in the view of the majority in *Payne v Tennessee*, another means by which a court may be informed of the relevant harm occasioned to the victim. The court ruled impact statements tender information long considered by a court when making a sentencing decision. As such, the United States Supreme Court advocates an inclusive view towards the victim.

In England and Wales, all persons injured or traumatised by a criminal incident have the ability to make a "victim personal statement", equivalent to a victim impact statement tendered in other jurisdictions. A victim personal statement forms part of the case file to be distributed to all parties in a matter, including the prosecution, defence and the court, and can be made in addition to any statement given to the police. Personal statements may be used by the court during sentencing. Under these conditions, courts are able to use victim personal statements when considering the objective seriousness of the harm resulting from an incident. Significantly, such statements may be used by the court with regard to those harms occasioned by both primary and family victims. Concern over the use of victim perspectives in the sentencing process in England and Wales developed as a result of some victims proposing particular sentencing terms in their statements. With

limited exceptions,[9] the commonly agreed role of an impact statement enables victims to indicate, in their own words, the impacts of the offence upon them. The determination of the appropriate sentence ought to be left for the judge. It is taken to be generally unacceptable for a victim to specify a particular sentence, such as length of a term of imprisonment, or custodial or non-custodial term. In the event of such a recommendation, the entire statement, or part of it, may be disregarded. However, against the trend of dismissing particular sentencing recommendations, some ground has been gained allowing for a more inclusive perspective where, under certain limited conditions, the consequences of a sentence on the actual victim will be considered relevant to the court. As indicated by cases that have comes for review before the Court of Appeal of England and Wales, this is true even for family victims.

In *R v Perks* [2001] 1 Cr App R (S) 19 the defendant was convicted of robbery and sentenced to four years' imprisonment. During the trial, the husband of the victim, addressed a letter to the Crown Prosecution Service indicated the devastating physical and mental impact of the attack on his wife. In the letter, he expressed his anger toward the offender, indicating that the offender should be imprisoned so that an example could be made of him. The letter was placed in the case file thus making it available to be read by any party, as well as the judge. The ground of appeal was that the sentence was manifestly excessive on the basis that the judge took this letter into account in sentence. Allowing the appeal, Garland J of the Court of Appeal states:

> The opinions of the victim and the victim's close relatives on the appropriate level of sentence should not be taken into account. The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender subject to two exceptions: i) Where the sentence passed on the offender is aggravating the victim's distress, the sentence may be moderated to

[9] See *Sentencing Act* (NT) s 106B(5A).

> some degree. ii) Where the victim's forgiveness or unwillingness to press charges provide evidence that his or her psychological or mental suffering must be very much less than would normally be the case.

The significance of *Perks* goes toward whether a particular sentence will aggravate the harm occasioned to a victim. Where the offender and victim are in a pre-existing relationship, a court may reduce the term of the sentence to diminish the impact of the sentence on the victim. This consideration will generally arise where the defendant and victim are somehow dependant on each other, either financially or emotionally or both. This consideration will most likely come to bear on the judge where the court is considering a lengthy term of imprisonment, or imprisonment for an offence for which a suspended or non-custodial sentence may suffice. *Perks* has set the pace for further decisions where minimal terms have been requested on the basis of some negative effect being reported by the victim. In *R v Nunn* [1996] 2 Cr App R (S) 136, the appellant was charged with causing death by dangerous driving, following the loss of control of his car, resulting in the death of one of his passengers. Following a guilty plea, the family of the deceased presented the Court of Appeal with victim statements indicating that the original term imposed on the defendant made it difficult for them to recover from the trauma they had experienced. The family suggested that the defendant, by way of his conviction and the loss of his passenger, had suffered enough. In sentencing the defendant, Judge J held that the victim's opinions were irrelevant. His honour then indicated that in the present matter, that the impact of the sentence on the victims was indeed relevant, albeit in limited circumstances:

> ...the Court is concerned not with the judgment of the deceased's mother and sister about the level of sentence imposed on the applicant, but with the clear evidence, which we accept, that by its very length the sentence on [the victim's] friend is adding to the grief and anxiety which they are suffering ... When the mother and sister of the deceased and the rest of the family have already suffered so much, we do not think that

> these adverse consequences of this particular sentence should be disregarded. In mercy to them we shall reduce the sentence as far as we can, consistent with our continuing public duty to impose appropriate sentences for those who cause death by driving dangerously under the influence of drink ... (*R v Nunn* [1996] 2 Cr App R (S) 136 at 140-141)

Perks and *Nunn* stand as authority for the passing of a lesser term of imprisonment where family victim present evidence that the actual sentence imposed is aggravating the trauma they are experiencing as a result of the original offence. *Nunn*, however, proposes that any reduction of sentence be construed objectively. Importantly, the court emphasises that any reduction not be informed by the victims themselves. Rather, it is for the sentencing judge to construe the aggravated harm caused to family members, as connected to the original offence, by examining evidence of the impacts of the sentence on each of the victims. However, *R v Mills* [1998] 2 Cr App R (S) 252, the court viewed evidence of aggravated harm as presented by the victim with greater enthusiasm. In this matter, the court looked favourably upon evidence of an improving relationship between the defendant and victim following the complaint of an attempted rape by a former partner of the victim. Judge LJ held, reducing the original sentence from six to three years imprisonment, that:

> We have considered the evidence of the victim with great care. We have reflected on all the circumstances of this somewhat unusual case. As a matter of principle, the victim of a crime cannot tell the court that because he or she has forgiven the perpetrator the court should treat the crime, in effect, as if it had not happened. This was a serious offence. Attempted rape is always a matter of general public concern, in addition to its more immediate concern to the victim. It is clear that the victim in this case has chosen to forgive the perpetrator of the crime, and has said so in terms, perfectly genuinely. That cannot decide the appropriate level of sentence, but we take her evidence into account as indicating the

> current extent of the impact of this particular crime on the victim. Having considered the matter in the light of the information before us, we have come to the conclusion that the sentence … was too long. (*R v Mills* [1998] 2 Cr App R (S) 252 at 254)

Mills can be distinguished from *Nunn* on the basis of the way in which the court comes to reduce each sentence, taking into account the impacts a lengthier sentence would have on each of the victims. Compared to *Nunn*, *Mills* indicates that a court may be more inclined to take the victim's perspective into account, through evidence presented by the victim themselves. In *Mills*, the court is clearly considering testimony from the victim personally. This evidence, however, is still scrutinised by the court in order to determine its objectivity, and it is held that such evidence cannot determine sentence alone. However, in doing so, the court moves toward a more inclusive, restorative approach, that makes room for the perspective of the victim by allowing for the impacts of the sentence on the victim, as presented by the victim themselves.

Victims' Advocates: A Reform Agenda for England and Wales

Reviewing the decisions of *Perks*, *Nunn* and *Mills*, Edwards (2002) argues that the Court of Appeal of England and Wales has gravitated toward a restorative framework which seeks to address various interests in terms of a broader understanding of the public interest. The court has shown that it will consider the interests of the victim, the offender and the general public in determining an appropriate sentence. The significant of this is that the court's understanding of the victim is not solely constituted by the court itself. Moreover, the court is inviting a perspective on the victim from the victim themselves, which stands the chance of actually impacting on the sentence to be determined. In the context of homicide cases, this is entirely inconsistent with the NSW approach. Despite this innovation, however, issues remain as to the exact way in which victim perspectives may be included as a routine aspect of sentencing. Indeed, reviews of victim personal

statements reveal that victims are not always afforded the opportunity to draft one by the police investigating an offence. Judicial officers would also vary in their use of such statements in any event (Secretary of State for Constitutional Affairs and Lord Chancellor, 2005: 14). The need to balance the competing views of victims and the public interest, against the rights of defendants, features as a significant concern. However, as Edwards indicates, the restorative framework seeks to garner perspectives normally seen to be incompatible. This is a significant movement toward a more proportionate approach toward sentencing:

> Under restorative conceptions of the sentencing process however such preferences can be accommodated more readily. By according some weight to the feelings of victims, restorative aims can be achieved: catharsis for victims, taking victims' interests into account, and achieving reintegration of offenders. (Edwards, 2002: 694)

To this end, the Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer, issued a consultation paper in 2005, phrasing this restorative approach in policy by providing family victims an opportunity to be heard before sentence is pronounced in homicide matters. Following the restorative framework set in motion in *Perks* and *Nunn*, the 2005 proposal established a process whereby victims were provided a direct voice in proceedings for homicide offenders. This policy has now moved through a pilot program in which family victims were given the option to instruct private counsel, known as Victims' Advocates, of the harms they have suffered. The Victims' Advocate a publicly funded lawyer, could be retained by the family victims to press their interests in any proceeding in which the offence was mentioned. In terms of the victim personal statement, the Victims' Advocate would help draft and advocate its content to the bench, particularly during sentencing hearings. Such submissions would ordinarily concern the relevant impacts and injuries occasioned to each family victim as a result of the loss of the deceased. The victims themselves would also be able to address the court. The Victims' Advocate presents independently of the prosecution and only represents

the victim's interests. As such, they present alongside the prosecutor, who continues to represent the public interest. The Victim's Advocate is limited to the pre-trial and sentencing hearings, and would not play a part in the trial of the offender. It was envisaged that their role would also be extended to plea deals or the downgrading of charges, withdrawal of charges by the prosecution, and discontinuance of proceedings.

News of the 2005 reforms indicated that most were in favour of the proposed Victims' Advocates pilot, with victims groups showing strong support. Concerns were raised that the proposals would do little other than raise victim's expectations that their personal statements would impact sentence. The rhetoric was that many sentencing judges determined sentence prior to any submission made by the Victims' Advocate. Other concerns included the deeming of such submissions as less relevant or irrelevant to the final sentence to be handed down (Secretary of State for Constitutional Affairs and Lord Chancellor, 2006: 6).[10] Formalising the procedure to the adopted during the pilot, the President of the Queen's Bench Division established a protocol indicating the functions of the Victim's Advocate, particularly in the sentencing process (President of the Queen's Bench Division, 2006).[11] This direction appeared to limit the formal role of the Victims' Advocate to the sentencing phase alone, excluding bail applications and other pre-trial proceedings, despite the policy recommending they be available to advise family victims following charge by the police. Contact between the Crown Prosecution Service was emphasised, however, consistent with new duties of prosecutors requiring them to consult with victims following in the first instance (Crown Prosecution Service, 2005).

[10] Of the 83 responses to the general aims of the scheme as outlined in the consultation paper, 47 were in favour of the scheme, 19 were against, and 17 supported family victims generally but did not support the proposal establishing Victims' Advocates.

[11] This protocol is written in accordance with III 28 of the Consolidated Criminal Practice Direction (UK) setting out a victim's right to present a victim personal statement to a sentencing court, and for that court to actually consider it prior to passing sentence.

The Victims' Advocates scheme was piloted from 24 April 2006 in the Old Bailey in London and the Crown Courts in Birmingham, Cardiff, Manchester (Crown Square) and Winchester. In June 2007 the Attorney-General Lord Goldsmith announced that a variation of the pilot scheme will be made available to all England and Wales (Office for Criminal Justice Reform, 2007: 42).[12] The new program, "Victim Focus", does not provide for private counsel and is restricted to the sentencing phase following conviction. This narrows the scheme to prosecutors who tender the victim's personal statement during the sentencing hearing.[14] This variation of the Victim Advocate's scheme will need to be evaluated in due course, especially in terms of whether it provides an enhanced experience for family victims through the inclusion of their perspectives as to the harms occasioned as a result of the offence.

Including the Victim: Time for Reform in NSW?

The innovative programs being piloted in England and Wales, combined with the acceptance of family perspectives internationally as well as across the states and territories of Australia, only highlights the paucity of rights afforded to victims in NSW homicide proceedings. However, the insertion of s 3A(g) into the *Crimes (Sentencing Procedure) Act 1999* (NSW) gives new context to sentencing in NSW. Identified by Spigelman CJ in *Attorney General's Application Under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* [2002] NSWCCA 515 at [57]-[59], several sentencing principles may need to be revised in the context of s 3A(g), prescribing that a court consider *inter alia* the harm done to the community. Demonstrated through the integration of family victim perspectives as those of the community in Victorian and Canadian sentencing law in particular, a focus on "community" under s 3A(g) may provide a means through which family perspectives may be incorporated into NSW homicide cases.

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[12] In February 2007 the Victims' Advocates pilot was extended for a further 12 months.

[14] The 'Victim Focus' scheme is available to family victims where the offender has been charged with murder; manslaughter; corporate manslaughter; familial homicide; causing death by dangerous driving; causing death by careless driving while unfit through drink or drugs; aggravated vehicle taking where death is caused.

The need to focus on community sentiment in determination of a proportionate sentence provides the basis for the inclusion, rather than the exclusion, of family perspectives. Family statements on the impact of the offence would be significantly useful when determining the basis and extent to which the victim and community condemn the offence, in an objective, fair way. The statement would thus need to be read in the broader context of the evidence adduced at trial, material put forward in mitigation or aggravation of sentence, and the sentencing judge's own reflection on the community's response to the offence in a general way. Family impact statements would therefore not provide the single basis for the objective assessment of the offence, but would support, where deemed relevant, the determination that the offence was of real consequence, as evidenced by the trauma, injury and loss indicated in a family statement.

Should the prospect of such reform appeal in NSW, homicide sentencing matters will be able to openly include family statements without the current requirement that the court acknowledge receipt of the impact statement then exclude it as irrelevant to sentence. It would only be in circumstances where a court cites a statement against the weight of community sentiment, or where community sentiment is informed exclusively through the impact statement, that appellate interference would be expected and warranted. A relaxing of the rules against the consideration of family statements in NSW would therefore potentially reduce the number of grounds of appeal currently raised in many homicide sentencing appeals.

Arguments for the liberal use of family statements in homicide sentencing matters needs to be read, however, in the context of the case against victim impact statements generally. The recent case of *R v FD; R v FD; R v JD* (2006) 106 A Crim R 392 emphasises several criticisms of the use of victim impact statements which, when read in connection with current limitations under *Previtera*, spells potential doom for the prospects of positive reform. In *R v FD; R v FD; R v JD*, Sully J raises four criticisms indicative of the controversial ways in which victim impact

statements try to 'balance interests that are not easily balanced' (*R v FD; R v FD; R v JD* (2006) 160 A Crim R 392 at 414.). In the context of sentencing practices where harm is primarily identified in terms of the immediate circumstances of the death of the victim, Sully J vitiates the usefulness of impacts statements on the basis of their conceived inconsistency with an orthodox and arguably conservative view towards the interpretation of sentencing principle.

Sully J raises four points in *R v FD; R v FD; R v JD* that diminish the potential benefit victim impact statements have in sentencing offenders. The restricted interpretation of impact statements in thus warranted due to the need to prevent offenders being sentenced under a 'lynch mentality'; that it is imperative to not allow the offender to be sentenced in a manner that is dictated by the victim; that the victim still deserves a means by which they are able to provide a public statement facilitating an 'emotional catharsis' in which the impacts of the offence may be expressed; and to provide for the meting out of a political imperative seeking to respond to the perceived lack of trust voters have in the sentencing process, particularly regarding matters of serious personal violence. As Sully J points out, it is this last point on the political imperative of the integration of victim rights in sentencing which may conflict with the 'accumulated wisdom of the common law of crime and punishment' (*R v FD; R v FD; R v JD* (2006) 160 A Crim R 392 at 414).

The significance of Sully J's four points is the recognition of the victim in a limited and non-justiciable form. The recognition of victim impact statements as an important vehicle of therapeutic jurisprudence emerges for Sully J through the fact that they allow for the expression of grief and loss on the part of the victim who would otherwise be largely excluded from proceedings. Considering the weight of authority for the further inclusion of victims on a substantive basis, Sully J's assessment of the relevance of impact statements as being against the 'accumulated wisdom' of the common law must be read critically. After all, victims are persons intimately connected to the consequences of the offence, a point well recognised in other jurisdictions. As far as family victims are concerned, various

jurisdictions have determined that not only is further integration desirable as a matter of open participation in the justice system, but significant in terms of the substantive contribution family victims can make to a determination of offence seriousness by proffering evidence that may be constitutive of community sentiment toward the offence. By enabling closer connections between family victims, the justice system and the community – all significant to the requisite need to pass a sentence proportionate to all circumstances of the offence and offender – various jurisdictions other than NSW have orientated themselves toward a position of respect and appreciation for victims of crime.

The prospects of family impact statements bearing greater significance in homicide cases is of appeal to various stakeholders in the NSW justice system. For the current restriction against family victims in *Previtera* to be overcome, the NSWCCA will need to find value in such statements beyond the mere participation of family victims in a non-justiciable way. The NSWCCA will need to determine that such statements are of substantive value in sentencing by revising the notion that such statements do little more than value one life as greater than another. To do this, the court will need to overcome the criticisms of impact statements more generally as being against sentencing orthodoxy as raised by Sully J. Suggested in *Berg* and *Tzanis*, where the issue is raised in an appeal, the NSWCCA must assess the need to recognise family statements as presenting something more than subjective conjecture, offensive to the principles of sentencing requiring objectively, and start recognising how valuable victim input may be to the determination of an objectively proportionate sentence inclusive of a variety of perspectives.

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The Rise of a Global Carceral Complex: From Garrison State to Garrison Planet

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Introduction

Through the military and the police, states have enormous capacity to coerce citizens and inflict violence. It is not surprising then that state terrorism, looked at in terms of numbers killed and harmed, is far more prevalent and significant than that of non-state actors.[15] And yet, 'terror', 'terrorism' and 'terrorist' are concepts that are considered almost exclusively in terms of the individual and sub-state groups. As a consequence of this myopia 'counter-terrorism' has frequently become the justification for state terror and violence that far outweigh the harm and violence they were purporting to counter.[16] When state terror and terrorism are considered it tends to be in the context of 'failed states' rather than the democracies of the West.[17] This chapter focuses on the violence and harm inflicted on prisoners and detainees in United States prisons in the 'war on terror' and links this to the regular, routine and normalised state terror practised daily on millions of prisoners held within US domestic prisons. This state terror, experienced vastly disproportionately among criminalised and racialised communities, amounts to state terrorism as it sends a warning to whole communities about their place in the social and economic hierarchy and the price of transgression.

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[15] Penny Green and Tony Ward, *State Crime: Governments, Violence and Corruption* (London: Pluto Press, 2004)
[16] Richard Jackson, 'The Ghosts of State Terror: Knowledge, Politics and Terrorism Studies' Paper Prepared for the International Studies Association (ISA) Annual Conference, 26-29 March 2008, San Francisco, USA
[17] William, Blum, *Rogue State: A Guide to the World's Only Superpower* (London: Zed Books, 2000)

Revelations of torture and abuse of prisoners in the US–led 'war on terror' have led to a growing body of critical research on the relationship between US domestic prisons and 'war on terror' prisons. The responses from the mainstream within the US have included outright denial alongside declarations that the horrendous cruelty inflicted on prisoners is unrepresentative of the values for which America stands.[18] Critical scholars, on the other hand, have pointed to parallels and connections between torture and abuse in US offshore prisons and the routine and normalised state terror inflicted upon prisoners and detainees within the US.[19] There is also an emerging body of critical commentary, research and scholarship that focuses on the role of private corporations, profit and corruption in the 'war on terror'.[20] This chapter extends these critiques by elaborating on the significance of the role of the US as self-appointed jailer to the world and by building an understanding of the drivers behind this development, including the role of private corporations and private profit. It argues that the 'war on terror' reflects, extends and reinforces the penal punitiveness and state terror that have taken root at the heart of the criminal justice system in the US and many other Western countries. More specifically, it argues that the US' role as global jailer and the way it executes this role need to be understood as logical extensions of the mass incarceration in which the US is global leader and exemplar. Understanding mass incarceration and its global spread under the banner of the 'war on terror' warrants a consideration of private prisons along with the processes, dynamics and consequences of neoliberal globalisation. While critiques of the 'war on terror' often set out to document its many and manifest failures, the purpose here is to consider and analyse who and what benefits, particularly the ways that the 'war on terror' and the state terror which accompanies

[18] See, for example, Lila Rajiva, *The Language of Empire: Abu Ghraib and the American Media* (New York: Monthly Review Press, 2005)

[19] Angela Davis, Abolition Democracy: Beyond Empire, Prisons and Torture (New York: Free Press, 2005); Judith Greene, 'From Abu Ghraib to America: Examining Our Harsh Prison Culture', Ideas for an Open Society: Occasional Papers from OSI-US Programs 4 (2004): 2-4; Avery Gordon, 'Abu Ghraib: imprisonment and the war on terror', Race and Class 48, no. 1 (2006): 42-59

[20] Dave Whyte 'The Crimes of Neo-Liberal Rule in Occupied Iraq' *British Journal of Criminology*, 2007, 47 no. 2 (2007): 177-195; Dave Whyte 'Hire an American! Economic Tyranny and Corruption in Iraq' *Social Justice,* 2007, 34 no. 2 (2007): 153-168; Jeremy Scahill *Blackwater: The Rise of the World's Most Powerful Mercenary Army* (Serpent's Tail: London, 2007); Peter Singer, *Corporate Warriors*; Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Allen Lane: Camberwell, Victoria, 2007).

[20] The *Age*, 2 March 2006

it *succeed* in opening up new markets for private capital and profit, thereby maintaining a fertile climate for the advance of neoliberal globalisation more generally.

The US as Global Jailer

In November 2001, shortly after the September 2001 attacks on the US (hereafter known as 9/11), President George W. Bush issued a Presidential Military Order for the 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism'. The Order allows for the arrest, detention and possible military trial of non-US citizens, regardless of their location, by the US Defense Department. The category of non-citizens subject to this order is extraordinarily broad, including those believed to 'have caused, threaten to cause, or have as their aim to cause injury to or adverse effects on the US, its citizens, national security, foreign policy, or economy', or simply anybody who the US believes it is in their interest to detain.[21] Prior to the issue of the Order the US was at the forefront internationally of punitive, long-term imprisonment.[22] The US was also well established as the world's laboratory for penal technologies of coercion and control and a trailblazer of prison privatisation.[23] The Presidential Order, by overcoming the territorial limits of sovereignty, transformed the US from global trendsetter to self-appointed world jailer.

The number of people being held in US offshore prisons and detention centres is difficult to accurately calculate. It has been estimated, however, that since 2001

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[21] George W. Bush, Federal Register: November 16, 2001 66, no. 222 Military Order of November 13, 2001 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism Presidential Documents: 57831-57836 http://www.fas.org/irp/offdocs/eo/mo-111301.htm

[22] Nils Christie *Crime Control As Industry: Towards Gulags, Western Style* (London and New York: Routledge, 2003), 91-109; David Garland, 'The meaning of mass imprisonment', in *Mass Imprisonment: Social Causes and Consequences,* ed. David Garland (London: Sage, 2001), 1-3. Christian Parenti, *Lockdown America* (London: New York, 1999), 163-169.

[23] Christie *Crime Control As Industry*; D. Shichor, *Punishment for Profit – Private Prisons/Public Concerns* (London, New Delhi: Sage, 1995); Andrew, Coyle, Allison Campbell and Rodney Neufeld, 'Introduction' in *Capitalist Punishment: Prison Privatization and Human Rights,* eds. Andrew, Coyle, Allison Campbell and Rodney Neufeld (Atkanta, London: Clarity Press/Zed Books, 2003), 9-15.

there have been approximately 60,000 people incarcerated by the US outside of the US in places such as Guantanamo Bay in Cuba and in Iraq and Afghanistan. Between them, the US military and the Central Intelligence Agency (CIA) run approximately twenty-five prisons in Afghanistan and seventeen in Iraq.[24] The volume of prisoners in offshore US prisons is significant and increasing. The number of prisoners in Iraq, for example, is continually expanding. After the closure of Abu Ghraib following the 2004 release of photographs and videos revealing torture and abuse of prisoners there, the first permanent US prison—a $60 million supermaximum security prison—was opened at Camp Cropper, near Baghdad airport. Additionally, despite the release of many prisoners, a new $38 million facility is being built at Guantanamo Bay.[25]

Prisoner Torture R US

The 2004 publication of photographs depicting torture, abuse, degradation and humiliation of prisoners at Abu Ghraib prison in Iraq focused world attention on the issue of terror inflicted upon prisoners in the US–led 'war on terror'. Mainstream opinion and official commentary in the US were quick to dismiss the revelations as unrepresentative of US practices in the 'war on terror' and more profoundly unrepresentative of the values at the heart of the nation. The President dismissed the practices as not 'American' while others, wedded to the idea of the US as an international paragon of virtue and a model of democracy, framed the revelations in the context of the idea of the US as longstanding global moral exemplar.[26] For these commentators, the damage done to the prisoners was secondary and insignificant compared to that done to the nation's reputation. Typical was the lament by one US senator that:

[24]Chalmers Johnson, *Nemesis: The Last Days of the American Republic* 2006), 36.
[25] Avery Gordon, 'The US Military Prison: The Normalcy of Exceptional Brutality' in *The Violence of Incarceration* eds. Phil Scraton and Jude McCulloch (Routledge: London, forthcoming 2008)
[26] Davis , *Abolition Democracy*; Rajiva, *The Language of Empire*

> Worst of all, our nation, a nation that, to a degree unprecedented in human history, has sacrificed its blood and treasure to secure liberty and human rights around the world now must try to convince the world that the horrific images on their TV screens and front pages are not the real America, that what they see is not who we are.[27]

US patriots were anxious to present the abuse as atypical: not representative either of the treatment of prisoners in the 'war on terror' or of the values of liberty, democracy and human rights that they believe the US holds dear. Despite these protestations, it is abundantly clear that the documented abuse, humiliation, sexual degradation, brutality, and torture by US personnel in Iraq and at other locations is not aberrant but systematic and institutionalised in the US–led 'war on terror'.[28] Beyond this, the torture and gross mistreatment practised in US offshore prisons mirror the experiences of millions of US prisoners incarcerated in domestic prisons and immigration detention centres. These practices amount to and are experienced as forms of state-perpetrated terror. Furthermore, because such practices are experienced so disproportionately by particular groups—Arabs and Muslims in the 'war on terror' and African Americans in domestic prisons—they send a message to these communities beyond the prison walls about their collective vulnerability to state violence, thus traumatising and terrorising entire communities. While the Abu Ghraib photographs and other revelations and documentation of torture and abuse in US offshore prisons are rightly the focus of moral outrage there is no basis for being surprised or shocked.[29]

Millions of US citizens have first-hand experience of similar treatment and conditions in domestic prisons and thousands of non-citizens have been subject to such in immigration detention facilities inside the US. In 2000, Joy James wrote of

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[27] Senator Susan M. Collins quoted in Neil MacMaster 'Torture from Algiers to Abu Ghraib' *Race and Class* 46 no. 2 (2004): 1-22 at p 2

[28] Seymour Hersh, 'The Other War', *New* Yorker, April 12, 2004; Johnson, *Nemesis: The Last Days of the American Republic*, 33-45.

[29] Gordon 'Abu Ghraib: imprisonment and the war on terror, 44

the 'institutionalisation of torture, abuse and repression in the US penal system'.[30] In short, US prisons constitute an apparatus of state terror. The tens of thousands of US citizens who work in prisons have authorised, supervised, witnessed or directly participated in this state terror. Judith Green points out that '[e]xperienced observers . . . are quick to recognize that the Abu Ghraib photos reek of the cruel but usual methods of control used by many US prison personnel'. [31] The dehumanisation exposed by the photographs 'is the modus operandi of the lawful, modern, state-of-the-art prison'.[32] Angela Davis argues that the permissive, 'barbaric' practices revealed in US detention in the 'war on terror' are a reflection and extension of the 'normalization of torture within domestic prisons'.[33] She maintains that the torture of prisoners in offshore prisons has foundations laid deep in the 'routine, quotidian violence that is justified as the everyday means of controlling prison populations in the US'.[34]

One aspect of the photographs and videos from Abu Ghraib that aroused particular outrage and disgust was the depiction of the sexual coercion and humiliation inflicted on prisoners. The Physicians for Human Rights report into the 'systematic use of psychological torture by US forces' in the 'war on terror' states that '[t]he use of humiliation as a means of breaking down the resistance of detainees, including forced nudity . . . began when the "war on terror" began'.[35] This statement, and the outraged surprise accompanying the public revelations of sexual abuse and humiliation, belies the reality that sexual coercion, most particularly in the form of routine strip searches, is a longstanding and normalised aspect of state terror within US domestic prisons, as well as in prisons in other advanced liberal democracies.[36]

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[30] Joy James 'The Dysfunctional and Disappearing: Democracy, Race and Imprisonment' *Social Identities* 6 no. 4 (2000): 483-493 at p. 483
[31] Greene, 'From Abu Ghraib to America: Examining Our Harsh Prison Culture', at p.4
[32] Gordon 'Abu Ghraib: imprisonment and the war on terror, 49
[33] Davis , *Abolition Democracy* p. 114
[34] Davis , *Abolition Democracy* p. 115
[35] Physicians for Human Rights 'Break Them Down: Systematic Use of Psychological Torture by US Forces' (Washington: Physicians for Human Rights, 2005): 5.
[36] See, McCulloch, J and George, A 'Naked Power: Strip-Searching in Women's Prisons' in *The Violence of Incarceration* eds. Phil Scraton and Jude McCulloch (New York: Routledge, 2008, forthcoming).

There are 'deep connections between sexual violence and the gendered processes of discipline and power embedded in systems of imprisonment'.[37]

There are also similarities in the design of the newly built 'war on terror' prisons and domestic prisons. The maximum security prison at Guantanamo Bay, for example, which imposes cruel, dehumanising sensory deprivation conditions that break down and destroy human beings, physically and psychologically, is based on the design of a Miami prison.[38] Additionally, Guantanamo Bay mirrors and extends the trend within the US to warehouse prisoners in supermaximum security facilities.[39] Another indication of the connection and continuity between US global prisons and domestic prisons is the overlap in personnel. Many of those revealed to be torturers at Abu Ghraib gained their initial experience in prisons inside the US. One, who took on a leadership role at Abu Ghraib, infamously remarked in a comment that reflects a perverted take on job satisfaction: 'The Christian in me says it's wrong, but the corrections officer in me says "I love to make a grown man piss himself"'[40]. As US prison activist Judith Greene puts it, the 'vengeful penal philosophy and harsh prison culture have led to a dreadful level of brutality and human rights abuses in our own prisons, and now this maliciously punitive mentality has been exported to Iraq by U.S. prison personnel'.[41] Since 2003 more than 5,000 civilian prison guards have been called up to military service.[42]

Conditions, trends, technology and other innovations circulate between the various spaces of incarceration so that the borders between the US criminal justice system and the expanding US global carceral complex are intertwined and increasingly indistinct. The connections between the institutionalised state terror in the 'war on

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[37] Davis , *Abolition Democracy* p. 115
[38] Carol Rosenberg, 'Permanent Jail set for Guantanamo' December 9 2004 *Miami Herald* http://www.commondreams.org/headlines04/1209-09.htm (accessed 26 February 2008).
[39] Lorna Rhodes, *Total Confienment: Madness and Reason in the Maximum-Security Prison* (Berkely: University of California Press, 2004).
[40] Specialist Charles A. Graner quoted in Greene 'From Abu Ghraib to America: Examining Our Harsh Prison Culture', at p.2
[41] Greene 'From Abu Ghraib to America: Examining Our Harsh Prison Culture', at p 4
[42] Gordon, 'The US Military Prison: The Normalcy of Exceptional Brutality'

terror' and state terror in US domestic prisons are demonstrated on a number of levels, including the exchange of personnel between domestic prisons and 'war on terror' prisons, and the routine state terror inflicted upon prisoners and detainees in both the global and domestic prisons. In addition, the routine denial of the systematic and institutionalised nature of state terror is a feature of both domestic and 'war on terror' prisons. Increasingly, the state's coercive capacities are paralleled or mirrored inside and outside national borders.[43] The evidence of state terror against prisoners in the 'war on terror' is both foretold and prescient in relation to state terror in domestic prisons.

Circulating State Terror: From Criminal Injustice to Military Injustice

The borders between foreign and domestic policies, and between military action and criminal justice, have been incrementally but extensively eroded over the past three decades. Since the end of the Cold War, the traditional boundaries between an internally-oriented domestic police sphere and an externally-oriented military sphere have become increasingly blurred.[44] This process has accelerated markedly in the post-9/11 era. The 'war on terror' extends the trend established with the continuing US–led wars on drugs, organised crime and early iterations of the 'war on terror', which was first declared using similar rhetoric during the presidency of George Bush senior in the 1980s.[45] The blurring of traditional boundaries is manifest in hybrid military and criminal justice configurations and operations at both the national and global levels.[46] National defence, internal security and law

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[43] Michael Hardt 'Sovereignty' (2002) <muse.jhu.edu/journals/theory_and_event/v005/5.4hardt.html>, (accessed 15 July 2005)
[44] P, Andreas and R, Price 'From war fighting to crime fighting: Transforming the American national security state' International Studies Review 3 no. 3 (2001): 31-52 p. 32
[45] Noam Chomsky, Pirates and Emperors, Old and New: International Terrorism in the Real World (London: Pluto Press, 2002) p. 2
[46] Jude McCulloch 'Blue armies, Khaki police and the cavalry on the new American frontier: Critical Criminology for the 21st Century' *Critical Criminology*, 2004 12 pp. 309-326; P, Andreas and R, Price 'From war fighting to crime fighting: Transforming the American national security state'; E, Alliez and A, Negri 'Peace and War Theory' *Culture and Society*, 20, no. 2: 109-118.

enforcement have increasingly merged.[47] President George W. Bush, setting out the US national security strategy in 2002, observed, '[t]oday, the distinction between domestic and foreign affairs is diminishing'.[48] The 'war on terror' has consolidated and extended the blending of crime and war so that 'securitisation' at home parallels closely war abroad.[49]

The 'war on terror' and the accompanying state of emergency is infinite because it is not temporarily or geographically bounded, being, as President George W. Bush terms it, a global enterprise of uncertain duration.[50] In these circumstances the state of emergency and the exceptional measures that follow become the permanent norm.[51] The opening up of a global militarised polity subject to continuous 'peacekeeping' by an army of 'globocops', that has emerged and intensified post-9/11, has combined the coercive powers of war with the punitiveness of the criminal justice system to create a framework that seeks to deny the basic human rights of individuals, caught within the net of what are deemed counter-terrorist military interventions. It denies them the protection of international laws embodied in instruments such as the Geneva Conventions and the protections traditionally afforded criminal suspects.[52] The conflation of the rules of war and criminal justice have precedence in the colonial past.[53]

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[47] Jonathan White 'Terrorism in Transition' in *Handbook of Transnational Crime and Justice* ed. Philip Reichel (Thousand Oakes: Sage Publications): 265-78; Peter Kraska and Victor Kappeler 'Militarizing American police: the rise and normalization of paramilitary units' *Social Problems*, 44, no. 1 (1997): 1-18; Michael Hardt and Antonio Negri *Empire* (Cambridge: Harvard University Press, 2000), 189.

[48] George Bush, The National Security Strategy of the US of America Washington: The White House (2002)

[49] A. Kaplan 'Homeland Insecurities: Transformations of Language and Space' in *September 11 in History: A Watershed Moment?* Ed. M, Dudziak (Durnham and London: Duke University Press, 2003); Jude McCulloch 'Blue armies, Khaki police and the cavalry on the new American frontier: Critical Criminology for the 21st Century'

[50] George Bush, *The National Security Strategy of the US of America* p. i

[51] Georgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005): 3

[52] See for example, Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004), Chapter 3; Jude McCulloch and Bree Carlton, 'Preempting justice: the suppression of financing of terrorism and the "war on terror"', *Current Issues In Criminal Justice* 17: 397-412.

[53] Emmanuelle Saada, 'The History Lessons: Power and Rule in Imperial Formations', *Items and Issues,* Social Science Research Council, 4, no. 4, Fall/Winter, (2003): 10-17.

Prior to 9/11, the US had already taken some initial steps along the road to becoming jailer to the world. In 1989 it invaded Panama in line with its 'war on drugs', purportedly in pursuit of 'narco-terrorists'. In the wake of the invasion, 5,000 Panamanians were held in detention inside Panama without charge for many years by the US.[54] The US' behaviour towards and within Panama provides an early example of the extension of the long arm of US criminal justice into extraterritorial contexts. The 2001 Presidential Order (referred to above) represents a formalisation and extension of US domestic policing and punishment into global spaces. To understand the nature and significance of the growth of a US global carceral complex and the impetus that underpins it, it is necessary to first appreciate the nature, extent and function of mass incarceration within the US.

Mass incarceration and state terror in the US

Prior to 9/11, prison populations in most Western countries expanded rapidly. The forerunner of this trend is the US where there has been an unprecedented increase in prisoners since the 1980s.[55] In the two decades between 1980 and the turn of the millennium the US prison population rose by 319%.[56] The 1990s were 'the golden age of prison expansion in America', with a doubling of the number of incarcerated men and women, from 1.1 million in 1990 to nearly 2 million in 2000, while spending on incarceration approached $40 billion.[57] The extent of mass incarceration in the US is unprecedented in the history of liberal democracy and has no parallel in the Western world.[58] The phenomenon is not confined simply to numbers and rates of imprisonment. Another significant dimension concerns the 'social concentration of

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[54] Joy James, 'Hunting Prey: The US Invasion of Panama' in *Resisting State Violence: Radicalism, Gender, and Race in the US Culture* ed. Joy James (Minneapolis: London, 1996), 63-83.
[55] Richard Sparks, 'State Punishment in Advanced Capitalist Countries' in *Punishment and Social Control* eds. T. Blomberg and S. Cohen (New York: mAldine De Gruyer, 2003), 30
[56] James Austin, John Irwin, and Charis Kurbin 'It's About Time: America's Imprisonment Binge' in *Punishment and Social Control* eds. T. Blomberg and S. Cohen (New York: mAldine De Gruyer, 2003), 433
[57] K, Pranis, 'Campus Activism Defeats Multinational's Prison Profiteering' in *Prison Nation – The Warehousing of America's Poor* in eds. T. Herviel & P. Wright (New York and London: Routledge, 2003), 156.
[58] Sparks, 'State Punishment in Advanced Capitalist Countries' p. 30

imprisonment's effects'.[59] In 2001, 66% of inmates in private prisons were racial minorities, with African Americans constituting the single largest group (43.9%).[60] In 2003, for every 100,000 black males in the US aged between 20 and 44, 36,932 men were in prisons. The number for white males was 4,954.[61] The upward spiral of incarceration, combined with the over-representation of particular communities and groups of people as prisoners and detainees, mean that incarceration is too frequently a defining experience for these groups and communities. Beyond reflecting broader social inequalities and structural violence, imprisonment also plays a defining role in amplifying these phenomena. Imprisonment is racialised and gendered, mirroring and extending the painful and burdensome legacies of slavery and colonisation, along with the myriad and intersecting oppressions of patriarchy.[62] Prison has also been used to punish political dissidents throughout US history.[63] The prison and detention centre also provide key experiences for the increasing number of people who work inside these institutions, particularly as other employment opportunities and the ability to escape such employment have contracted markedly.[64]

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[59] Garland, 'The meaning of mass imprisonment', p. 1
[60] Michael Hallett, *Private Prisons in America: A Critical Race Perspective* (Urbana and Chicago: University of Illinois Press, 2006), p. 4
[61] Michael Hallett, *Private Prisons in America: A Critical Race Perspective* (Urbana and Chicago: University of Illinois Press, 2006), p 7-8.
[62] Angela Davis, *Are Prisons Obsolete* (New York: Seven Stories Press, 2003); Davis , *Abolition Democracy*
[63] Ward Churchill and Vander Wall, eds. *Cages of Steel: The Politics of Imprisonment in the US* (Washington, DC: Maisonneuve Press, 1992).
[64] Ruth Gilmore-Wilson, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing* (*California*, Berkeley: University of California Press, 2007).

Private Prisons

The term, prison-industrial complex, was coined by activists and scholars 'to contest prevailing beliefs that increased levels of crime were the root cause of mounting prison population' and to underline the connections between corporate interests and incarceration.[65] Prison-industrial complex draws and builds from the term, military-industrial complex, first used in the early 1960s by US President Eisenhower in his farewell speech to warn about the dangers of the conjunction of an immense military establishment and a large arms industry.[66] Eisenhower's early warning proved prescient. In 2003, Robert Higgs summarized the military-industrial complex as:

> [a] vast cesspool of mismanagement, waste, and transgression not only bordering on but often entering into criminal conduct ... The great arms firms have managed to slough off much of the normal risks of doing business in a genuine market, passing on many of their excessive costs to the taxpayers while still realizing extraordinary rates of return on investment.[67]

The boom in prison populations and rates of imprisonment within the US coincided with the establishment of private prison corporations during the 1980s. The ability of private corporations to profit through punishment and imprisonment is understood to be a significant driver of punitive penal policy and associated increases in imprisonment within the US. As Governor of Texas, prior to being elected president, George W Bush was instrumental in positioning that state as 'the world capital of the private-prison industry'.[68] During his time as governor the number of private prisons in Texas grew from 26 to 42.[69]

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[65] Davis, *Are Prisons Obsolete* p. 84
[66] Chalmers, Johnson , *The Sorrows of Empire: Militarism, Secrecy and the End of Empire* (London: Verso 2004), 39
[67] quoted *ibid*, 309
[68] Judith Greene 'Bailing Out Private Jails' *The American Prospect* September 10, 2001
[69] Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Allen Lane: Camberwell, Victoria, 2007): 294

The unprecedented nature of mass incarceration in the US provoked speculation on the limits to which it could be taken.[70] In 1995, a senior executive of Correction Corporation of America argued that 'the USA market would expand "almost indefinitely"'.[71] Prior to the advent of the 2001 'war on terror', commentators assumed, however, that national borders provided at least a territorial limit on mass incarceration facilitated through US penal policy. James Austin and his co-authors published a chapter in 2003, but clearly written prior to 2001, observing that:

> America has had to construct its locations of banishment within its border. This has been done at feverish pace. As was done in eighteenth-century England, we even tried using barges in New York City. Although we lack an Australia where we can set up prison colonies, we are increasingly building huge megaprison settlements in isolated rural communities where land is cheap . . .[72]

The November 2001 Presidential Order, however, substantially demolished the limits of territory. The 1989 invasion of Panama (see above) provides one early example of the extraterritorial imposition of imprisonment by the US. The involvement of transnational corporations in prisons and immigration detention centres provided another means by which the limits of territory on mass incarceration were breached prior to the Presidential Order.

Shortly after they emerged in the 1980s in the US, private prison companies actively pursued expanding markets and profits beyond their home base.[73] US private prison corporations are running prisons in or have run prisons in countries including Australia, Canada, New Zealand, the United Kingdom and South Africa.[74] Despite

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[70] Garland, 'The meaning of mass imprisonment', p.3

[71] Richard Harding, *Private Prisons and Public Accountability,* (Buckingham: Open University Press, 1997), 4

[72] James Austin, John Irwin, and Charis Kurbin 'It's About Time: America's Imprisonment Binge' in *Punishment and Social Control* eds. T. Blomberg and S. Cohen (New York: mAldine De Gruyer, 2003), 441

[73] Stephen Nathan, 'Prison Privatization in the United Kingdom' in *Capitalist Punishment: Prison Privatization and Human Rights*, 190

[74] Andrew, Coyle, Allison Campbell and Rodney Neufeld, 'Introduction' in *Capitalist Punishment: Prison Privatization and Human Rights,* 1

these successes in market expansion, transnational private prisons corporations have, however, encountered some significant barriers in entering the international market. Governments in countries that are ideologically well disposed to neoliberal principles have been willing to embrace private prisons as part of the trend away from public ownership and state control towards privatisation. Nevertheless, it has often taken companies several years of lobbying to persuade governments outside of the US, particularly in the face of labour union opposition, that privatisation is a good option for prisons.[75] Even in countries like Australia, where state governments have enthusiastically embraced prison privatisation,[76] private prisons have run into sustained and sometimes passionate public opposition. A long-running campaign by prison activists in Victoria (a state in Australia), for example, forced the government to use its emergency powers to step in and take over the management of a women's prison from the US private corporation that had been running it for four years. The campaign succeeded in documenting and publicising escalating violence, mismanagement, cover up, and multiple and serious breaches of contract which endangered both prison staff and prisoners. The campaign, linked to similar activist groups within the US, was critical not only of the particular circumstances of the specific prison and the private prison company that ran it, but of the whole concept of prisons for profit.[77]

Private prisons have also had some success in penetrating markets in the Global South. The World Bank and the International Monetary Fund, global crusaders for neoliberalism, have attempted to impose private prisons on developing countries as part of structural adjustment programs, but such efforts have met resistance.[78] Even in the US, where the companies wield considerable political influence, the behaviour of the companies combined with philosophical objections to punishment for profit

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[75] Stephen Nathan, 'Prison Privatization in the United Kingdom' in *Capitalist Punishment: Prison Privatization and Human Rights*, 164

[76] Paul Moyle, *Profiting from Punishment: Private Prisons in Australia: Reform or Regression?* (Annandale: Pluto Press, 2000), 1

[77] Amanda George, 'Women Prisoners as Customers: Counting the Costs of the Privately Managed Metropolitan Women's Correctional Centre: Australia' in *Capitalist Punishment: Prison Privatization and Human Rights.*

[78] Nathan, 'Prison Privatization in the United Kingdom' pp. 198-201

have resulted in community campaigns that have succeeded in revealing them 'as cheats, liars and liabilities'. These revelations have led to a decline in profits and a slowdown in private prison growth. The massive expansion of private prisons within the US in the 1980s and 1990s has not continued into the new millennium.[79]

The deceleration in the expansion of private prisons within the US has coincided with an expanding international market for profit from prisons. Invasion and occupation overcome the limitations of national territory and provide spaces and human beings that can be captured and imprisoned, thus expanding the US project of mass incarceration. Despite the massively disproportionate incarceration of people of colour within the US and the racism manifest at every level of the criminal justice system, long-term incarceration there still requires the application of some formal process and determination of guilt, although since 9/11 domestic legislation has substantially eroded due process protections. The declaration of the 'war on terror', the Presidential Order, and invasions of and subsequent occupations of Afghanistan and Iraq, however, have disposed with even the pretext of due process. People in Afghanistan and Iraq and indeed anywhere in the world can be captured, abducted and incarcerated indefinitely by the US. This capture and detention is not based on what people have done, or even on what they are suspected to have done or are suspected of planning to do, but on what they *might* do at some unspecified time in the future to harm the interests—however these might be defined—of the US.[80] There are tens of thousands of people in offshore US prisons, held without charge or evidence, sometimes for years. These people, many of whom have had nothing to do with insurgency or violent opposition at all, including children, women and the elderly, make up the next wave of US mass incarceration.

Disaster Capitalism: State Terror, the 'War on Terror' and Private Profit

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[79] Christian Parenti, 'Privatized Problems: For-Profit Incarceration in Trouble' in *Capitalist Punishment: Prison Privatization and Human Rights* pp. 30-38

[80] Jude McCulloch and Bree Carlton, 'Preempting justice: the suppression of financing of terrorism and the "war on terror"', *Current Issues In Criminal Justice* 17: 397-412

There is little empirical evidence available detailing the profits made by private prison corporations in the 'war on terror'. What we do know, however, is that private corporations are making huge profits in the 'war on terror' and that prisons are an important and significant aspect of the 'war on terror'. Peter McLaren and Gregory Martin, commenting on the profits flowing to major US companies from the invasions of Afghanistan and Iraq, observed that '[t]he best business in the global marketplace these days appears to be the business of bombing the infrastructure of a country to the Stone Age and then receiving millions of dollars to rebuild it'.[81] Post-invasion reconstruction and the provision of 'services' during occupation have created huge opportunities for private firms. The enthusiastic exploitation of these opportunities has been dubbed disaster capitalism and hailed, as 'the rise of the disaster capitalism complex'.[82] During the first fourteen months of the occupation of Iraq, the US-led regime spent around $20 billion in Iraqi oil revenue, most of which was distributed to US corporations.[83] The private contractors and mercenary armies are making huge profits in Iraq.[84] Since the first year of occupation 'reconstruction funds' have been redirected to pay for the military and security costs of the occupation.[85] While money for reconstruction in Iraq has slowed down, money for building prisons continues to flow. The US State Department's *only* request for rebuilding funds from Congress in 2006 was $100 million for prisons.[86] At the time of writing, there were calls out to private firms for up to $5 million of services for the newly-constructed Camp Cropper prison in Iraq.[87] By mid-2004, multinational Halliburton's income from Guantanamo Bay was approximately US$155 million.[88]

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[81] Peter McLaren and Gregory Martin, 'The Legend of the Bush Gang: Imperialism, War and Propaganda' *Cultural Studies: Critical Methodologies* 4 no. 3 (2004): 281-303 at p. 296; see also, Dave Whyte 'The Crimes of Neo-Liberal Rule in Occupied Iraq' *British Journal of Criminology*, 2007, 47 no. 2 (2007): 177-195.
[82] Naomi Klein 'The rise of disaster Capitalism' *The Nation,* May 2, 2005; Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Allen Lane: Camberwell, Victoria, 2007), 281.
[83] Whyte 'The Crimes of Neo-Liberal Rule in Occupied Iraq'
[84] Klein, *The Shock Doctrine,* p. 9; 13-14; Jeremy Scahill, *Blackwater: The Rise of the World's Most Powerful Mercenary Army* (Serpent's Tail: London, 2007); Peter Singer, *Corporate Warriors*
[85] Dave Whyte 'Hire an American! Economic Tyranny and Corruption in Iraq' *Social Justice,* 2007, 34 no. 2 (2007): 159
[86] The *Age*, 2 March 2006
[87] *Y -- Multiple Award Task Order Contract (MATOC) for Construction projects at Camp Cropper within Camp Victory installation, Baghdad, Iraq*

I am not aware of any specific research on the role of private prison corporations in the 'war on terror'. However joining the dots between the behaviour of these corporations within the US and other markets they have penetrated previously, such as Australia, and the behaviour of private corporations within Iraq generally, where systematic and institutionalized corruption has been documented, one can speculate that the distinction between private profit and public interest is non-existent and that profit is seen as an end in itself, regardless of human costs.

In a book published in 1995, David Shichor, considering the arguments for and against private prisons, claimed that:

> nobody seriously recommends that the military be privatized, that wars be fought by soldiers and sailors employed by IBM, or say, Fighting Forces of America, Inc. If death and disaster on a considerable scale are inevitable products the rule seems to be that the responsibility is the business of government. The government is at least responsive to the will of the electorate, and it presumably will not declare or wage war with profit as its major goal.[89]

More than ten years after these words were written, with the widespread use of contractors, even combat forces, in every aspect of the 'war on terror', the idea of a privatised military, including private military prisons and war-driven by the pursuit of profit seems less absurd, though no less morally repugnant or confronting to notions of accountable government.[90] However, in considering profit, particularly profits from prisons, as one of the drivers of the 'war on terror', it is important not to get too caught up in focusing on the role of specific corporations, though work has barely begun even in relation to that aspect. It is of a higher level of importance to

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http://www.fbodaily.com/archive/2007/04-April/05-Apr-2007/FBO-01265724.htm (accessed 27th February 2008)

[88] David Rose, *Guantanamo: The War on Human Rights* (New York: The New Press 2004), 54

[89] David, Shichor, Punishment for Profit: Private Prisons/Public Concerns (Thousand Oaks: Sage, 1995), vii.

[90] See, for example, Klein, *The Shock Doctrine,* p13-14

examine the capitalist system as a whole and the broader politics that drive global mass incarceration, along with the state terror and terrorism that accompany it.[91] Criminologist Dave Whyte concludes, based on field research in Iraq, that '[v]irulent and institutionalized corruption in Iraq has extended the neocolonial reach of the US sustaining a much broader strategy of domination'.[92]

Prisons for the Free World

Violence and incarceration including torture, abuse, sexual violence and supermaximum security conditions, domestically and in the wake of military aggression, amount to state terror because they are inevitably experienced as a form of terror by incarcerated people. Beyond this violence and incarceration, both domestically and in the 'war on terror', are a form of state terrorism. The impacts of violence and incarceration are concentrated in racialised and criminalised groups. Violence and incarceration are part of a political strategy designed to send a message about the social, political and economic system as a whole and strike fear into those communities that are disproportionately the victims of violence and incarceration.

Beyond the purely economic rationale of the prison, mass incarceration in the US serves an important ideological function: '[t]he prison industrial complex is not only a set of interest groups and institutions. It is also a state of mind'.[93] Neoliberalism and repressive social control are a 'package deal' through which the 'rhetoric of criminalization and punishment legitimizes states that have reneged on their commitment to the social wage'.[94] As Angela Davis argues, prison:

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[91] Parenti, 'Privatized Problems: For-Profit Incarceration in Trouble' p. 30
[92] Dave Whyte 'Hire an American! Economic Tyranny and Corruption in Iraq' *Social Justice*, 2007, 34 no. 2 (2007): 164
[93] Schlosser quoted in Hallett *Private Prisons in America* p. 80
[94] Philomena Mariani, 'Overview: Law, order, and neoliberalism', *Social Justice*, vol 28, no 3, (2001) pp. 2-4

> ... functions ideologically as an abstract site into which undesirables are deposited, relieving us of thinking about real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers ... It relieves us of the responsibility of seriously engaging with the problems of our society, especially those produced by racism, and increasingly global capitalism ... The prison has become a black hole into which the detritus of contemporary capitalism is deposited.[95]

Within the US, criminalisation of African and Indigenous Americans resonates with the slavery and genocides of former times and assists in maintaining African Americans and Indigenous people as marginalised and vilified minorities, thus working to obscure the continuing history of state terror and terrorism. Mass incarceration of the poor, a category which substantially overlaps with 'race', blames the victims for the myriad and intensifying failures of capitalism under conditions of neoliberal globalisation. Those that actively oppose and resist neoliberalism are also exiled and isolated, if not silenced, through incarceration. Mass incarceration is driven as much by the political profit as the material profit that goes hand in hand with the promotion of fear and the punishment of criminalised and racialised groups. States no longer willing or able to respond to demands for social justice under the tenets of neoliberalism are quick to respond to, exacerbate and create the fears that underlie the demands for security in its most repressive and coercive forms. As Giroux observes: 'What has emerged is not an impotent state, but a garrison state that increasingly protects corporate interests while stepping up the level of repression and militarization on the domestic front'[96]—a shift from welfare to warfare state. The US as the exemplar of neoliberalism is also the exemplar of this process. The fear and anxiety maintained and even manufactured around crime, and more recently and intensely around national security, serve to detract attention away from problematic domestic politics. Law, order and security politics mask a range of insecurities that arise from government

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[95] Davis, *Are Prisons Obsolete?*, 16

[96] Henry Giroux, 'Global Capitalism and the Return of the Garrison State' *Arena Journal* New Series 2002 no. 19: 141-160, p. 143

policies by associating notions of security exclusively with the state or nation rather than with individuals or communities.

In the same way that domestic mass incarceration and state terror reflect and amplify social and 'racial' hierarchies within the US, the emerging global practice of incarceration assists to maintain hierarchies between different states, primarily the US and the rest, but also the West and the rest, and between peoples within states. The labeling of a broad range of social movements, armed struggles and protagonists in conflicts hostile to the 'interests' of the US as terrorists works to obscure the reality of the US' pursuit of self-interest through state terror in the form of military aggression and incarceration.

In the same way that neoliberalism and punitive penal policy have marched hand-in-hand domestically the spread of neoliberal globalisation has extended and intensified this process throughout the world. As Naomi Klein points out, there is a direct connection between military 'shock and awe', the economic shock treatment of coerced neoliberal restructuring and the physical and psychological shock delivered through mass incarceration and endemic torture in the 'war on terror'.[97]

Internationally, the Unites States suffers from a 'superiority complex' which provides it with the justification for conquest, invasion and colonial rule, and serves to reduce qualms over the moral rightness of domination.[98] Even thoughtful critiques of punitive penal regimes assume that such practices do not impact on the fundamental nature of Western societies as the home of civilized people. James Austin and others, for example, reflecting on mass incarceration in the US, comment that: '[a]s a civilized people we must not tolerate this'.[99] The idea that mass incarceration may be uncivil but nevertheless undertaken by civilised people

[97] Klein, *The Shock Doctrine,* p7
[98] Chalmers, Johnson , *The Sorrows of Empire: Militarism, Secrecy and the End of Empire* (London: Verso 2004), 29
[99] Austin, Irwin, and Kurbin 'It's About Time: America's Imprisonment Binge' p.463.

suggests that such practices, when carried out in putative liberal democracies, may be problematic but not defining.

The failure to consider uncivil practices of state terror through mass incarceration to be defining is related to the long-held and firmly established notion of Western democracy as the original and natural home of ideas of freedom, equality and justice. The development of postcolonial studies and critical race scholarship has revealed liberal democracies' historical tendency towards violence against and incarceration of identifiable groups, who are socially, politically and culturally constructed as uncivilised. Democratic states have routinely denied access to rights and citizenship on the grounds of 'race', both at home and in 'their' colonies. Exclusion from rights via renewed notions of dangerousness, related particularly to class and 'race', was established at the inception of modern penal systems.[100]

Imperialist narratives have also incorporated the idea of western liberal markets as fair, open and transparent as opposed to corruption and backwardness associated with 'primitive' less developed states.[101] As William Pfaff argues, the claim to virtue underlies notions of Manifest Destiny as a claim to power.[102] In previous eras the idea of Manifest Destiny involved spreading white civilisation, whereas today such claims are likely to be made in terms of democracy, human rights and free markets.[103] Ironically, the claims to moral virtue translated into Manifest Destiny laid the foundations for the violation of the rights and processes underpinning those claims, coupled with endemic corruption in the form of the active promotion of war, pain and wholesale disaster for profit. The myth of moral virtue works to hide, silence, minimise and deny the continuing brutal history of mass incarceration and

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[100] B. Hudson, B *Justice in the Risk Society: challenging and re-affirming justice in late modernity*, (London: Sage, 2003), 35-36.
[101] Dave Whyte 'Hire an American! Economic Tyranny and Corruption in Iraq' *Social Justice,* 2007, 34 no. 2 (2007): 153-168
[102] William Pfaff, 'Manifest Destiny: A New Direction for America', *The New York Review of Books*, vol. LIV, no. 2, 2007: 54-58.
[103] S, Perera 'Our Patch: Domains of Whiteness, Geographies of Lack and Australia's Racial Horizon in the "war on terror"' in *Our Patch: Enacting Australian Sovereignty Post 2001*, 2007, S, Perera ed. pp.119-146 at. 128-129)

the systemic corruption of private profit linked to punishment and prisons within Western countries, the US in particular. The myth of moral virtue, exemplified by the hypocritical response to the revelations of torture and abuse in US global prisons, fuels the moral basis for the pursuit of the 'war on terror' and the expansion of mass incarceration internationally. The invasion of Iraq was, among other things, touted as a way of ending the corruption of the Saddam Hussein regime. Such statements are now viewed, in light of revelations of post invasion corruption, as 'breathtakingly hypocritical'.[104]

Conclusion

The 'war on terror', and specifically the expansion of US mass incarceration to encompass the entire planet, provide an emblematic example of states' strategic deployment of 'counter-terrorism' to engage in the widespread use of terror against people and communities stereotyped as terrorists. Despite protestations to the contrary the documented state terror and torture of prisoners and detainees in the 'war on terror' are not outside the moral framework of the US but instead reveal the values put into practice daily upon the bodies of millions of prisoners by thousands of American citizens, both in the country itself and increasingly in its global prisons offshore. Increasingly the boundaries between 'homeland' and global security, domestic and offshore prisons, are rendered porous as state terror and terrorism circulate between spaces of violence and incarceration. The internal drivers of mass incarceration in the US—inequality, racism, prisons for profit and neoliberalism—more generally are embracing new frontiers and capturing new markets. The people of the world represent the bodies upon which US state terror, in the form of mass incarceration and torture, will be practised. The 'war on terror', including the Presidential Order that allows for the capture and detention of non-citizens of the US anywhere in the world, the invasions of

[104] Dave Whyte 'Hire an American! Economic Tyranny and Corruption in Iraq' *Social Justice*, 2007, 34 no. 2 (2007): 160

Iraq and Afghanistan, and the establishment of a global carceral complex, have extended and transformed mass incarceration from a US–based phenomena to a process that encompasses the entire globe: a move from garrison state to garrison planet.

From Care to Crime – Children in State care and the development of criminality

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In 1979, notorious NSW prisoner, Bernie Matthews, published an article in a gaol-house magazine, celebrating the Year of the Child.

> *"For most of us behind these walls, the road to prison has been a steady progression of Boy's Homes and Reformatories. To some we are crime statistics. To others, we are a combination of animals, brutes, deviates, psychopaths, products of broken homes, or just plain psychologically unbalanced individuals.....*
>
> *During the past 9 years in prison there is one thing that has occurred with monotonous regularity: the guys I knew in Mt. Penang and Albion Street and Yasmar were in those places for truancy, running away from home, stealing and in some cases house-breaking.*
>
> *Today I see those guys I knew 14 and 15 years ago walking the yard. Now they are doing time for murder, rape armed robbery and kidnapping.*
>
> *Some may look at this example in a cynical vein and remark that it is a big step from robbing a bicycle to robbing banks. It isn't a big step at all. IT IS A PROGRESSIVE EXTENSION OF THE JUVENILE / JUSTICE SYSTEM.*[1]

[1] Matthews, Bernie *Contact*, Parramatta Correctional Centre, 1979

The progression from juvenile offending to adult offending has been clearly established.[2] However, Matthews illuminated an issue which most other studies or commentary have overlooked or downplayed. Mt Penang, Yasmar and Albion St may have been juvenile detention centres that catered to young offenders, but they also housed child welfare cases, those young people who were committed to an institution for being abandoned, neglected or abused. In Matthews words, the Boys' Homes and reformatories detained children who had truanted or run away from home. Of significance in this observation is not merely the progression of young offenders from juvenile detention to adult institutions, but another, more disturbing pathway – that of the offending trajectory of children placed in State care for purely welfare reasons.

Academic research has largely ignored this vital connection. The NSW Bureau of Crime Statistics and Research 1974 study *A Thousand Prisoners* [3] typifies the way the over-representation of those with a history of care are lost in the literature.[4] BOCSAR reported that 'a substantial number of the prisoners (in NSW) had lived in an orphanage or some form of children's home', but rather than highlighting the staggering fact that 41.2% had been institutionalised as children (54 in their first 5 years of life, and another 358 between the ages of 6 to 18), the opportunity to unravel the relationship between time in care and subsequent offending was overlooked. BOCSAR simply attributed the massive over-representation of prisoners from a care background to their status as products of a broken home, and assumed that they had been placed in care because of abuse. This proposition was not explored further in the study, and the significance of a care history as a predictor of delinquency was not revisited for decades.[5]

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[2] For example, Baker, Joanne, *Juveniles in Crime – Part 1: Participation Rates and Risk Factors,* NSW Bureau of Crime Statistics and Research, Sydney NSW 1998

[3] The New South Wales Bureau of Crime Statistics, Statistical Report 16: *A Thousand Prisoners*, August 1974.

[4] In fact, the study itself was lost. The Bureau's research list of publications fails to list the report and the BOCSAR library had not retained a copy.

[5] Weatherburn, Cush and Saunders, *Screening juvenile offenders for further assessment and intervention*, Report 109 NSW Bureau of Crime Statistics and Research, Sydney NSW 2007

Snapshots of prison populations the world over reveal that people who have been in State care are over-represented in prisons and juvenile detention facilities. The significance of the data however, has not been picked up, and while the findings tend to be reproduced year after year there have been few attempts to probe more closely, to untangle why so high a proportion of the prison population shares this common background.[6] Likewise, little attention has been paid to what leads to offending amongst children in care. Heavy qualifications and assumptions have been placed on findings that have indicated that wards are over-represented in offending populations.[7] Coupled with apparent general disinterest, this has meant that research into offending by wards is a neglected area. In this respect the care population has been regarded in very much the same way as Aboriginal over-representation in the criminal justice system was viewed until only 30 or so years ago - as something to be noted occasionally in prison statistics, but with little attempt to unravel the social, cultural and institutional factors that may provide some explanation.

The prison studies have however, served a useful, if limited purpose. It is because of these snapshots that we know that approximately 21% of the Canadian gaol population,[8] 23% of the UK adult gaol population and 38% of juvenile detainees have been in care.[9] Almost unbelievably, United States' research has placed the number of prisoners with a care history as high as 80% of the custodial population.[10] The few Australian studies that have been undertaken also reveal an alarming picture. Studies of adult female prisoners have reported that between 30-50% were removed from

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[6] Taylor, Claire Young People in Care and Criminal Behaviour, Jessica Kingsley Publishers, 2006 at 13.
[7] For example, McDonald et al cautioned against the 'potential for spurious associations' in this area, and warned that the results must be interpreted with caution, McDonald, Allen, Westerfelt and Piliavin, *Assessing the Long-Term Effects of Foster Care: A Research Synthesis*, Institute for Research on Poverty, Kansas, 1993 at 77.
[8] Mason, Brian "Implementing the Young Offenders Act - An Alberta Perspective" in Hudson, Hornick and Burrows (Eds) *Justice and the Young Offender in Canada*, (pp 51-63) Wal & Thompson Inc 1988 p 62
[9] UK Select Committee on Health, *Second Report, Inquiry into Children Looked After By Local Authorities,* House of Commons HMSO U.K. 1998
[10] For example, US Department of Justice, *Bureau of Justice Statistics Special Report: Women in prison,* USDJ, Office of Justice Programs 1991:6; US Department of Justice, Office of Justice Programs, B*ureau of Justices Statistics Special Report, Mental Health and Treatment of Inmates and Probationers*, 1999:6; Golden, R. Disposable Children: *America's Child Welfare System*, Belmont, Ca; Wadsworth Publishing Company, 1997 p 171

their families as children and placed in care[11] while the 2001 NSW Inmate Health Survey found that 1 in 3 Aboriginal prisoners and 1 in 5 non-Aboriginal prisoners had spent time in care.[12]

An examination of juvenile detainees reveals a similar picture. In 1999 the NSW Community Services Commission reported that 3% of the children in juvenile detention centres were state wards. The Commission conceded that it had substantially under-stated the number by relying on official notifications as to wardship status - if the files did not label a detainee as a ward then they were not counted as such. Nonetheless, the Commission found that even at 3% of the detainee population, wards were significantly disproportionately over-represented in detention, compared to their numbers in the broader juvenile population.[13] Essentially, the Commission found that male wards were 13 times and female wards were a staggering 35 times more likely to go to a juvenile detention facility than their non-ward peers.[14] A few years later, a survey of the Reiby juvenile detention centre[15] found that 42% of the juvenile detainees had been in substitute care for at least one episode; 19% were presently in care; and 13% were state wards. Just last year the *Young People in Custody Health Survey* - the juvenile version of the adult prison survey – reported that 28% of young offenders had spent time in care.[16]

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[11]Hastings, F, *A Census of Women in Custody in NSW 1998: Interim Results from the Women in Custody Survey*, Women's Services Unit, NSW Department of Corrective Services, Sydney Australia 1997 NSW Department of Corrective Services, Women's Services Unit, 1997; Sisters Inside, Kilroy D *When will you see the real us*? Women in Corrections: Staff and Clients Conference, Australian Institute of Criminology Adelaide 2000 pg 3; Denton, Barbara, Voices from below: *Women in prison and drugs*, 1995 p37 The National Drug and Alcohol Research Council

[12] Butler T and Milne *The 2001 Inmate Health Survey,* Corrections Health Service, Sydney Australia, 2003

[13] Community Services Commission, *Just Solutions*, 1999 pg 17

[14] When youth on community orders were examined, the Commission found that wards were 6.5 times over-represented on supervision orders, compared to the general juvenile population.

[15] The Hon Brad Hazzard MP, Governor's Speech: Address in Reply, *Hansard*, Legislative Assembly, NSW Parliament 15 March 2002 at 583

[16] Allerton, M., Champion, U., Kenny, D.T., Butler, T. et al (2003). 2003 *Young People in Custody Health Survey.* NSW Department of Juvenile Justice, Sydney Australia

US studies show that youth with previous foster care experience are four times more likely to be early start juvenile delinquents than youth with no foster care experience.[17] Looked after children (the British term for being in State care) of the age of criminal responsibility are three times more likely to receive a caution or conviction than their peers.[18] Australian studies have found that there is a higher rate of detention for State wards compared to other young people. While 7% of charges levelled against juvenile offenders resulted in commitment in a juvenile detention facility, 21% of charges brought against wards led to a custodial sentence.[19]

State wards have higher recidivism rates than the general population – the CSC found 70% of wards re-offended compared to 59% of the general juvenile detainee population - according to a report released this year by the Create Foundation, one year after leaving care, almost half of the young people will have committed a crime.[20]

There is also evidence that State wards re-offend at vastly disproportionate rates. Burdekin found that "...children in care were 160% more likely to reoffend than non wards"[21] while the Australian Law Reform Commission warned that "the care system is producing long term criminal offenders."[22] Young people in care may also be committing disproportionately violent or serious offences. As the former head of the Child Protection Unit at the Children's Hospital Westmead, Dr Suzanne Booth, citing

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[17] Alltucker K (2004) *Factors Influencing the Development of Juvenile Delinquency: Differences Between Early and Late Starters*, Thesis, University of Oregon.
[18] Sinclair, Wilson Pitthouse & Sellick (2004) *Fostering Success: An exploration of the research literature in foster care,* London: Social Care Institute for Excellence, Nottingham University
[19] Community Services Commission, *Just Solutions*, 1999 pg 17. The question arises – is this disparity due to poor legal representation of wards, judicial bias, or does it arise because wards offend earlier, more frequently and at higher levels of severity, thus warranting more severe sentencing sanctions? This is a clear indication of the failure of research in this area to date that these issues have not been unravelled.
[20] Create Foundation, *Report Card* 2008
[21] The Human Rights and Equal Opportunity Commission, *Our Homeless Children*: Report of the National Inquiry into Homeless Children, Australian Government Publishing Service, Canberra Australia 1989
[22] Australian Law Reform Commission / Human Rights and Equal Opportunity Commission *Seen and heard: priority for children in the legal process: Report of the National Inquiry into Children and the Legal Process,* Sydney Australia, 1997

the killers of Anita Cobby and Janine Balding warned, State wards are at risk of becoming perpetrators of violent crime.[23]

Those who grew up in care have significant mental health, and social needs. Studies have touched on the fact that offenders with a history of out of home care have different physical and mental health outcomes compared to the general detainee population. For example, the *2008 Young People on Community Orders* found that they were significantly more likely to have relatives who had been in prison; to have experienced a physical injury requiring medical treatment; to have experienced unwanted sex; report having no close friends; received special education and treatment for substance abuse; be living in unsettled accommodation; be unemployed; and to be in receipt of government benefits.[24] Aboriginal prisoners removed from their families as children were found to experience significantly worse outcomes with regards to mental health than their non-removed Aboriginal peers: and were significantly more likely to be jailed more than 5 times; to have experienced child sexual assault; and to have attempted suicide.[25] As the Royal Commission into Aboriginal Deaths in Custody's examination of ninety-nine indigenous people who had died in State custody found, nearly half of the deceased had been taken as children from their families by State authorities, and placed into State care.[26]

These findings have wider policy and practice implications. If young people in care (and those adults who have now left care) have particular characteristics that are not shared by the rest of the prison population – already an extremely vulnerable group in terms of health, mental health and a range of other indicators – shouldn't policymakers be directed towards this? For example, if people once in care are engaging in sexual activity earlier, what does that mean for the delivery of sex

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[23] Sandham, Sonya 'Under-funded welfare system 'harms young', Sydney Morning Herald, 29/03/96 p4
[24] Kenny & Nelson, *Young People on Community Orders: Health, Welfare and Criminogenic Needs*, Sydney, 2008 at 2.8
[25] Egger & Butler, The long-term factors associated with removal from parents amongst Indigenous prisoners in NSW, *Australian and New Zealand Journal of Public Health*, 2000 vol 24, no 4
[26] *Report of the Inquiry into the Death of Glenn Allan Clark* Royal Commission into Aboriginal Deaths in Custody 1991, The Reconciliation and Social Justice Library, www.austli.ed.au

education programs, or the transmission of infectious diseases? If over half the care population has attempted suicide, what implications does this hold for suicide risk and prevention programs both in the community and inside our prisons?

What does it mean for crime prevention that care leavers re-offend at greater rates, more often, and perhaps at higher levels of seriousness? And what does the presence of this group within the prison mean for recidivism programs, currently focused on family reunification, and maintaining family and social connections as a means of reducing the stresses that can lead to the commission of crime?

The importance of preserving family contacts when someone is incarcerated has only recently been understood. It is currently a major platform in the corrections philosophy, both in NSW and internationally. Yet ironically, this emphasis on family preservation, community involvement and a sense of belonging, leaves those who have been in care, out in the cold once more.[27]

Diversionary programs, such as Youth Conferencing and Circle Sentencing, are premised on the idea that because an offender will feel shame at an offence he or she will come to appreciate the impact of their act upon the victim and the wider community. But to feel shame, you have to feel part of the community set up to judge you. Those who have grown up in care, often are excluded from participation even in this style of program, because they do not have a community of their peers, or a family of their own, to whom they belong and thus, one which can judge and influence their behaviour.

Why has so little been done to acknowledge, let alone to address, the disadvantage experienced by so many?

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[27] McFarlane, K. & Murray, J. *Falling through the Cracks*, Rights Now, Journal of the National Children and Youth Law Centre, pg 16 (2000)

A remarkable outburst from a Victorian judge sheds some light. On three occasions in as many months Judge Gebhardt criticized the Victorian Government's 'sloppy and disgraceful' handling of children in State care.[28] He lamented the 'pattern of neglect and indifference, a pattern which we see far too often in this Court" exhibited towards young wards, and criticised the 'incompetence' that led to so many former children in care ending up before criminal courts. The Department, His Honour declared, "should be made aware of the consequences of their incompetence."[29] Repeating concerns aired in previous decisions, His Honour commented "...in the last six months I've had a number of young offenders before me who have been victims of sloppy and disgraceful behaviour by the Department of Human Services. What can one say of a department whose behaviour and activities makes lives worse."[30] Former Chief Family Court Justice Alastair Nicholson was quick to agree with his Victorian counterpart. Writing in The Age, the former judge declared that 'the state bears responsibility for turning out a 'bad penny' when it has been neglectful of its responsibilities. It, too, is in the dock."[31]

Successive State and Territory Governments have followed the lead of the Senate Community Affairs References Committee and apologized for the harm done to generations of Australian children who grew up in institutional care.[32] The latest

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[28] *R v H* [2005] Victorian County Court, Gebhardt J 02/05/05 at [12]
[29] *R v H* [2005] Victorian County Court, Gebhardt J 02/05/05 at [14]
[30] *R v RLB* [2005] Victorian County Court, Gebhardt J 10/02/05 at [16]
[31] Nicholson, Alastair 'Failing abused and neglected youth hurts us all' *The Age* May 10, 2005
[32] The Hon R Meagher, Senate Inquiry into Children in Institutional Care, *Hansard*, Parliament of New South Wales, 23 June 2005; The Hon Steve Bracks, *Hansard*, Parliament of Victoria, 9 August 2006; O'Brien Amanda, 'Millions for abused wards of state, *The Australian*, 13 June 2008 citing Premier Alan Carpenter. The Commonwealth Government recognised that 'the policies that allowed these outrages to be perpetrated on innocent children were not only misplaced; they were inexcusable in any era" and stated that while 'it would not be appropriate for the Australian Government to issue an apology for a matter for which it does not have responsibility, the Government expresses its sincere regret that there children were placed in situations where they did not receive the care they deserved" *The Australian Government Response to the Committees' Reports Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children and Protecting Vulnerable Children: A national challenge*, Commonwealth of Australia 2005 at 2.

apology - by the South Australian Premier on behalf of the Government and Church agencies – was delivered just two days before this paper was delivered.[33]

Yet the issue of offending by children in care, and Government responses to it, remains a neglected area. Much more needs to be done to devise programs that speak to those who have grown up in care so that we may have a chance to break the 'welfare-justice nexus.' Historically, people who grew up in care make up between 1.35% - 0.2% of the NSW population. However, the numbers have increased to 0.6%[34] with over 12,700 children now in care in NSW and it is thought that this will top 20,000 in the next five years.[35] If the rates of offending described in studies continues, juvenile crime must be set to significantly increase.

Concern about the inevitability of the pathway from care to crime has been echoed by the Victorian Auditory General,[36] successive State and Federal Parliamentary Inquiries[37] and the Ministerial Council on the Administration of Justice.[38] Yet contrary

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[33] The Hon MD Rann, 'Children in State Care Apology', *Hansard*, Parliament of South Australia, 17 June 2008

[34] McFarlane K, *JusticeHealth Prisoner Health Research Symposium.* Sydney NSW (2005); Human Rights and Equal Opportunity Commission / Australian Law Reform Commission, *Seen and heard: priority for children in the legal process: Report of the National Inquiry into Children and the Legal Process,* Sydney Australia, 1997. Indigenous children are more over-represented in out of home care, at 19% of substitute care placements, although they make up only 3.5% of the child population, in Steering Committee for the Review of Commonwealth / State Service Provision, *Report on Government Service Provision 1997*, Industry Commission, Melbourne 1997 at 547.

[35] NSW Department of Community Services, *Submission to the Special Commission of Inquiry into Child Protection in NSW*, citing the Department's Annual Report 2006/07 p 5

[36] Victorian Auditor General, *Protecting Victoria's Children, The Role of the Department of Human Services,* Vic Govt Printer Melbourne 1996, at 266*:* The high incidence of criminal behaviour and the likelihood of it continuing beyond discharge from wardship is of serious community concern and warrants research as to causes and prevention strategies.

[37]Standing Committee on Social Issues, *A Report into Children of Imprisoned Parents,* Legislative Council, Parliament of New South Wales, No 12 1997 at 57: Clearly from the evidence to this Inquiry, children who are made wards of the State because their primary carer is in prison present a serious risk of involvement in anti-social behaviour and entry into the juvenile justice system; Select Committee on the Increase in the Prison Population, *Final Report*, NSW Parliament, 2001 at Rec 1: Research focusing on the needs of former State wards and care leavers in the prison system should ensure the number of former State wards and care leavers in the prison system be comprehensively identified*';* Standing Committee on Law and Justice, *Crime Prevention Through Social Support, Second Report* No 14 2000 at 86: citing Murray J, 'a strong component of any crime prevention strategy or services that the State initiates must address those who have already gone through the child welfare system, and who have found themselves fast-tracked into the criminal justice system, homelessness, social exclusion and

to the NSW Parliament's assertion 8 years ago that, 'the Departments of Juvenile Justice and Community Services do not have to be convinced of the importance of preventing cycles of intergenerational offending by State wards,"[39] little has changed to address the issue.

My research will provide more information about how and why State wards offend and what can be done to address it. I am hoping that this time, policy-makers and program-developers will take heed because, as the Hon. Justice James Wood, former Police Royal Commissioner and currently the Special Commissioner examining the NSW Department of Community Services, declared over a decade ago "No community with any real concern for the safety and well being of its children can tolerate a system under which there is an inevitable, or even substantial, drift of State wards to juvenile justice, with its increased risk of progression to adult imprisonment."[40]

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prostitution'; Community Affairs References Committee, *Protecting Vulnerable Children: A national challenge, Second Report on the inquiry into children in institutional or out-of-home care,* The Senate, 2005 at 16.43 Rec 16: recognition of State ward and careleaver involvement in the criminal/penal system can lead to an improved understanding of the factors influencing crime and social disorder, and that research, should be matched by appropriate resources, policies and administrative effort.

[38] Ministerial Council on the Administration of Justice (MCATSIA) *Review of the Standing Committee of Attorneys General (SCAG) Reconciliation Action Plan,* 2003: recommended examination of the legal issues and incarceration rates among previously separated children.

[39] NSW Parliament, Standing Committee on Law and Justice, *Crime Prevention into Social Support*, Report 14, August 2000

[40] Wood JRT, Royal Commission into the New South Wales Police Service, Vol 5 *Paedophile Inquiry*, Sydney 1997 p 1046

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Women's bodies, moral panic and the world game: Sex trafficking, the 2006 Football World Cup and beyond[1]

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Trafficking in people and particularly trafficking in women for the purpose of sexual exploitation ('sex trafficking') re-emerged in the international arena in the early 1990s. Frequently referred to as 'modern-day slavery' (Bales 1999, Bertone 2000, Hughes 2001, Jeffreys 2002, King 2004, van den Anker 2004, Roby 2005, US Department of State 2008), estimates about its scope vary to the extent[2] that figures are considered arbitrary (Doezema 2000, Agustin 2005: 40, Kempadoo 2005), prompting many critics to argue that despite increased interest what we know about this phenomenon is still exceptionally limited (Kempadoo 1998, Kelly 2002). Although such discrepancies in estimates as Kempadoo (1998: 15) noted "should be a cause for extreme suspicion of the reliability of the research", they have been widely circulated and the agreement has been reached that sex trafficking is growing (Apap et al. 2002, Carrington & Hearn 2003).

Women and children are identified as particularly vulnerable: a 2008 US Department of State Trafficking in Persons (TIP) report estimated that 80 percent of all victims of trafficking are "women and girls" (US Department of State 2008: 7), while some scholars estimate that even millions of women worldwide have been trafficked into the sex industry (Raymond et al. 2002). However, not all women were perceived to

[1] This proceeding paper is an updated version of the paper published with Sharon Pickering. Available at http://www.vds.org.yu/File/Tem0802.pdf

[2] For example, in 2002 the US Department of State (2002: 1) estimated that between 700,000 and four million people are trafficked worldwide annually, while in the 2006 Trafficking in Persons (TIP) report figures are reduced to 600,000 to 800,000 (US Department of State 2006).

be in danger of being trafficked: the predominant discourse within anti-trafficking framework portrays victims as young, poor and disadvantaged women from developing countries who, in the search for better life, have been tricked or lured into sex work (Bertone 2000, Clark 2003, US Department of State 2006), and then severely abused and exploited. In the European context victims are commonly portrayed as poor and naïve women from Central and Eastern Europe (IOM 1995, Hughes 2001, Miko 2003, Nikolic-Ristanovic et al. 2004).

A range of actors joined forces in what has been coined "the 21st century abolitionist movement" (US Ambassador John Miller, US House of Representatives' Subcommittee on Africa, Global Human Rights and International Operations 2006: 27) in the mission to 'rescue' women from such gloomy fate. Although such representation of sex trafficking is not entirely incorrect, it is just a part of a more complicated picture. Yet these simplified images of trafficking results in initiatives that are ultimately harmful for women who they supposed to protect. The staging of the 2006 FIFA World Cup is the latest example of how a wide ranging coalition of interests fuelled a moral panic around sex trafficking in Europe that aimed to prevent "disastrous human rights abuses" (Crouse 2006), but impacted negatively on women's lives, particularly in relation to their representation, migration and mobility, both within countries of destination and origin.

This paper is based on a qualitative analysis of media coverage of sex trafficking around the 2006 World Cup in Germany. I analyzed 46 articles in English language on this topic in the six months prior and during the event[3] that review the ways this event brought into focus some of the key debates on sex trafficking in Europe. In this paper I am concerned with how the World Cup is arguably another illustration of merging

[3] This included English language newspapers and media outlets - Reuters, World Net Daily, Associated Press, Agence France-Presse, International Herald Tribune, The New York Times, Washington Post, Independent Online, The Guardian, BBC News Service, The Sunday Herald, Deutche Welle, Spiegel Online, Expatica, and religious web sites Christian Science Monitor, Chirstian News Wire, Christian Post, Christianity Today, Catholic News, LifeSite News, Ekklesia, The Whitehaven News, and Baptist Press News. I then used textual analysis to identify the key arguments and speakers within the media studied.

punitive border protection, the criminalization of women, and the undermining of women's human rights, under the cover of protection of women. Finally, this paper will highlight that measures introduced around this event did not end with a referee's final whistle.

The moral panic unfolds: Football, 'Sex Slavery' and Media Frenzy

The storm, it seemed, came from nowhere: several months before the football carnival across Germany kicked off, various organizations and groups released estimates that the 2006 World Cup is likely to accelerate sex trafficking. The figures fluctuated from 30.000 to 60.000 potential victims expected to be trafficked during the competition (Council of Europe 2006, CARE for Europe 2006, IOM 2006, Neuwirth 2006, Salvation Army 2006, Sparre 2006). It is unclear how estimates were established as none of the organizations that quoted these figures stated the source. In its report published after the World Cup, the International Organization for Migrations (IOM) revealed that estimates were first cited by the German Association of Cities and Towns (Deutscher Städtetag), and were quickly picked up by the media (Hennig et al. 2006). Although some grassroots groups and organisations dismissed such claims as exaggerated (*Daily Times*, 10 March 2006), and while the police in the host city of Munich suggested figures were "plucked from the air" (Haape 2006), the media continued to refer to thousands of women in danger of being trafficked for the World Cup. Meanwhile, the German Association of Cities and Towns disclaimed the figure (Hennig et al. 2006).

The analysis of media reports prior to the World Cup suggests that estimates originated from the estimated number of migrant sex workers expected to travel to Germany for the World Cup (*Deutsche Welle*, 10 June 2005, Paterson 2005, Iglesias 2006). Within the demand-supply equation, the number of sex workers perceived to migrate to fulfil the demand for commercial sex during the World Cup altered to the number of women who might be trafficked, by establishing at first *potential* and

subsequently an *explicit* connection between sporting events and the increase in demand for commercial sex:

> "The event's organizers are expecting at least 40.000 prostitutes to descend on Germany from throughout Europe to meet demand."
> **Tony Paterson** (The Independent Online, 9 December 2005)

> "Traffickers constantly monitor the demand pattern, looking for opportunities to maximize their profits obtained through the illicit sale of human beings. The 2006 World Cup presents such an opportunity... It is critical that the German government, civil society and the international community look seriously at the *potential links* between this major sporting event and the *potential increase* in the demand for sexual exploitation of women and children."
> **Ashley Garrett** (IOM, 2006: 30-1, emphasis added)

> "Experiences show that at every big sporting event where a large number of men gather, there is a *spectacular rise* in the demand for sexual services."
> **Ulrike Helwerth**, spokeswoman for the NGO German Women's Council (Iglesias 2006, emphasis added)

In the reports that followed, this claim that *some women* among those expected to migrate might be trafficked, that is forced to sex industry, or deceived about the conditions of work, altered to an allegation that *majority if not all women* will been trafficked:

> "The German Women's Council has estimated that an additional 40.000 women will be brought into Germany to provide commercial

> sex acts for hundreds of thousands of male soccer fans. Many of these women *are likely* to be victims of trafficking".
> **Janice Shaw Crouse,** Concerned Women for America (Jalsevac 2006, emphasis added)

> "During the World Cup around 40.000 young women are expected to be *imported to Germany for sexual trafficking"*.
> **Salvation Army** (2006, emphasis added)

As an analysis of media reports indicate, the moral panic around 'sex slaves' and the World Cup in Germany was fuelled by sensationalistic reporting, in which trafficking was reduced to sex work, and women trafficked for sex portrayed as innocent and naïve girls forced into the sex industry (Neuwirth 2006, Bindel 2006). Media outlets referred exclusively to research and estimates by abolitionist groups, sometimes explicitly denying the possibility that some women may freely consent to sex work.[4] After several months of heated media debate, *Spiegel Online* (26 May 2006) reported that,

> "With all the negative coverage, one could be forgiven for thinking that Germany is a country of human-trafficking pimps and shackled prostitutes... You could be forgiven for thinking that visitors looking to watch a bit of soccer will be greeted by an army of skimpily clad, under-aged Ukrainian sex slaves... Forced prostitution, of course, is a very real and serious problem in Germany. But much of the foreign coverage seems to deliberately conflate the two issues."

This media frenzy was sustained by a variety of actors, ranging from local non-governmental organizations (NGO), international human rights groups, feminist

[4] For example, Chon and Ellerman (*The Washington Post,* 10 June 2006) reported that "traffickers and those who benefit from sex trafficking promote an image of women freely choosing to be involved in prostitution... It is the 'Pretty Woman' myth, which many apparently like to believe in order to justify their inaction or ignorance on the issue".

abolitionists to religious Right. Soon after the news about 'sex huts' – houses built specifically to satisfy the demand for commercial sex during the World Cup – hit the headlines, this coalition openly targeted Germany's liberal policy in relation to sex work, arguing that "prostitution is to sex trafficking what coal is to steam engines" (*Christianity Today*, 2 July 2006). In the special Hearing for the House of Representatives dedicated to the World Cup and possible massive human right abuses related to it, the Republican Congressmen Christopher H. Smith argued that,

> "[s]ince the matches are being held in Germany, which legalized pimping and prostitution in 2001, the World Cup fans would be legally free to rape women in brothels... Of the approximately 400.000 prostitutes in Germany, it is estimated that 75 percent of those who are abused in these houses of prostitution are foreigners, many from Central and Eastern Europe. *We know beyond reasonable doubt that so many of these women are coerced and they are there because of force, fraud or, like I say, coercion"*
> **Christopher H. Smith** (US House of Representatives' Subcommittee on Africa, Global Human Rights and International Operations 2006a: 7, emphasis added)[5]

The US Secretary of State's advisor on human trafficking John Miller has been especially vocal in linking women's migrations, sex work and sex trafficking, arguing that,

> "All the research and evidence available shows that when you have large flows of women for sexual purposes, there is going to be trafficking. There is a link between prostitution and sex trafficking"
> **John Miller** (Association Franse-Presse, 10 June 2006)

[5] It is interesting to note that this section of Congressmen Smith's speech was later deleted from the Report.

It was, indeed, "a rare slap to at a close American ally" (Cooper 2006). German law enforcement officials argued in vain that there was "no major upsurge in prostitution-related criminality" during the sporting events this country hosted in the past (Haape 2006). A few days before the opening ceremony, German police stated there are "no signs of any explosion of forced prostitution that had been warned of in the months leading to the opening day" (*Christian Post*, 11 June 2006), yet it was too late. The new moral panic was well under its way.

Abolitionist feminist organizations, led by the Coalition against Trafficking in Women (CATW), joined the anti-sex work coalition by launching the campaign 'Buying Sex Is Not a Sport' (CATW 2006). Women's groups with similar agenda across Europe followed the suit. In Ireland, the National Women's Council of Ireland launched their version of 'Buying Sex is not a Sport' campaign (Crouse 2006), while in Germany campaigns 'Final Whistle – Stop Forced Prostitution', 'Red Card for Forced Prostitution', and 'Responsible Johns' have been launched (*Deutsche Welle*, 23 February 2006; *Spiegel Online*, 26 May 2006). Religious communities and faith-based organizations also directly targeted Germany's policy toward sex work. The Catholic Family and Human Rights Institute started the campaign "Stop World Cup Prostitution", while Caritas, one of the largest charities of the Catholic Church, concluded that "it is important to recognize that sexual exploitation, prostitution and trafficking of human beings are all acts of violence against women" (Catholic News, 25 May 2006). Initiatives were equally distributed in both perceived countries of origin (Eastern and South-Eastern Europe) and destination for victims of trafficking (Germany): the German Lutheran Church distributed leaflets aimed to reduce the demand for sex work in Germany (*Ohmynews*, 27 May 2006), while nuns in Poland issued anti-prostitution leaflets in eastern European languages (Luxmore 2006) aimed to warn young women in perceived countries of origin about the danger of sex work and trafficking.

The snowball kept rolling: Amnesty International (2006) called on European governments to launch prevention campaigns in countries of origin, and asked the German government to take responsibility and ensure measures to combat trafficking during the 2006 World Cup. It also called on "all states with football fans travelling to Germany to raise awareness of the fact that many sex workers present in Germany during the World Cup may have been trafficked" (Amnesty International 2006). Volunteers from Salvation Army and CARE travelled to Germany with leaflets designed to stop men from going to brothels (Salvation Army 2006, CARE for Europe 2006), while IOM, the Swedish Agency for International Development (SIDA) and the MTV Europe produced a "TV announcement addressing the demand side of sex trafficking ... directed at both potential clients of prostitutes as well as those most vulnerable to becoming trafficked" (IOM 2006).

As the World Cup was getting closer, the pressure was high on footballers and football associations. Amnesty International and Parliamentary Assembly of the Council of Europe urged FIFA to take responsibility for effectively combating sex trafficking during the World Cup (Amnesty International 2006, Council of Europe 2006). FIFA, however, disclaimed this request arguing that it "has no power to take legal action against human trafficking and forced prostitution" and that "it cannot be responsible for such matters" (FIFA 2006). National football teams were next: CARE (2006) urged "all football teams playing at the World Cup this year to publicly condemn Germany's acceptance of the exploitation, trafficking and pimping of women for sex" and called "upon high-profile players to make their opposition to the 'Mega Brothel'". Sweden was the first country to react to such requests. The president of Swedish Football Association promised that Swedish players will not use brothels during the Cup (Bindel 2006), while Swedish Equal Opportunity Ombudsman called on his team to withdraw from the Cup as a protest against "prostitution and the human trafficking associated with it" (Spiegel Online, 12 April 2006). The coach of the French team was outraged:

> "It is truly scandalous. People are talking about women, importing them to satisfy the base instincts of people associated with football. It is humiliating enough for me that football is linked with alcohol and violence. But this is worse. It is slaves that will come and be put into houses. Human beings are being talked about like cattle, and football is linked with that."
> **Raymond Domenech** (Chon & Ellerman 2006)

The German national team was particularly under scrutiny. A spokeswoman for Deutscher Frauenrat - the German national women's council - stated that "after seeking role models and support for our campaign among the entire German football team, so far we have managed to get support only from Jens Lehmann (German national team's goalkeeper)", at which expressed their reaction as "not only disappointed but really angry" (Haape 2006). As a result of this pressure the President of the German Football Federation Theo Zwanziger said the Federation needs to change its position on sex work(*Spiegel Online*, 8 March 2006).

In spite of "no conclusive evidence that Germany's liberal approach to prostitution made it more attractive to human traffickers" (Michele Clark, the Head of anti-trafficking assistance unit at the Organization for Security and Cooperation in Europe (OSCE), cited in Tzortzis 2006), the pressure on Germany to address its policy towards sex work prompted the German delegation to the OSCE to issue a statement that "we must assume - even if there are no reliable figures – that women will be forced into prostitution and will perhaps be brought to Germany solely for this purpose" (Delegation of Germany to the OSCE 2006). Although supposedly not a "campaign against normal prostitution" (Expatica, 8 March 2006), the moral panic around World Cup became exactly that. As the EU employment commissioner Vladimir Spidla declared, "very few people become prostitutes out of their free will" and declared prostitution to be "incompatible with human dignity" (Expatica, 8 March 2008). Women's agency has been undermined, and their possible *choice* to engage in

sex work effectively denied. Such an approach to sex work and sex trafficking affected lives of women engaged in German sex industry, and those who, for whatever reason wanted to migrate during the World Cup.

The Outcome

As a consequence of conflating trafficking and sex work the crackdown on illegal prostitution and sex trafficking resulted in large-scale raids throughout Germany, with nearly one hundred people, seventy four of them sex workers, arrested by the German police (*Associated Press*, 1 June 2006). The interior minister of the Hesse province directly linked these raids with "concerns expressed by human rights organizations and other groups that thousands of women, mostly from Eastern Europe, could be smuggled into Germany and forced to work as prostitutes during the World Cup". In neighbouring province of Rhineland-Palatinate 22 people were arrested and 34 were issued citations "mostly for immigration violations and failure to comply with business regulations" (*Associated Press*, 1 June 2006).

Anti-trafficking measures affected not only German sex workers, but also women from the supposed countries of origin who, for whatever reason, wanted to visit Germany during the World Cup. As women in danger of being trafficked for sex during the World Cup were constructed as young, naïve women from Eastern and Central Europe (Ekklesia 2006, Haape 2006, Tzortzis 2006), who seek "a life free of poverty or abuse" (Neuwirth 2006) but instead end up being severely victimized, their bodies have been yet again constructed as weak and vulnerable.

> "We are very anxious about what will happen in Germany next month. The stories of these girls locked in houses are absolutely horrendous. These young women are either sold by their families, kidnapped or believe they are going to decent jobs to earn money to send home. They end up without any rights and with ruined lives"

> **Gwyneth Smith**, Cumbria District Methodist Women's Network (Morgan 2006)

In order to help them, as EU Chief Justice Franco Frattini explains,

> "[v]isa requirements should be slapped on all non-EU citizens travelling to Germany… as a part of a drive to prevent an expected increase in the trafficking… We need to introduce and re-introduce temporary visas for all third countries – even those not requiring visas so far – but which are possible origin countries for trafficked women and children… the authorities (need to) ensure that people potentially 'compromising public order', one of the grounds for refusal of entry into the Schengen area, are indeed refused such entry"
> **EU Chief Justice Franco Frattini** (*EU Observer*, 9 March 2006)

Coincidentally or not, this latest restriction of women's rights has been launched on the International Women's Day.

Conclusion

This research indicates that the bodies that enforce borders are not only those agents that patrol the physical border but those (male and female) agents that patrol moral borders around the acceptability and otherwise of sex work. Those moral enforcement agents not only perform a gendered securitization of the border but also a social and racial patrol of particular groups. Consequently the moral panic surrounding the World Cup evidenced a peak in the subjection of some racial and social groups to differential border, immigration and labour regimes. The curtailment of (some) women's mobility and work rights in the name of securing their protection (from themselves as well as from traffickers) relied on an slippery numbers, the

securitization of the European union and agendas of key players identified in this paper.

The World Cup is over, and although IOM (Hennig et al. 2006) indicated that an increase in human trafficking did not occur (as it did not occur for previous major sporting events such as 1998 FIFA World Cup in France, 2004 UEFA Championship in Portugal, or 2004 Olympic Games in Athens – Hennig et al. 2006), some organizations have already been pointing out to upcoming sporting events, such as the 2010 Olympic Games and the World Cup in South Africa as the potential risk for trafficking (Delaney 2007, Graham 2007, The Future Group 2007, Heckler 2008). During the recent European football Championship in Austria and Switzerland the SBS reported (27 May 2008) that fans are "confronted with shocking images of human trafficking in between more traditional adverts for beer, food and consumer goods".

What we have not seen after the 2006 World Cup are critical assessments of the effects of this latest moral panic to women they supposed to protect. Instead, there are random evaluations that, surprisingly or not, claim that "prevention campaigns and increased law enforcement efforts during the World Cup may have reduced the risk of trafficking" and that "characteristics of the fan-base at the 2006 World Cup had a direct impact on the demand for sexual services" as many of the fans were families with children (Hennig et al. 2006: 2; similar in Tavella 2007, Delaney 2007). Campaigns were, thus, praised as a success. What is even worse, some authors assessed that "international community's late response and sensationalism of inaccurate facts did not have a significant impact on the situation" (Tavella 2007: 217).

What needs to be acknowledged is that 'protective' measures around sex trafficking prevent women to exercise their agency and further narrow women's options. Targeting sex work instead of sex trafficking is one of such measures. At the same time, while acknowledging risks the increasing number of migrant women face, particularly if their journeys are undocumented, it is essential to pinpoint that making

these journeys more difficult will not prevent women to endeavour to their migration patterns. Instead, it is essential to tackle structural, global, national and individual circumstances that increasingly limit some women's choices. The new agenda is needed (Segrave & Milivojevic 2005) that will move away from the law and order framework, and that will acknowledge trafficking in its all complexities. Otherwise women with 'wrong' passports who want to fulfil their migration avenues or simply to support their football team will have to run away from their 'rescuers'.

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Organised abuse and the politics of disbelief

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Organised abuse refers to any incident of child sexual abuse in which multiple adults act in a coordinated or premeditated way to sexually abuse multiple children.[1] Although it is a relatively infrequent form of sexual abuse, organised abuse has been amongst the most incendiary issues in debates on child sexual abuse over the last thirty years (see Brown, Scheflin et al. 1998; Kitzinger 2004). This paper will explore how organised abuse came to play a central role in conflicts over the signification of child sexual abuse. As narratives of sexual violence have gained increasingly legitimacy in the public eye, it seems that organised abuse has come to represent a new frontier of disbelief.

Since the 1980s, disclosures of organised abuse have been disparaged by a range of activists, journalists and researchers who have focused, in particular, on cases in which sexually abusive groups were alleged to have behaved in ritualistic or ceremonial ways (e.g. Eberle and Eberle 1986; Loftus and Ketcham 1994; Wakefield and Underwager 1994; Guilliatt 1996; Nathan and Snedeker 1996; Ofshe and Watters 1996). Whilst these authors claimed to be writing in the interests of science and social justice, what has emerged from their writing are a familiar set of arguments about the credibility of women and children's testimony of sexual violence; in short, that

[1] There is no common, recognised typology for cases of child sexual abuse that involve multiple perpetrators (Kelly and Regan 2000). A range of terms are used in the literature to describe sexual abuse by groups or networks of offenders, including "paedophile rings", "child sex rings", "multi-victim, multi-perpetrator" abuse, or "network abuse" (e.g. Burgess and Lendeqvist Clark 1984; Faller and Plummer 1996; Cairns 2000). "Organised abuse" has been selected for the purposes of this paper as a neutral and inclusive term (see Bibby 1996).

women and children are prone to a range of memory and cognitive errors that lead them to make false allegations of rape.

This paper argues that this body of literature has systematically misconstrued allegations of organised abuse, and used organised abuse as a lens through which the debate on child abuse could be re-envisioned along very traditional lines, attributing victim status to accused men and constructing liars out of women and children complaining of sexual abuse. The ambiguities, the uncertainties, and the complexities of cases of organised abuse have made it an important discursive site for a number of actors with ideological objections to the changes wrought by feminism and child protection. In particular, by framing allegations of organised abuse as bizarre and beyond belief, they sought to reassert an older politics of disbelief that contests the notion that women and children are reliable witnesses.

The backlash against child protection

For much of the 20th century, women and children's disclosures of sexual violence have often been contested by drawing on entrenched cultural beliefs about women and children; namely, that they lack a firm sense of identity and memory, and are thus prone to confabulation and wilful falsehood (Campbell 2003). Across a range of professions and disciplines, indicators of distress in sexually assaulted women and children have been systematically re-interpreted in such a way as to camouflage the prevalence of sexual violence, minimise its harms, and direct blame away from offenders (Olafson, Corwin et al. 1993). From the 1960s, the efforts of the women's movement, in coalition with a range of professionals and researchers, catalysed a reconfiguration of sexual violence as a frontier of disbelief. Feminism brokered new forms of care and support for abused women and children, including rape crisis services and domestic violence shelters (Driver and Droison 1989; Farr 1991). A growing number of medical and psychological professionals began to consider the family home, and intimate relationships, as potential sites of serious and life-

threatening harm (Kempe, Silverman et al. 1962; Kempe 1978). By the early 1980s, significant gains had been made in relation to the public awareness of incest, sexual abuse, sexual assault and domestic violence (Herman 1981; Russell 1984; Finkelhor and Yllo 1985). Disclosures of sexual violence were given increasing recognition as authentic representations of lived experience, and this opened up a new range of testimonial positions for women and children. In Australia, and around the world, child protection services began receiving, and acting on, an unprecedented number of child abuse notifications, and health and welfare services began scaling up to treat sexually abused clients (Breckenridge and Carmody 1992). Crucially, the media proved a relatively conducive vehicle for a range of new narratives about sexual violence and sexual abuse.

Dramatic social change often prompts a response from those threatened by the emergence of new meanings, understandings and practices. In the early 1980s, a nascent political movement developed in the United States, constituted of people who objected to the rise in state-sponsored interventions in family life and parent-child relationships. This movement was largely a piecemeal and ineffectual effort until the first prosecutions for organised abuse provided them with a key opportunity to centralise and politically mobilise (Faller 2004). In 1984, the community group Victims of Child Abuse Laws (or VOCAL) was formed in the aftermath of a collapsed investigation into allegations of organised abuse in Jordan, Minnesota. VOCAL was formed by two parents acquitted in the case, and Dr Ralph Underwager, a Lutheran minister and psychologist who acted as an expert witness in their defence. In court, Underwager had claimed that the children's disclosures of organised abuse were the product of brainwashing by social workers, who, he testified, used Communist thought reform techniques to force the child witnesses to invent allegations against their parents (Summit 1994b: 14). These dark intimations of a conspiracy of female professionals strong-arming children into destroying their families would be a feature

of Underwager's activism over the next few decades.[2] Ostensibly, VOCAL was formed to advocate for the rights of parents with complaints against the child protection system, but it attracted a range of other people, including anti-feminists, father's rights activists, convicted sexual offenders and pro-paedophile advocates (Hechler 1988). Within a year of it's establishment, VOCAL claimed three thousand members in one hundred chapters across forty states (Meinert 1985), providing an expansive platform for the promulgation of a position on child sexual abuse that harked back to views more prevalent in the early-to-mid twentieth century: child sexual abuse is infrequent and not necessarily harmful, children cannot tell the difference between fact and fantasy, and social workers and others who investigate child abuse are obsessive and hysterical.

Media coverage of sexual abuse in the early 1980s was focused, primarily, on the manner in which child sexual abuse had been historically denied and silenced (Beckett 1996). Organised abuse featured powerfully in VOCAL's effort to give salience to a message about child abuse that was otherwise running counter to dominant media themes. In a small number of child protection investigations in the 1980s, children reported ritualistic forms of sexual abuse, involving sexual assault and torture by groups of people within religious or cult-like "satanic" ceremonies (Scott 2001). A number of community concerns about child sexual abuse coalesced around these cases, particularly the reliability of children's testimony, the validity of child protection investigation processes, and the vulnerability of adults to false allegations of abuse. These concerns proved to be an effective frame for VOCAL in contesting the authority of child protection services. VOCAL highlighted children's allegations of ritual abuse as evidence that children had a natural propensity for confabulation and fantasy (Marron 1987) and that social workers and psychologists were caught up in a

[2] Underwager believed that that "hysteria" about child sexual abuse was being fuelled by "radical feminism" and women's jealousy of the intimacy between men and boys (Geraci 1993). In one instance, he accused "feminists in America" of waging a campaign of libel against him, following widespread criticism over his claim that "[p]aedopihles need to become more positive and make the claim that paedophilia is an acceptable expression of God's will for love and unity among human beings" (Lightfoot 1993).

"moral panic" about child abuse (Wakefield and Underwager 1994). These views were promoted by Ralph Underwager in a prolific campaign in defence of people accused of sexual abuse and organised abuse. By the late 1980s, Underwager had testified for the defence in more then 200 sexual abuse cases in the US, Canada, Australia, New Zealand and Britain (Grant 1994), and 28 of them involved allegations of organised and ritual abuse (Marron 1987). The views espoused by Underwager and VOCAL received widespread coverage in the mainstream press, although they were tempered by reports of substantiated investigations and prosecutions of cases of organised and ritual abuse (e.g. Hollingsworth 1986; Marron 1989).

One of the longest-running and most expensive American child molestation cases of the 1980s, the McMartin preschool case, proved to be the tipping point for the credibility of ritual abuse allegations. The legal proceedings in the case were so protracted and the allegations so extreme that the failure to secure convictions in the case became, in the public eye, emblematic of allegations of ritual abuse as a whole. The McMartin case began in 1983 with a small number of complaints of sexual abuse at a local preschool in California. The investigation quickly snowballed, and over 360 former and current students, ranging from toddlers to teenagers, disclosed sexual and ritual abuse by the operators and teachers of the preschool over fifteen years (Gorney 1988). Some children spoke of a set of strange and baffling experiences in which they were taken, underground, from the preschool through a set of tunnels to a waiting car, and driven to other locations in the area. There, they spoke of being subjected to sexually exploitative acts by groups of people, including ritualistic practices. The investigation resulted in numerous charges against the owners and teachers of the preschool and seven years of legal proceedings, including a prolonged preliminary hearing, and two criminal trials, both of which resulted in hung juries. There was a high rate of attrition amongst the child witnesses, who underwent extensive and hostile cross-examination for up to three weeks (Schindehette 1990). As the proceedings drew out, journalists began to drift away from the seemingly interminable day-to-day ordeal of the court process. The tone of news reporting on

McMartin became increasingly general and thematic, as journalists used the case to illustrate broader concerns about children's testimony and the law.

When a mistrial was declared in the second trial, a media furor ensued. One opinion piece in the Wall Street Journal called for the child witnesses in the McMartin case to be charged with perjury and jailed (Cockburn 1990). Commentators argued that the McMartin case was evidence that society was "hysterical" about sexual abuse (Nathan 1990) and that child protection workers were engaged in a conspiracy to force children into fabricating abuse claims as part of a "child abuse industry" (Eberle and Eberle 1993). In the aftermath of the case, media coverage of organised abuse specifically, and child sexual abuse more generally, began to feature terms such as "moral panic" and "witch hunt" with increasing frequency. This inflammatory rhetoric would be adopted by academic commentators on organised and ritual abuse throughout the 1990s. For instance, Sebald (1995; 1997) described children complaining of organised abuse as "witch-children", and he linked them to the "defaming children" of the witch trials and the Inquisition. These children "bought to the stake uncounted thousands of innocent people", however, he observes ominously, "they were never punished for their lethal role." (Sebald 1997: 44) The metaphor of the "witch hunt" would feature prominently in the writings of researchers and academics on ritual abuse (e.g. Loftus 1995; Henningsen 1996; Victor 1998), casting men as the victimised innocents, and women and children as their lying persecutors. Ultimately, ritual abuse and the McMartin case became the *cause celebre* of the renewed discourse of disbelief regarding children's testimony of child sexual assault that had been building throughout the 1980s. The findings of an archaeological dig at the McMartin preschool site, which uncovered recently backfilled tunnels and ritual articles in accordance with the children's disclosures, came too late to counter the momentum of the backlash (Summit 1994a).

In the early 1990s, these debates were something of a passing curiosity in Australia. Unlike the United States, there was no organised counter-movement in Australia

against child protection services. Whilst some journalists questioned the basis of charges in organised abuse cases, they did not frame organised abuse as evidence of a "moral panic" about child sexual abuse. Some journalists gave sympathetic coverage to children and adults disclosing organised and ritual abuse (Preston 1990a; Preston 1990b; Juan 1991; Editorial 1993), whilst cases emerged to give weight to their claims. In the late 1980s and early 1990s, substantiated cases of organised and ritual abuse arose in Victoria, New South Wales and Western Australia (Hole 1989; Humphries 1991; Milburn 1992; Wilson 1992; Ogg 1996). In response to the needs of clients with a history of extreme abuse, psychotherapists formed the Australian Association of Multiple Personality and Dissociation. A self-help network of adult survivors of organised and ritual abuse, called Ritual Abuse Survivors and their Supporters, also formed during this period. Since the early 1990s, sexual assault and domestic violence workers have been developing training and information packages on organised and ritual abuse (NSW Sexual Assault Committee 1994), whilst lobbying state governments for a response to the issue (Sydney Rape Crisis Centre 1995; Standing Committee on Social Issues 1996; ACT Community Law Reform Committee 1997; Standing Committee on Community Services and Social Equity 2002). In 1993, the United Nations Special Rapporteur on the Rights of the Child, reporting on his mission to Australia, noted the emergence of reports of organised and ritual abuse, and recommended that the Australian government remain "on guard" (Muntarbhorn 1993: 14).

The rise of "false memory" discourse in Australia

By the mid-1990s, a public backlash against allegations of organised and ritual abuse was underway in the Australian media. This backlash drew extensively on "false memory" literature arising from an influential American lobby group, the False Memory Syndrome Foundation. The Foundation was sponsored by Ralph Underwager, and it was formed to represent the interests of parents accused of sexual abuse by their adult children. Whilst VOCAL's message of panic and illness had

been primarily metaphorical, the Foundation took this one step further, inventing a psychiatric diagnosis called "False Memory Syndrome". The Foundation proffered this "syndrome" as an alternative explanation for the claim that some adults were recalling incidents of child sexual abuse after a period of prolonged amnesia. Despite extensive evidence of traumatic forgetting, the Foundation claimed that it was impossible to forget sexual abuse, and that therefore such claims were the product of a "False Memory Syndrome" (Calof 1993). They characterised the "syndrome" as an epidemic, in which memories of sexual abuse act as viral objects that could be transmitted to suggestible women and children by direct contact with social workers or psychotherapists, or else through exposure to books, television programs, or movies about child sexual abuse. Much of the logic underlying this framework was similar to the "moral panic" position previously advocated by VOCAL. The Foundation's rhetoric of infection and transmission, however, enriched their courtroom and media strategies with authoritative-sounding medical terminology that appealed to journalists and academics. Cases of organised and ritual abuse had a central role in this narrative of infection, confabulation and pathology. Survivors of organised abuse, and the professionals who cared for them, were frequently stigmatised in this literature as the diseased carriers of a dangerous sociogenic illness (e.g. Loftus and Ketcham 1994; Wakefield and Underwager 1994; Pendergrast 1995; Ofshe and Watters 1996).

VOCAL, the Foundation and affiliated defense experts drew on attitudes to women and children that have a long history in medico-legal discourse (see Herman 1992; Scutt 1997; Campbell 2003), however, organised abuse served as a focal point through which these attitudes could be reasserted with a particular intensity. Underwager, claimed that, when asked questions about sexual abuse, children would inevitably invent an account of organised and ritualistic abuse because the "fantasy world of children is filled with mayhem, murder, cannibalism, blood and gore" (Struck 1986). In Underwager's account, all forensic interviews with children provoked their sadistic sexual fantasy life, creating "psychotic" and sexualised children who were

"ruined for life" (Duncan 1987; Smith 1992). In 1988, as an expert defense witness in the Mr Bubbles committal hearing in Sydney, Underwager argued that the child witnesses in the case had been turned into "monsters" by the investigation process (Hoyle and Glover 1989; Munro 1990). Thus, the historical archetype of the knowing child, forever "ruined" by their association with sex, took on strange and demonic proportions. A similar argument was advanced by a prominent member of the Foundation, Prof. Richard Ofshe, who suggested that, when women are in environments of free-association, they will naturally fantasise scenarios of brutal rape and ritual sadism (Ofshe and Watters 1993; Ofshe and Watters 1996). Like Underwager and children, Ofshe referred to psychotherapy as "making monsters" out of women. No longer was a woman or child an empty vessel who could easily imagine, or be convinced to believe, that they were abused. In public discourse, there were dark inferences that there was something malevolent within women and children driving cases of organised abuse specifically and allegations of sexual abuse more generally.

In the Australian context, "false memory" discourse had a resonance that VOCAL's messages about "moral panic" had lacked. In a 1993 *Sydney Morning Herald* article entitled "Parents the latest victims of widespread sex abuse," philosopher Denis Dutton claimed that False Memory Syndrome "represents a threat to every loving, normal parent whose child might some day, encountering a rough patch, fall into the hands of a therapist who accepts the myths of memory repression and hypnotic enhancement". He characterised a typical woman in therapy as gullible and easily led, and compared her memories of sexual abuse to accounts of alien abduction (Dutton 1993). By the mid-1990s, a range of Australian journalists were using "false memory syndrome" to describe "false allegations" of sexual abuse, under headlines such as:

- This Man Lost Everything When His Daughter Accused Him Of Sexual Abuse (Wyndham 1994)

- Injustice In The Realm Of Unreliable Recesses Of The Mind (McGuinness 1994a)
- Abuse All Around When A False Memory Lingers (Molitorisz 1995)
- Recovered Memory Creates 'Honest Liar' (Hughes 1995)
- Abuse Cases: Doubts Grow On 'Recovered' Memories (Guilliatt 1995)

Cases of organised and ritualistic abuse featured frequently in these articles as *prima facie* examples of false allegations of sexual abuse. By the mid-1990s, stereotypes of women and children as suggestible and potentially malicious fantasists were firmly back on the agenda of the Australian media. These stereotypes, however, were now rebadged as righteous outrage over cases of organised abuse, and repackaged in the pseudo-scientific rhetoric of suggestibility and "false memories" first brokered by lobby groups of people accused of sexual abuse. Under the disparaging label "satanic abuse" or "satanic ritual abuse", a number of Australian commentators invoked cases of organised and ritual abuse to justify characterizing women and children's memory as fallible, and their testimony as lacking credibility.

From 1994 to 1996, *Fairfax* journalist Richard Guilliatt published a series of articles on allegations of ritual abuse, culminating in his book, *Speak of the Devil: Repressed memory and the ritual abuse witch-hunt* (Guilliatt 1996b). In this work, Guilliatt invited his readers to consider "ritual abuse" as a foreign viral object, introduced into Australia from the United States, that has since over-run the Australian child protection sector. He described the Mr Bubbles investigation as a "welter of bizarre claims and community panic" originating at a child abuse conference in Sydney in 1986. Guilliatt developed a theory that, during this conference, Australian child protection workers were unduly influenced by four American clinicians who had worked with the child witnesses in the McMartin case. Although he provides no evidence that ritual abuse was discussed at the conference, or that the attendees in question met one another, Guilliatt surmised that Australian child protection workers are so susceptible to a "witch-hunt" mentality that their mere proximity to

professionals involved in the McMartin case led them two years later to coerce children into fabricating scurrilous ritual abuse allegations.

Paddy McGuinness expounded on a more conspiratorial variant of this argument, linking "satanic ritual abuse" with an international "movement" of health care and legal professionals with "political, ideological or financial motives" for coercing clients into making false allegations of sexual abuse (McGuinness 1994a). In a number of articles, McGuinness likened allegations of ritual abuse to "a rash of harassment, gender, race and other discrimination, childhood sexual abuse and similarly fashionable complaints" so numerous that, he suggests, "most of them cannot be considered credible". He describes these allegations as a form of terrorism enacted by women against men, and he encourages those accused to "fight back" and launch legal proceedings against the mental health professionals supporting complainants (McGuinness 1994b; McGuinness 1995b; McGuinness 1995a). Other journalists compared allegations of ritual abuse to stories of alien abduction (Wynhausen 1994) and suggested that cases of ritual abuse proved that "false memory syndrome" and "false allegations" were a "growing problem" in Australia (Waterstreet 1996). This hyperbolic treatment of ritual abuse was repeated in Australian academic circles, primarily by psychiatrists associated with the Australian False Memory Association (e.g. Gelb 1993).

As media controversy escalated, the nascent policy response to organised and ritual abuse ceased. During this period, the Wood Royal Commission took evidence from representatives of the Australian False Memory Association, and their report suggested that they found the argument of the Association far more compelling then the numerous submissions made to the Commission relating to organised and ritual abuse. The Commission suggested that the cases of organised and ritual abuse bought to their attention could be the product of suggestion by therapists acting out a "religious fervor" and "paranoia" about sexual abuse (Royal Commission into the New South Wales Police Service 1997: 104). It is notable that, during this period, both

the National Crime Authority and the Wood Royal Commission chose to focus their investigations of organised abuse on the extra-familial abuse of boys, often targeting homosexual men as perpetrators (see Miller 1997; Royal Commission into the New South Wales Police Service 1997). In contrast, disclosures of ritual abuse primarily implicate sexually abusive fathers, and other relatives, who provide children for sexual abuse to others outside the home (Cleaver and Freeman 1996; Scott 2001). More recently, disclosures of organised and ritual abuse in Indigenous communities (e.g. ABC News 2006; Overington 2006) have been afforded the credibility that is denied to similar disclosures of abuse in Anglo-Australian communities.

Elsewhere, I have suggested that this pattern of denial is an expression of the reluctance of policy makers and law enforcement to acknowledge the scale of sexual violence against women and children in "first world" nations (Salter 2008). Organised and ritual abuse brings "exotic" forms of violence into the normative spaces of the everyday – into homes, churches and schools – challenging social idealisations of family life, and disrupting racialised distinctions between "civilisation" and "barbarity". In Australia, organised abuse is displaced onto developing nations, black communities, or sexual minorities, but its occurrence is rarely acknowledged in urban, Anglo-Australian communities and homes. Disclosures of organised abuse have, instead, been subject to quarantine by discourse; encircled and expelled by the rhetoric of "false memories" and "moral panic". Central to these discursive maneuvers have been the reassertion and intensification of the traditional politics of disbelief regarding the suggestibility of women and children and their supposed propensity to accuse innocent men of rape and violence.

The social dynamics of memory, credibility and disbelief

The conflict over the credibility of testimony of sexual abuse has sometimes been called the "memory wars", since psychological research findings on memory and recall have featured prominently throughout (Campbell 2003). Many of the efforts to contest the rise of "false memory" discourse have relied on scientific evidence of traumatic amnesia and the accuracy of memory recall (e.g. Brown, Scheflin et al. 1998). Whilst this literature constitutes a significant evidence base for the credibility of sexual abuse testimony, it has often failed to identify and address the reactionary gender politics at the heart of the "false memory" and "moral panic" hypotheses. In spite of their pseudo-scientific rhetoric, these arguments are not based upon empirical evidence, but rather upon appeals to pejorative stereotypes and "common sense" knowledge about women and children. Furthermore, remembering is not simply a matter of cognitive structures and individual capacity. Remembering is also a social act, bound up in the practices, and skills, associated with constructing a narrative, speaking or writing that narrative, and the iterative relationship between narrator and audience (Plummer 1995). The credibility of a narrative of sexual abuse rests, in no small way, on the narrator's mastery of key communication and attachment skills, and the social resources they can draw on for care and support. Abused and neglected children frequently have limited opportunities to gain such skills and relationships, and, as adults, these deficits contribute to, and are compound by, factors such as mental illness, disability and poverty.

Sceptical commentators have highlighted the "incredible" manner in which adults and children disclose histories of organised and ritual abuse to great effect. Assertions and retractions, gaps or contradictions, exaggerations and conspiratorial beliefs have all been used as evidence that individuals who disclose organised and ritual abuse are unreliable witnesses. Oppositional literature has paid scant attention to the reality of the lives of adults or children with a history of organised abuse, or the obstacles they face in developing a clear autobiographical narrative. People with a history of

violence and trauma can experience discontinuities in memory and identity that adversely impact on the clarity of their autobiographical memory (Van der Kolk and Fisher 1995). Whilst these issues can be addressed in psychotherapy, many adults with histories of organised abuse are chronically disabled and impoverished, and unable to access affordable and effective mental health care. Their attempts to articulate their histories may therefore be halting, fearful, paranoid or contradictory. The "incredibility" of such narratives does not speak to the fallacy of "memory" per se, nor does it indicate that the narrator is not a person of serious intent. Instead, these fragmentary disclosures are indicative of the scarce resources that many adults with histories of violence and abuse have available to make sense of their lives.

It is common for adults with histories of organised abuse, cogent of the distortions of traumatic amnesia and the degradation of memory over time, to prevaricate over the accuracy of their memories (e.g. Corwin 2002: 14 – 15). In my experience as a researcher, adults with histories of organised abuse often undertake rigorous reality-testing and fact-checking over many years in order to come to an understanding of their recollections of abuse. It is also true that some adults with histories of organised abuse have developed conspiratorial explanations for their abuse. Online, conspiracy theories abound which attribute tremendous political, and sometimes supernatural, power to sexually abusive groups. Oppositional literature has made great sport of these conspiracy theories, however, as Hacking (1995) points out, the counter-cry of "witch hunt" is an inadequate alternative to these conspiratorial beliefs, since "[c]onspiracy and witch-hunt are mirror images, as far as explanations go." (p 114) The proposition that psychotherapists, social workers, radical feminists and Christian fundamentalists have joined forces and engaged in collusion on an international scale to coerce children and women into fabricating claims of ritual abuse against innocent men is no more reasonable then conspiracy theories about Satanists and paedophiles.

There are also concerning political dimensions to these cries of "witch hunt" and "moral panic" since they efface the agency and lived experience of adults and children

who disclose organised and ritual abuse. The "typical survivor" of oppositional literature is described as an anxious older woman with "vague complaints" or "emotional problems", who fabricates wild stories of abuse at the bidding of a therapist, or simply as an expression of her post-modern malaise (Loftus and Ketcham 1994; Wakefield and Underwager 1994; Ofshe and Watters 1996). The image of a woman without a will or identity of her own, at the whim of social forces and professional malpractice, is central to oppositional literature on ritual abuse, and a mainstay of sceptical literature on sexual abuse in general. It is a characterisation in stark contrast to the struggles for self-determination, wellbeing and justice that dominate autobiographical narratives of organised and ritual abuse. In her life history research with adult survivors of ritual abuse, Scott (1998b) noted that she interviewed "a disproportionate number of young women who had escaped their abusive families as teenagers, sought help and support, and disclosed their abuse while it was still ongoing."

Examples abound in which children and adults with histories of organised and ritual abuse are active agents in their own lives, rather then the passive victims of "recovered memory therapy" described by oppositional literature. In 1982, a German national, Phoenix Van Dyke, fled to Australia to escape ongoing ritual abuse by her family and an abusive group based in her home town. She became an outspoken activist who founded the support network Ritual Abuse Survivors and their Supporters following a conference for incest survivors in Sydney in 1992. Van Dyke distributed a monthly magazine *Beyond Survival* on ritual abuse for much of the 1990s, and she lobbied sexual assault services and politicians for a response to the needs of ritual abuse survivors. In his sceptical coverage of ritual abuse for the *Sydney Morning Herald*, Richard Guillliatt dismissed Van Dyke as "a 36-year-old separatist lesbian who had been locked in a mental institution as an adolescent" (Guilliatt 1996a). Guillliatt's incredulity was not shared by the Australian Refugee Review Tribunal, which, in 1998, found Van Dyke a credible witness. In their decision, the Tribunal stated: "It is accepted ... [that] such groups exist in Germany and the

authorities have been largely ineffective in stopping their illegal activities..." The Tribunal found that Van Dyke was at risk of being harmed and/or killed if she returned to her country of birth "as the German government is either unwilling or unable to protect victims of ritual abuse." (The Australian Refugee Review Tribunal quoted in Becker and Coleman 1999) Although the Tribunal accepted that Van Dyke was a survivor of organised and ritual abuse, and was therefore vulnerable to revictimisation in Germany, it found that she did not fall within the accepted categories of persecution, and therefore there was no legal basis to grant Van Dyke a protection visa. A few months later, the then-Minister for Immigration, Phillip Ruddock, overturned the Tribunal's decision, and granted Van Dyke a protection visa (Van Dyke, personal communication, 2008). It is interesting to note the differential in media coverage given to the intimate details of Van Dyke's life in 1996, when even her sexuality was considered a relevant variable in media assessments of her credibility, in comparison to the failure of any media outlet to report on the decision to grant her refugee status two years later. It seems that Van Dyke only garnered press coverage when she could be characterised as a crazed feminist extremist. When the Minister for Immigration decided she was a bona fide refugee and survivor of torture, she became invisible within the politics of disbelief.

This differential can be explained, at least in part, by what McLeod and Goddard (2005) have described as the "radical denial" of sceptical commentators on ritual abuse. Over the last fifteen years, the proposition that ritual abuse does not exist has become so deeply embedded within the politics of disbelief regarding women and children's testimony of sexual assault that the entire edifice is destabilised when substantiated cases of ritual abuse come to the fore. Accordingly, sceptical commentators have chosen to ignore the emergence of substantiated cases of ritual abuse. Kelly (1998) noted the widespread failure of the media to respond to the evidence of ritual abuse unearthed in the investigation of Marc Dutroux's crimes in Belgium:

> One of the fascinating silences surrounding the Dutroux case ... was the refusal amongst journalists and commentators to notice how many of the facts echo elements of accounts by children and adults of ritual abuse. These accounts have been defined as 'incredible' and 'impossible' - countless academic and journalistic sceptics have insisted *ad nauseam* that they would only believe if material or forensic evidence was forthcoming, and, according to them, none ever has been. Here we had that evidence, but no one made the connection, no one chose to remember what they (or their publication) had said previously, no one took the brave stand of revising their opinion in public.

Where sceptical commentators are confronted with investigations and prosecutions of organised and ritual abuse, the imperviousness of their position to change is stark. In 2005, seven people were indicted in the American state of Louisiana following an investigation into organised and ritual abuse at a local church. Two men have since been sentenced to life in prison, with five more awaiting trial. The confessions of some of the accused, one of whom kept a detailed diary of the abuse, corroborates the statements of child witnesses that they were sexually abused by groups of people whilst being subject to "satanic" rituals involving the killing of animals and the forced ingestion of blood (Ellzey 2007). At trial, an FBI agent testified that the defendant led the investigating team to a "pitch black room" in the church where, he claimed, he had engaged with the other defendants in sexually abusive "devil worship". A switch on the wall turned on a black light which illuminated inverted Biblical scriptures drawn on the walls in iridescent ink (Ellzey 2007). In a media interview, Prof. Richard Ofshe, founding member of the False Memory Syndrome Foundation, claimed that the probity of the confessions of the defendant, and the statements of child witnesses, were in question because they included details of ritual abuse. Such abuse, according to Ofshe, has never and will never occur, and any reference to ritual abuse should call into question the probity of all charges in a sexual abuse trial (Lemoine 2008).

Beyond the politics of disbelief

The subject of organised abuse, as a whole, has been dominated by the controversies over ritual abuse. Ritualistic abuse is associated with the extremes of child maltreatment,[3] however, it is not a ubiquitous feature of cases of organised abuse (Gallagher, Hughes et al. 1996). Lobby groups and activists for people accused of sexual abuse have found great rhetorical utility in emphasising allegations of ritualistic abuse, at times claiming that a particular sexual abuse investigation is a "ritual abuse case" when no such allegation was made (Cheit 2001) or where no evidence of ritualistic abuse was adduced at trial (Summit 1994b). When conflated with ritual abuse, sexual abuse charges are then attributed to fantasy on behalf of the child witness or adult complainant, and malpractice on behalf of investigating professionals. Where ritualistic abuse has been a feature of sexual abuse allegations, sceptical commentators have claimed that such allegations can be traced back to the influence of a small group of zealots, usually characterised as "Christian fundamentalists" and/or "radical feminists" (Jenkins and Maier-Katkin 1992; La Fontaine 1998; Pratt 2005). In this literature, organised abuse and sadistic abuse are frequently conflated with "ritual abuse", and the reader is encouraged to conclude that claims-makers in the field of ritual abuse are a narrow group of ideologically motivated extremists.

In fact, a diverse range of professionals have documented their encounters with adults and children with histories of organised and ritualistic abuse, including:

- academics and researchers (Cuomo 1994; Pepinksy 2002; Raschke 2008)
- child protection workers (Doran 1994; Goddard 1994)

[3] Ritualistic abuse and the "misuse of ritual practice" is also emerging as a factor in the trafficking of minors and women from Africa into Europe for the purposes of sexual exploitation (International Organization of Migration 2001; Committee of Human Rights 2002), whilst forms of torture commensurate with narratives of ritual abuse (such as electroshock and confinement in coffins) have been documented in illegal brothels in Asia (Kristof 2008) .

- domestic violence workers (Rowden-Johnson 2003; Cooper 2004; Cooper, Anaf et al. 2006)
- general practitioners (Jonker-Bakker and Jonker 1991; Jonker and Jonker-Bakker 1997)
- investigative journalists (Boyd 1991; Tate 1991; Wood and Chulov 1999)
- nurses (Sarson and MacDonald 2008)
- paediatricians (Hobbs and Wynne 1994; Buck 2008)
- police officers (Anon. 1994; Mallard 2008)
- psychiatrists (Ehrensaft 1992; Goodwin 1994; Rockwell 1994)
- psychoanalysts (Casement 1994; Perlman 1995; Stack 2002)
- psychotherapists (Gould 1987; Summit 1988; Hudson 1991)
- school teachers (Haydne 1992)
- sexual assault workers (Scott 1998a; Schmuttermaier and Veno 1999; Campbell 2002)
- and social workers (Dawson and Johnston 1989; Wood 1990; Lunn 1991).

Non-offending parents (Stone and Stone 1992), foster parents (Kelsall 1994; Cairns 2000; Scott 2001) grandparents (COTA 2003), and religious ministers (Cotton 2000) have reported their experiences of caring for children subject to ritual abuse. I have documented my experiences as a carer for an adult survivor of ritual abuse (Salter 2004). As claims-makers in the field of organise and ritual abuse, we are not the ideologically homogenous "rumour-mongers" or "moral panickers" supposed by the oppositional literature. We have little in common in terms of our profession background, education, training, and religious or political orientation, and we articulate very different (and frequently conflicting) opinions about the nature of ritualistic abuse. The breadth of this literature indicates that cases of organised and ritual abuse are coming to light in a range of contexts, and first responders are usually people with no prior knowledge of organised abuse, and limited capacity to identify and treat victims.

In Australia, research provides a picture of the diverse circumstances in which workers are encountering survivors of organised abuse, and the burden of this abuse on health and welfare services. Much of this research has been focused on worker's contact with clients with a history of ritual abuse. In 1992, a survey of 92 attendees at a conference on ritual abuse in Melbourne found that 65 had worked with a total of 424 clients with a history of ritual abuse (AAMPD 1992). In 1994, eight women's health services in the ACT reported, in one week, being contacted by 43 new clients reporting a history of ritual abuse (Courtney and Williams 1995), whilst a survey of 79 workers at community health centres and women's services in NSW reported 123 cases of ritual abuse for the year (NSW Sexual Assault Committee 1994). In 1995, the Sydney Rape Crisis service reported receiving 584 calls from women who identified themselves as survivors of ritual abuse in the 12 months prior to June 1995 (Sydney Rape Crisis Centre 1995). Stepping Out, a supported accommodation service for adult survivors of child sexual assault in Sydney, has also reported a high rate of contact with women with a history of ritual abuse (Van Dyke 1995). In 1999, a ten-year case review of a Centre Against Sexual Assault in Melbourne identified 153 cases of ritual abuse from 1985 – 1996 (Schmuttermaier and Veno 1999). In 2000, Sisters Inside, a Brisbane-based community group for women in jail, published the findings of a survey of 100 of their members, which found that 16% reporting a history of organised and ritual abuse (Kilroy 2000). In 2004, a case review of a domestic violence service in Adelaide found that 15% of clients were seeking protection from organised groups of offenders, including bikie gangs and ritualistic cults. In interviews, these women spoke of spouses and/or family members who had trafficked them (and, sometimes, their children) into larger networks of perpetrators who subjected them to torture and sexual exploitation (Cooper, Anaf et al. 2006). Interviews with workers found that they were often overwhelmed by the complexities of these cases, including the health and security needs of adults victimised in organised contexts (Cooper 2004).

In Australia, cases of organised and ritual abuse have been emerging since the late 1980s, however, investigations of these claims have been characterised by allegations

of police incompetence and conflicts of interest. In 1992, a senior member of Victorian sexual crimes unit, Roy Carroll, stated that there was a lack of material corroboration for accounts of organised and ritual abuse, and therefore such accounts were unlikely to be true (Carroll 1992). Paradoxically, in the three years prior to his 1992 presentation, Carroll's unit had been involved in the investigation of an alleged case of organised and ritual abuse at a preschool in the Mornington Peninsula. Although no criminal charges were laid, the allegations of abuse at the preschool were substantiated by a government inquiry, and the preschool was closed in 1992 (Milburn 1992). In 2004, the Victorian Ombudsman recommended that four sexual abuse cases be reopened, including the Mornington Peninsula case. Commenting on his review of the investigations, the Ombudsman expressed "serious concerns as to the truthfulness of evidence provided under oath to his investigators by two of the state's most senior sexual crimes investigators." (Hughes 2004a) The Ombudsman complained that a senior member of the sexual crimes squad displayed "unprofessional conduct" whilst being interviewed, to the point that his behaviour and attitude "raises doubts about his continuing suitability to his current position" (Hughes 2004a). Despite the Ombudsman's concerns, neither officer was removed from their position after the Police Association threatened state-wide industrial action (Hughes 2004b). The Mornington Peninsula case remains closed, with a senior investigator stating that the newly formed Office of Police Integrity, overseen by the Ombudsman, does not have the resources to investigate allegations of police protection of organised abuse (Hughes 2005).

Similar criticisms have been made regarding investigations of organised abuse in New South Wales and Western Australia. In a 1992 government review of an investigation into an alleged case of organised abuse at a Sydney kindergarten, the New South Wales police were criticised for their lack of "specialised child sexual assault investigators, ineffective intelligence and surveillance, ineffective attempt to obtain corroboration and the absence of a professional covert operation" (Sands 1999). Subsequently, the Wood Royal Commission found that the investigation into the case

had been "seriously deficient". At the Commission, it emerged that the officer in charge of the investigation was an associate of a corrupt police officer and two known child sexual offenders. Furthermore, the officer had been previously been accused by police informers of taking money from child sexual abusers in exchange for dropping charges or ignoring their crimes (Brown 1996; Kennedy 1999). During the Western Australia Royal Commission into Police Corruption, the former head of the Western Australian paedophile unit, Andrew Patterson, stated that he had been ordered by his superiors to repeatedly mislead state and federal parliament over the extent of organised abuse and child pornography in the state (Shine and Egan 2002). Patterson claimed that he was instructed to testify to a 1995 Commonwealth inquiry that paedophile rings did not exist in Western Australia, although a number of networks had been documented by his unit. He also claimed he was instructed by his superiors in 1997 to mislead state parliament and withhold information on any current child pornography charges. "There were cover-ups in denying the fact that we had a problem with pedophilia networks and organised pedophilia," he said. "There was also a cover-up in terms of hiding child pornography figures." (Taylor 2002) His unit was subsequently disbanded in 1998, and Patterson stated that he believed that senior police were uncomfortable with the unit's investigations into cases of organised abuse, including one investigation involving a senior member of the judiciary. Following the closure of the Royal Commission, Patterson stated that he believed that "paedophile rings" are still active in Western Australia (Egan 2004).

Conclusion

During a period in which women and children's testimony of incest and sexual abuse were gaining an increasingly sympathetic hearing, lobby groups of people accused of child abuse construed and positioned "ritual abuse" as the new frontier of disbelief. The term "ritual abuse" arose from child protection and psychotherapy practice with adults and children disclosing organised abuse, only to be discursively encircled by backlash groups with the rhetoric of "recovered memories", "false allegations" and "moral panic". Seeking to recast the debate on child abuse according to an older politics of disbelief, these groups and activists attempted to characterise sexual abuse testimony, as a whole, through the lens of "ritual abuse":

> It must be obvious to rational people that accusations based on memories that include satanic ritual are delusions of some sort. For those of us who are only accused of 'run-of-the-mill incest,' this should turn out to be some help. If 'memories' of satanic abuse can be induced in therapy then so can memories' of incest or anything else. (Pamela Freyd, co-founder of the False Memory Syndrome Foundation, quoted in Calof 1993)

It does not take much effort to understand why people accused of child sexual abuse may engage in a vigorous defence of their innocence, nor why they might be joined by professional defence experts that make hundreds of thousands of dollars a year defending them. What does bear explaining is the purchase that their rhetoric found in the media, academia and the broader community. It seems that many Australian journalists and academics held deep seated concerns about the credibility of women and children as reliable witnesses to their own lives. After a period of relatively sympathetic media coverage on sexual violence, organised abuse was used as a frame through which concerns about women and children's testimony could be made legitimate again. The impact of this rhetorical strategy on the lives of adults and children with a history of organised abuse has yet to be measured, however, the

controversy that has been the hallmark of the politics of disbelief has effectively displaced reasoned consideration of the challenges posed by organised and ritual abuse. It seems that reports of organised abuse can be overlooked, ignored, or displaced onto minority groups, but it is too troubling a subject to approach directly without a framework of disbelief. Over the last thirty years, that framework has been in ready supply, stemming both from the long-standing medico-legal tradition of denial, and from the activism of lobby groups of people accused of sexual abuse.

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Exploring the Group-Identity Function of Criminal Law

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> *Science advanced, knowledge grew, nature was mastered, but Reason did not conquer and tribalism did not go away* (Isaacs 1975).

Introduction

From the available data on the race or ethnicity of the world's prisoners,[42] it is possible to discern a global tendency of each population to imprison a disproportionate percentage of some minority groups.[43] African-Americans and Hispanics are disproportionately represented in American prisons (Sampson and Lauritsen 1997; US Bureau of Justice Statistics 2007). Aboriginals are disproportionately represented in Australian prisons (Sedlak and Broadhurst 1996; Snowball and Weatherburn 2006). In New Zealand, where Maori make up 15 per cent of the population, 44 percent of men and 42 per cent of women in prisons identify themselves as Maori (Bull 2004). Unequal imprisonment of minority groups has been documented in Spain, Japan, Britain, France, Israel, Sweden, Canada, and Germany (Martens 1997; Costelloe, Chiricos et al. 2002; Korn 2003; Zimmerman, Yun et al.

1. Many countries do not keep data on the race or ethnicity of prisoners. In those countries that do keep data, the differing definitions of racial and ethnic groups make it difficult to draw transnational comparisons. Nevertheless, in every country where data is available, it appears that some minority groups are disproportionately imprisoned. For data on world prison populations generally, see the World Prison Brief, available at www.prisonstudies.org. See also, (Walmsley 2003)
2. Within any society, not all minority groups experience higher levels of incarceration. Rather, higher levels of incarceration are found to apply to stigmatised or oppressed minorities. For an excellent discussion of racial stigma, see (Lenhardt 2004)

2003; Ruddell and Urbina 2004). As Michael Tonry points out,

> What is most striking about [the data demonstrating overrepresentation of minorities in prison] is that they come from so many countries. They apply to many groups and many countries, suggesting that bias, disparities, and disparate impact policy dilemmas are not uniquely the characteristics and problems of any particular minority groups or countries but are endemic to heterogeneous developed countries in which some groups are substantially less successful economically and socially than the majority population (Tonry 1997).

Further, incarceration rates around the globe are rising, making the disproportionate impact of criminal punishment on minority groups a matter of growing importance (Walmsley 2003).

Data demonstrating the disproportionate imprisonment of oppressed minority populations abounds as does empirical research that seeks to explain the data. Much of this research focuses on the issue of what has been described as the 'elevated rates of offending (according to official statistics) among oppressed racial minorities' (Phillips and Bowling 2003). In other words, for many researchers the question is: Why do minority group members commit more crimes? Pursuing the answer to this question has led researchers to explore the criminogenic influence of socio-economic deprivation and social disorganisation (Shaw and McKay 1929; Currie 1998; Pratt 2005). Others have considered whether crime may have genetic or biological factors (Wilson and Herrnstein 1985; Regulus 1995).

At the other end of the spectrum are researchers who question whether the official crime rate and imprisonment statistics are reflective of actual rates of criminal behaviour. These scholars have considered whether discriminatory law enforcement,

criminal justice processing or sentencing patterns account for elevated levels of minority imprisonment (Stuntz 1998; Rudovsky 2001; Zimmerman, Yun et al. 2003; Waddington, Stenson et al. 2004). Similarly, researchers have also considered whether the law itself contributes to the disproportionate imprisonment of minority groups through the establishment of behavioural norms that do not reflect the values of the minority culture (Sellin 1938; Hawkins 1995a).

The debate, which has sometimes been characterised as 'polemical' and 'sterile'(Phillips and Bowling 2003), has not ignored the possibility that the causes of disproportionate incarceration are not mutually exclusive – that is, that a variety of factors may all contribute to the overrepresentation of some minorities in prison (Chiricos and Crawford 1995). Much of the research, however, has focused predominantly on one nation or one criminal justice system.[44] Studies therefore present findings that may appear to be limited to the particular racial groups or ethnic minorities studied. Each study, taken alone, may create a false perception that the problem of disproportionate incarceration is a characteristic of one minority group, one historical or political situation, or one kind of culture clash. The problem may therefore be falsely perceived as one of 'Aboriginal criminality' or 'racism in the United States'. Thus, a potential risk of looking at a single nation or criminal justice system is that the research itself may contribute to existing stereotypes, misconceptions and biases against the oppressed minority (Hawkins 1995b). This risk is not, of course, a sufficient reason not to do the research; a significant body of work addresses the issues of racialised punishment without falling into the trap of stereotyping, (e.g. (Davis 1998; Cunneen 2001) Such work may be extremely useful not only to improve understanding of the problem of over-incarceration of certain minority groups, but also to assist in formulating strategies for reducing minority imprisonment rates within one culture or country. It is limited, however, in scope and implication to the culture or cultures studied.

3. There are some notable exceptions. See, e.g.,(Costelloe, Chiricos et al. 2002; International Society for the Study of Dissociation, Chu et al. 2005; Pratt 2005)

Some scholars advocate taking a comparative or cross-national approach to considering the problem of over-representation of certain ethnic minorities in prison, but do so only with great caution (Sampson and Lauritsen 1997; Tonry 1997). There are good reasons to proceed with caution into the realm of making cross-national generalisations or undertaking studies of ethnic minority incarceration. Differences in the history of various minority groups and their relationships with majority cultures, differences in the economic and political structure of various societies, and differences in the criminal justice systems of each country, all undoubtedly play an important role in producing outcomes that are idiosyncratic and not susceptible to a single explanatory theory. Further, empirical research faces enormous difficulty in collecting and comparing data from sources that use differing definitions of minority or ethnic group status, and of criminal behaviour, etc.(Tonry 1997).

It is nevertheless important to explore the implication of what has been demonstrated in numerous single-nation studies: In every country where the question has been studied, the crime and incarceration rates for members of some minority groups greatly exceed those for the majority population'(Tonry 1997). If disproportionate incarceration (or punishment) of some disfavoured minorities is found everywhere, the obvious implication is that the problem is not particular to one ethnic group. Nor is it fundamentally a problem of one race or one historical racial conflict. It is not a problem that faces only immigrant groups. Neither is it solely a problem of capitalism or post-colonialism. The disproportionate imprisonment of some disfavoured minorities appears to be a global phenomenon. While theories of disparate incarceration that focus on racism, immigration, capitalism and colonialism may have strong explanatory power at the level of a single legal system, they cannot explain the global phenomenon.

One may argue that any attempt to understand disparate punishment at a global level must founder on the rocks of particularised histories, individual cultural and legal

differences, and varying economic and political circumstances. It would not be possible to gather appropriate data or test a global theory of disproportionate incarceration. Such a global theory would be vulnerable to the same critique that has been levelled at conflict theory: It would 'explain everything and predict nothing.' (Kubrin, Stucky et al. 2009).

On the other hand, it may be that criminology has already grasped the global nature of disproportionate punishment, but has not made it a point of emphasis because of the difficulties of studying global phenomena. This essay does not attempt to create a grand theory for understanding disparate imprisonment in all of its various historical and cultural manifestations. Rather suggests that a shift in emphasis or focus from the particular to the global, from the cultural or racial to the human, is appropriate and may yield new insights. It turns to some of the traditional and basic building blocks of criminology – anthropology and psychology – to draw attention to the fact that, although certain ethnic, racial and migrant groups are at the receiving end of the global phenomenon of disparate punishment, the issue may be endemic to human society. Addressing the issue may require strategies that are global or 'human' in their perspective.

Human universals and group identification

Anthropologists tell us that some things are universal to all humans. For example, all human societies have language, dance, music, jokes. In all human societies, people suck their wounds. We show surprise, fear and happiness through facial expressions. More fundamentally for this discussion, human beings are not solitary dwellers. We live in groups, develop group identity, and maintain group unity (Brown 1991 at 57). In George Vold's description of human nature, 'people are fundamentally group-involved beings whose lives are both a part of and a product of their group associations.' (Vold, 1986: 271).

Although human groups may be structured in a wide variety of ways, an 'important consequence of group structuring is the delineation of *in-group* from *out-groups*' (Worchel 1998). According to Isaacs, '[t]his fragmentation of human society is a pervasive fact in human affairs and always has been' (Isaacs 1989). Sumner, who contributed the concept of ethnocentrism to social science, conceived of it first in the context of a 'primitive society'(Sumner 1906/1979).

> The conception of the 'primitive society' which we ought to form is that of small groups scattered over a territory. . . A group of groups may have some relation to each other (kin, neighbourhood, alliance, connubium and commercium) which draws them together and differentiates them from others. Thus a differentiation arises between ourselves, the we-group, or in-group, and everybody else, or the others groups, out-groups. The insiders in a we-group are in a relation of peace order, law, government, and industry, to each other. . .
> Each group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders. Each group thinks its own folkways are the right ones, and if it observes that others have other folkways, these excite its scorn. Opprobrious epithets are derived from these differences. 'Pig-eater,' 'cow-eater,' 'uncircumcised,' 'jabberers,' are epithets of contempt and abomination.(Sumner 1906/1979).

Since 1906, Sumner's description of 'primitive society' has attracted the criticism of anthropologists, who point out that group alliances and ethnic identities are unstable in some societies, and sociologists, who note that individuals may belong to more than one group and may admire some out-groups (Levine 2002). The boundary, influence and meaning of Sumner's 'ethnocentrism' is contested in the social sciences. Nevertheless, the phenomenon of self-categorisation and establishment of

in-group and out-group identities has been demonstrated in dozens of psychological studies in a variety of cultures (Brown 1986; Taylor, Peplau et al. 2006). In-group self-categorisation can be thought of as pro-social, providing for group cohesion and cooperation and political agency (Turner, Hogg et al. 1987; Bedolla 2005). It is also present at the core of inter-group conflict, stigmatization of minority group members, and social alienation (Levine and Campbell 1972; Bedolla 2005).

A salient aspect of group-identification is that, once we identify as a group member, we immediately form an in-group preference. We derive part of our self-esteem from group membership and tend to ascribe positive characteristics to our own group and negative characteristics to others (Tajfel 1982). As we identify with a group organised around any value, activity or status, we not only automatically attribute positive qualities to our own group and negative qualities to the out-group, but also act in ways that favour our own group (Worchel and Simpson 1993). Surprisingly, experiments in social psychology demonstrate that even when people are assigned *randomly* to a group – in other words, the subject has no basis on which to differentiate between her own group and another group – in-group preference is still shown (Brown 1986) p.544-545. According to Roger Brown, individuals show a consistent preference for 'maximal in-group advantage over the out-group'(Brown 1986). In-group members will, for example, forego receiving a reward if their group will thereby gain greater comparative advantage over the out-group (1986).[45]

Moreover, subjects who demonstrated in-group preference were not aware of their bias and believed that they had behaved fairly. Most subjects 'try to introduce some level of fairness by rewarding both in-group and out-group members' but nonetheless favour their own group (Taylor, Peplau et al. 2006). In spite of systematic bias toward greater rewards for their own group, subjects were *unaware* that they had, for example, assigned more points to members of their own group (Brown 1986; Taylor, Peplau et al. 2006).

4. Group processes are also susceptible to a host of cognitive errors, including overgeneralisation, over confidence, group polarisation, miscalculation of risk, and others. (Beale 1997)

Similarly, cognitive processes linked to stereotyping and discrimination may be unconscious. While some racism or discrimination is intentional, recent social science reveals that unconscious bias is much more prevalent than intentional discrimination (Lenhardt 2004). Although people notice differences and naturally separate people and things by category, some differences form part of the perceptual foreground' while others are part of the 'perceptual background' which do not necessarily become part of conscious thought (Ainlay and Crosby 1986). Split-second decisions are often made on the basis of perceptual background categorisations. Thus, we are susceptible to what has been termed 'implicit bias' – the tendency to unconsciously associate our own group with pleasant traits and other groups with unpleasant ones, especially in split-second decision-making processes (Sunstein 2006). The phenomenon of 'implicit bias' has been shown to be 'extremely widespread' in psychological tests (Sunstein 2006).

Of course, most in-groups are not created at random by social scientist researchers. The phenomenon of group-identity creation takes place in society, in the context of history and culture. Real-world in-groups and out-groups may derive from a wide variety or combination of factors: birthplace, name, language, physical characteristics, history and origins, religion, and nationality (Isaacs 1975). More importantly, real world manifestations of group-identity have real world effects, contributing to nationalism, patriotism, group cohesiveness, homogeneity, group solidarity, and social cooperation within the in-group; and stereotyping, prejudice, dehumanization, stigmatisation and discrimination against the out-group (Levine and Campbell 1972).

As psycho-social processes of group-identification and ethnocentrism combine with historical circumstance, economics and politics, dynamic social groups and inter-group relationships take form. Kotkin (1993) has used the term 'global tribe' to refer to groups like the British, Japanese, Chinese, Indians, and Jews who have dispersed

around the globe, but maintain a sense of group-identity. These metaphorical 'tribes' have a sense of common origin and values, even though they are genetically diverse and live in many different climates, contexts and nations (Kotkin 1993). Similarly, the metaphor of tribalism has been used to connote the process of group-formation or de-individualisation (Maffesoli and Foulkes 1988). 'Tribalism', 'racism', 'ethnocentrism', 'nationalism', 'patriotism' all refer to various types of group identity formation. Group identity formation and in-group preference is not a trait of any particular ethnic, racial economic or political group. Rather, the motives are 'deeply rooted'; they are 'motives that are primitive and universal'(Brown 1986).

Although the motivation for forming group identity is 'deeply rooted', the boundaries of the group may be fluid (Bedolla 2005). Moreover, an individual is likely to be a member of numerous groups simultaneously (e.g., gender, family, clan, clubs, neighbourhood, nation) and in the interaction between the individual and social contexts, a sense of group identity may change over time (Pospisil 1971; Bedolla 2005). Group identity is thus neither fixed nor unitary, but flexible and layered.

The role of group identity in the criminal law

By identifying the 'disproportionate incarceration of some minority groups' as a phenomenon, we implicitly accept and call attention to a minority group identity. What may be less obvious, but no less important, is that we also imply a majority or dominant group identity. Although criminologists have long been aware of the role that group conflict may play in the operation of the criminal law, comparatively little work has been done to examine the role that criminal law may have in defining or reinforcing group identity. In 1958 George Vold presented his group conflict theory of crime, which conceived of the whole social process of law making, law breaking and law enforcement as a 'direct reflection of deep-seated and fundamental conflicts between interest groups and their more general struggles for control of police power and the state'(Kubrin, Stucky et al. 2009), quoting Vold, 1958:339). In succeeding

years, conflict theorists have argued that 'crime is a reality that exists primarily as it is created by those in society whose interests are best served by its presence'(Kubrin, Stucky et al. 2009): 228) If one considers criminal law from a group identity perspective, however, crime or criminal law is not only the product of dominant interests, but also a force that fosters group identity formation itself. As discussed below, criminal law plays a role in defining and reinforcing the identities of both the in-group and the out-group(s).

A. *Criminal law is in-group self-defining.*

Criminal law can be seen as a tool for de-individualization. In the United States, it is commonly said, 'This is a nation of laws, not of men.'[46] All law represents an effort not to be 'men' who are subject only to their individual passions, but to become something greater, a group that is regulated by ideals and aspirations. The criminal law is, among other things, an expression, albeit a compromised and incomplete expression, of the shared meanings, morality and aspirations of the tribe (Garland 1990).

There is another, more concrete sense in which criminal law is group self-defining. Every group has 'law' or rules (whether written or unwritten) for membership in the group and rules that describe the rights and obligations of group members. The criminal law, in particular, places behavioural prerequisites on inclusion in the group: *If you are to be a member of this tribe, you must not do X (e.g. murder, rape, steal, etc.) If you violate this rule, you will no longer be a member of this tribe.* In other words, criminal law in setting the boundaries of acceptable behaviour within the group draws a demarcation line around the group. Violations of those boundaries result in symbolic or actual exclusion from the tribe – whether by expulsion, incarceration, ostracism or execution (Brown 1991).

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5. John Adams wrote the phrase "to the end it may be a government of laws and not of men" in the 1780 Constitution of the Commonwealth of Massachusetts to explain the reason for separation of powers into three branches of government.

Banishment, deportation, imprisonment, and execution all require literal exclusion of the rule-breaker from the group. Other punishments may remove only some aspect or privilege of group membership, e.g., a licence to drive, the right to vote, or the right to child custody (Ahrens 2000). Branding and shaming punishments symbolically strip the offender of their humanity. The dehumanization of those who violate our group's criminal law is well-illustrated in the metaphors of slime and filth applied to convicts and prisoners in cases that span more than one hundred years from a variety of sources (Weyrauch 1999). Even the attachment of the label "criminal" to the person who has committed the prohibited act constitutes symbolic exclusion from the tribe. The *criminal* is an outcast. The criminal is a public enemy. The criminal is sub-human. Using the label 'criminal' (or 'thief', 'junkie' etc.) to describe the wrong-doer symbolically deprives the individual of his or her humanity and group membership (Becker 1963).

This is important because it not only identifies him or her as a person worthy of punishment and or ostracism, but also identifies him or her as someone who is not worthy of the concern or care of the in-group members. Notice that the conditions of imprisonment – cold, remorseless deprivation – generally do not worry the general public when the person being treated in this way has been labelled a 'criminal' (Pratt 2002). Group members are freed from guilt or remorse about the treatment of the convicted person by the thought that the 'criminal' deserves punishment and is not human, not my tribe, not like me.

It is easier to punish members of the out-group. A recent cross-national analysis of imprisonment rates in 140 nations concluded that social heterogeneity (based on race, ethnicity, religion and language) was positively associated with imprisonment rates (Ruddell and Urbina 2004). Similarly, lesser diversity was associated with the abolition of capital punishment (Ruddell and Urbina 2004). Another study of thirteen progressive democracies concluded that 'expansions in minority presence and the

resulting threats to majority group dominance combine to produce increasingly punitive outcomes'(International Society for the Study of Dissociation, Chu et al. 2005). Similarly, a recent comparative study of community attitudes toward punishment in the Czech Republic and Florida found that 'antipathy toward minority "others" is a strong predictor of punitive attitude' (Costelloe, Chiricos et al. 2002)210. The study considered attitudes toward African Americans in Florida and Gypsies and refugees in the Czech Republic. In spite of the vast cultural and historical differences between the minority groups in these communities, members of both majority tribes exhibited a more punitive attitude toward the minority 'other' (Costelloe, Chiricos et al. 2002).

Punishment itself works to establish and maintain group identity and to reinforce group values. Denunciation of the criminal act (and the 'criminal') reinforces group identity and group values. According to Garfinkel, the moral indignation of the tribe is expressed through a 'degradation ceremony' (Garfinkel 1965). The attributes of a 'successful degradation ceremony,' require the denouncer to 'make the dignity of the supra-personal values of the tribe salient and accessible to view, and his denunciation must be delivered in their name' (Garfinkel 1965). Punishment separates the group from the punished person and helps to maintain positive group identity. Among the 'beneficial side-effects' of criminal punishment is the restoration of social cohesion 'which may be threatened or disturbed by certain sorts of offending' (Lacey 1988):183). Although social cohesion may be construed as a social good, Garland points out that punishment produces a 'distinctive form of solidarity: "the emotional solidarity of aggression" (Garland 1990). This particular solidarity has been termed 'a form of tribal group hostility'(Weisberg 1985).

Further, criminal prosecution creates a sense of group well-being by placing the blame for harmful or painful events on an individual. This allows the in-group to be a victim rather than a perpetrator of evil (The bad thing that happened is not *our* fault. It is the fault of the criminal.). Placing the blame on the individual exonerates the in-

group from responsibility for criminogenic social conditions. As Garfinkel notes, in the criminal process the characteristics of the crime and the criminal are made to stand out as individual, unique and 'never recurring' (Garfinkel 1965). In this way the 'features of the mad-dog murderer reverse the features of the peaceful citizen' (Garfinkel 1965) and the in-group members are permitted to maintain a positive group identity. By placing the blame for harmful or painful events on an individual, by identifying and denouncing a 'perpetrator' and 'victim,' the group is distanced from the harm, absolved of any potential blame, and made to feel safe again.

B. *Criminal law reinforces minority group identity.*

Because the criminal law represents the stated ideology and morals of the majority group, the law itself may evoke oppositional ideology within the minority.

> When a group perceives (correctly or not) that it is the object of repression, it responds by opposing the moral categories and social meanings of the repressive group. Groups, defined by class or other status categories, engage in struggles to vinciate ideological systems and so to vindicate themselves (Sampsell-Jones 2003).

Minority groups are their own in-group. For the minority, majority is the out-group, whose rules may not be considered legitimate or requiring of obedience. When the minority group perceives the law as a tool of oppression, mistrust not only makes individuals less likely to assist law enforcement, but also more likely to disobey legal commands (Luna 2005). Rather than produce the desired deterrent effect for the minority group, the law backfires. Butler argues, for example, that the high incarceration rate of African Americans has led some African Americans, particularly the 'hip-hop community' to 'interrogate the social meaning of punishment'(2004: 997).

> To say that hip-hop destigmatizes incarceration understates the point: Prison, according to the artists, actually stigmatizes the government. In a culture that celebrates rebelliousness, prison is the place for unruly 'niggas' who otherwise would upset the political or economic status quo. In this sense, inmates are heroic figures (Butler 1978).

Intergroup conflict, competition, antagonism or lack of understanding can make it easier for either group to disrespect the norms and liberty of members of the other group.

C. Criminal Law draws its protective boundaries around the group.

Criminal law enforcement protects members of the tribe. Traditionally, criminal law enforcement has operated primarily within the boarders and norms of one jurisdiction and tribe.[47] In this sense, it has been asserted that 'law is an intragroup phenomenon'(Pospisil 1971) at 343. When one jurisdiction has multiple resident groups, the protection of criminal law enforcement is not always guaranteed to minority resident groups. As illustrated in the recent report dealing with sexual abuse of Aboriginal children in the Northern Territory of Australia, crimes may go unreported; reported crimes may go unprosecuted; problems of communication, culture, and mutual suspicion may make it difficult for citizens to report and for police and prosecutors to do their jobs (Australia 2007).

Further, when the minority group is viewed as less than human, the protection of the minority group members is not a priority for the majority. Anthropologists have repeatedly observed a 'double standard in traditional morality' – with 'one set of ethics for ingroup members, a lower set or no restraints for outgroup members'

6. With the advent of transnational and international criminal law enforcement, the tradition appears to be on the wane.

(Levine and Campbell 1972). Crimes against out-group members do not carry the same moral weight as crimes committed against in-group members. Failure to recognise the humanity of the minority tribe may also contribute to the willingness of the majority tribe to ignore crimes against out-group members. The point is illustrated in an editorial by an American journalist:

> There was a time in this country [the US] when we accepted a separate standard of justice for whites and blacks, and a time when we rarely bothered to prosecute an immigrant so long as his crime was committed against one of his own kind. Whatever they did in Chinatown or Little Italy on a Saturday night – whatever they did to their wives and daughters, in particular – was their business. As a society, we gradually turned against that approach, accepting, in the name of fundamental fairness and our common humanity, the notion that a black American, or a Greek, or an Irish or a Chinese immigrant who falls victim to a crime is entitled to the same safeguards as a native-born white. (Mainichi Daily News)

Notice that, for this writer, the concession that the minority group members deserved the protection of the criminal law required an affirmation of their 'common humanity.' Extending the protection of the law to them required bringing these immigrants within the boundaries of the group.

In practice, extending the protection of the dominant tribe's criminal law to minority groups has raised troubling issues. The extension of police protection to minority neighbourhoods may require the police to increase patrols and, consequently, increase the probability of abrasive encounters with the police (Hahn 1971-1972). Some of the conflicts have been notorious. For example, in Chicago during the early 1990s police made a practice of picking up African American youth, whom they

suspected of criminal activity, and dropping them off in white neighbourhoods where they were likely to be beaten up by local residents (Sampsell-Jones 2003).

Understanding the 'common humanity' of minority group members is no small task in the context of a human society that organises itself in groups. Building a group identity that applies to all of the members of a legal society may be a utopian dream. The public media, political discourse and social discourse of the dominant group often conflates minority status with criminality. In Australia, for example, a recent analysis of media and political sources opined that 'the social imaginings of the criminal in contemporary Australia increasingly involves the invocation of the Arab Other as a primary folk devil'(Brown 2006). Nevertheless, building a concept of 'common humanity' might be seen to be the core task of the internationalist legal agenda.

Conclusion

A number of studies have looked for and failed to find empirical evidence to demonstrate that disproportionate incarceration rates are caused by biased decision-making on the part of police, prosecutors, and judges (Tonry 1997; Waddington, Stenson et al. 2004). On the other hand, research has documented that increased minority presence or minority threat to group dominance is strongly correlated with imprisonment rates (Ruddell and Urbina 2004). Based on current sociological data, it is not possible to quantify how discriminatory processing affects minority imprisonment. On the other hand, given the apparent disproportionate imprisonment of minority groups around the world, it seems fair to say that the criminal justice system *operates* in a way (or perhaps in a context) that favours the in-group over the out-group. Further, psychological studies show that the biased decision-making is unconscious and any decision may be rationalised or justified *post hoc* (Sunstein 2006).

Institutional structures that consistently impact disproportionately on out-group members should be examined to discover where or how they provide opportunities for biased decision-making. In the criminal justice process, it appears not only that there are that opportunities for in-group favouritism exist at virtually every level,[48] but that part of the traditional role and function of the law itself is to define and reinforce in-group identity. The interaction between group identity and criminal law is both reciprocal and dynamic.

[48] These opportunities exist at the creation of criminal law's substantive norms, where the morality of the dominant group is encoded into legal proscription; at the creation of enforcement procedures and policies, where the dominant group's perceptions about crime and criminality will control the allocation of resources, the methods of training police, prosecutors and judges; and the rules that govern police interaction with the public; and at the enforcement of substantive criminal norms, which necessarily give a decision-making discretion to police (to stop, search, investigate, arrest), prosecutors (to charge), judges (in bail and sentencing) and correctional institution officials (prison accommodations and parole).

Writers on ethnocentrism are divided on the question of whether in-group preference produces primarily positive or negative effects. In-group favouritism and out-group antagonism may have helped our ancestors protect limited resources and increase the survival rate of one's own family (Taylor, Peplau et al. 2006). In a multicultural or polyethnic community, however, it becomes apparent that there is a need to find a de-tribalised way of formulating criminal justice norms and enforcement policies. The problem of developing multicultural or multi-tribal norms is both difficult and important. As McNamara points out, the concept is often greeted as a call for the minority group to receive 'special treatment' (McNamara 2004). The idea of using different norms to apply to different cultural groups within one society runs afoul of the concept of the 'rule of law' and principles of equality before the law (Ibid at 21). With regard to the emotional, moral issues involved in criminal law, is it possible to find norms that can be non-discriminatorily applied at a super-tribal level? Perhaps part of the solution might be to decriminalise those behaviours for which there is no super-tribal disapprobation. Luna favours the 'depoliticization' of substantive criminal law (Luna 2005). He would shift the authority from lawmakers to non-political experts in criminal justice to insulate the criminal justice system from the kind of in-group decision-making I describe above (Ibid).

Considering the law in light of group behavioural science opens the door to further thinking about the impact of psychology on group decision-making processes. Can criminal legal processes be insulated from implicit bias? In the context of civil law, Sunstein favours procedures that introduce more deliberation in legal decision-making and to insulate the process from implicit bias or flawed group decision-making (Sunstein 1999; Sunstein 2006). In the context of criminal law legislation, that might mean delaying the enactment of new criminal legislation until a minority impact report can be debated and drafted. In the context of criminal procedures, it may be possible to devise other ways to insulate decision-making from in-group bias. At least one study of intergroup relations has found that the development of a

common group identity diffuses the effects of stigmatization and improves intergroup attitudes.(Dovidio 2001)

The first step toward being able to deal with any problem is to recognize and understand it. If we re-envision the criminal law in the context of a human species that existed for more than a hundred thousand years in semi-isolated, small, roving bands; that has lived together in concentrated and semi-permanent groups for only tens of thousands of years (Wilson 1988); and that now finds itself crowded into an increasingly small planet, the diminishing value of in-group loyalty and out-group antagonism becomes apparent. As the world becomes a smaller neighbourhood, those societies that develop ways to diffuse intergroup conflict and forge inclusive group identities are more likely to achieve greater justice.

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Losing the War on Drugs: Prohibition and Proliferation

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Introduction

Contemporary patterns of drug use have evolved from changing polices, which have been shaped by political, economic, demographic and social changes. Before the European colonisation of Asia, opium production was limited and the drug was used almost solely for medicinal purposes (McCoy, 1972: 59). This changed during the eighteenth century when large scale opium smuggling by colonial powers created addicted populations and financed the building of the colonies (McCoy, 1972; Nakoe, 1993). Prohibition, driven by moral crusades in the late nineteenth century, triggered restrictions on drug use and trafficking (McCoy, 2000). Massive expansions in drug markets and drug abuse followed prohibition, prompting calls for tougher measures to contain the problem; ironically, these strategies have exacerbated the situation. Despite ample evidence of the failure of punitive drug law enforcement strategies, there are few efforts being made in Australia or internationally, towards non-punitive drug policy reform.

Creating drug markets

Drug smuggling in Asia began in the 1500s when the Portuguese began importing opium into China from India. This lucrative trade was taken over by the British East India Company in 1773, making Britain the world's largest opium merchant and consequently the most powerful colonial power (McCoy, 1972: 59-60). Even though China prohibited opium smoking in 1729 and then banned opium imports in 1800,

British opium importation continued and opium smoking in China increased (Wright, 1924). This resulted in two opium wars in 1839 and 1856, which forced China to legalize the importation of opium. By this time, there was an estimated 15 million Chinese opium addicts (McCoy, 1972: 63; Wright, 1924).

Morals and burgeoning drug markets

Campaigning for opium prohibition began in the 1870s, following moral crusades by the anti-opium movement, the Christian Temperance movement and the Protestant churches of England and America. Success was achieved after the British Parliament passed a motion to stop India's opium trade in 1906 (McCoy, 2000). Although there were no mandatory international controls that could interfere with colonial opium trade, all colonial governments agreed to reduce their opium sales over a number of years, reducing production considerably by 1934 (McCoy, 2000: Nakoe, 1993).

Even though the new restrictions initially produced a decline in the legal opium trade, they later opened up market opportunities for an illicit trade in Europe and Asia (McCoy, 2000: 200-2). This prompted tighter prohibitions and a subsequent expansion of illicit drug markets, which prospered as drug smugglers capitalized on higher drug prices caused by the prohibitions. The market proliferation triggered a mass demand for opium and later, a world demand for heroin. Further attempts at prohibition and suppression continued to fail as drug production, markets and use multiplied (McCoy, 2000: 202).

Colonisation and the growth of drug markets

Throughout the nineteenth century, colonial expansion in Southeast Asia created a high demand for labour. In the early twentieth century, impoverished, opium addicted Chinese peasant populations, escaping war and famine in China, flocked to Southeast Asia for work (McCoy, 1972: 63). In order to maintain opium supplies for

the new immigrants, colonial governments imported cheap opium from India and China and set up licensed opium dens throughout Southeast Asia; this resulted in huge expansions in opium consumer markets (McCoy, 1972: Nakoe, 1993). State-regulated opium sales soon provided 40-50 percent of colonial revenues, financing colonial infrastructure and construction across Southeast Asia (McCoy, 1972: 63).

Opium to heroin

When prices of licensed government opium began to climb rapidly, migrating Chinese hill tribes began illicit local production in the mountains of the Golden Triangle. The number of opium addicts swelled and their increasing demand facilitated massive expansions in opium production throughout the region and into Burma (Lintner, 2000: McCoy, 1972). After independence in the1940s, illicit production in Burma soared and booming opium markets moved into Thailand (Lintner, 1994). By the late 1950s the region was producing around 50 percent of the world's illicit opium (McCoy, 1972: Lyttleton, 2004).

Thriving drug markets supplying addicted populations, paved the way for drug syndicates to start up profitable heroin refinery laboratories in the Golden Triangle. From the 1960s-70s, heroin became a commercial global commodity and the Golden Triangle a major supplier (McCoy, 1972; 2000; Lintner, 1994; 2000).

The War on Drugs

By 1961, the United Nations and the US initiated programs to eradicate illegal poppy cultivation and prosecute drug traffickers (McCoy, 2000: 203). By the late 1960s, President Nixon had launched the War on Drugs, which was an attempt to address the problem of American soldiers becoming addicted to heroin in Vietnam then returning home to their US suburbs with drug habits (Lintner, 2000: 12). The US subsequently strengthened its Drug Enforcement Administration (DEA) and

collaborated with the United Nations to increase global narcotics control (Lintner, 2000: 13).

Proliferation

The War on Drugs was initially successful and opium cultivation and heroin exports were reduced substantially. However, success was short lived as victories ironically facilitated market expansion. With global drug demand still in tact and a shortage of drug supplies there were massive increases in the world price of heroin. Traffickers in Southeast Asia had no trouble filling the unmet global demand throughout most of the 1970s, in America, Europe and Australia (McCoy, 2000: Lintner, 2000). As surveillance and seizure increased, markets shifted and opium production increased. By the end of the 1980s, world opium supply had exploded with an increase of 400 percent since the early 1970s. By the 1990s Southeast Asia was one of the world's largest suppliers of heroin (McCoy, 2000).

Afghanistan

Similar to the situation in Southeast Asia, prohibition and eradication programs in Afghanistan have not reduced supply but have merely expanded illicit markets (McCoy, 2000: 14). After the Afghan-Soviet war ended in 1992, Afghanistan had three million war refugees and gross poverty. Opium was an ideal cash crop to address Afghanistan's social and economic problems. With no foreign aid and the outbreak of civil war, opium crops provided one of the few sources of finance (McCoy, 2000: 212-14). It is not surprising that despite UN/US opium eradication programs in Afghanistan, opium production has soared. In 2005, the UN estimated that the country was providing around 89 percent of world illicit production (United Nations, 2006).

From Heroin to Amphetamine Type Stimulants

Since 2001, global drug trends have shown a dramatic decline in the availability and use of heroin and substantial growth in the use of amphetamine type stimulants (ATS) (United Nations, 2006). During this time, Australia has experienced a shift in patterns of drug use from heroin to ATS, suggesting that a shortage in the supply of heroin has stimulated the consumption of ATS (Drabsch, 2006; National Drug and Alcohol Research Centre, 2006; McKetin, McLaren and Kelly, 2005; Maher, 2007). This view is reinforced by studies, which find that the shortage of heroin has led to increased use of ATS because heroin users are changing to ATS due to a lack of the availability of good heroin (Maher, 2007). Even though there is some dispute as to whether there is a direct causal relationship between heroin shortage and increases in ATS usage (Snowball et al, 2008), there has nevertheless, been substantial increases in the production and use of ATS, with more potent forms emerging despite large seizures of the drug at Australian border points. ATS can be produced locally in crude laboratories but is mostly imported from Southeast Asia, China, Hong Kong, Japan, South Korea and Taiwan (Drabsch, 2006), indicating that there has been wide geographical expansions in international drug markets and production.

In Australia, there are currently more than 70,000 habitual ATS users, compared with around 40,000 habitual heroin users (Drabsch, 2006). The trend towards ATS has presented a number of challenges, especially for health professionals. Prolonged use of ATS has been associated with psychosis, violent behaviour, hostility and aggression, prompting medical drug specialists to comment that ATS makes heroin look like 'the good old days' (McKentin, McLaren and Kelly, 2005; Drabsch, 2006; Wodak, 2007).

Criminalisation of drug users

Increases in prison populations

An estimated 2 million people, or a quarter of the total global prison population is incarcerated for drug offences (Rulles, Kushlik, and Jay 2006). In Australia between 1996 and 2006, the national prison population increased by a substantial 42% (ABS, 2006). Incarceration rates for women in Australian prisons increased by a staggering 90% compared with 39% for male prisoners during the same period (AIC, 2006). Women prisoners have higher levels of substance abuse and it is estimated that up to 70% of women's offences in Australia are directly related to their drug use (Kevin, 1995). In the UK over the past decade, the number of incarcerated drug offenders has increased five-fold for women and three-fold for men and it is estimated that between 50% - 80% of all prisoners are now serving time for drug-related offences (Rulles, Kushlik and Jay, 2006).

In the US, the war on drugs has resulted in huge surges in prison populations. Those who are most disadvantaged by the war are black people and poorer populations who are more vulnerable to being criminalised by 'get tough' drug policies (Bobo and Thompson, 2006; Tonry, 1994). The black incarceration rate in the United States is 8 times higher than for non-Hispanic whites and has risen by 900 percent since the 1950s (Bobo and Thompson, 2006: 451-3).

The War on Drugs justifying human rights abuses

China celebrates UN world anti-drugs day with mass executions of drug offenders, in 2002 there were 64 executed and a similar number the year before (Rulles, Kushlik, and Jay 2006). Thailand's War on Drugs, initiated in 2003, justified gross and horrific violations of human rights. After only three months of the war almost 2,500 alleged drug dealers had been murdered (Human Rights Watch, 2004). The Thai government

promoted the use of violence, intimidation and random extrajudicial executions against drug suspects. The police, who were placed under pressure and offered cash incentives to show results, stopped at nothing to follow orders and meet expectations (Human Rights Watch, 2004).

Finding solutions

Harm reduction

There is an awareness of failed drug prohibition policies nationally and internationally, within government and NGOs (see Rulles, Kushlik and Jay, 2006). Despite this, efforts to reduce harm for the drug user and the community, continue to work within a prohibitionist framework, with few efforts being made to explore alternatives (see Rulles, Kushlik and Jay, 2006). Harm reduction policies such as treatment programs, prison alternatives, heroin and methadone prescription programs, and needle syringe programs have reduced health problems and have helped some drug users to rebuild their lives. Some programs have even helped to lower the crime rates of drug users (see Vumbaca, 1999). However, these reforms focus on harm minimization for the individual drug user without addressing the greater harm caused by law enforcement policies. Attempting to minimise harm within a legal framework that itself maximises harm will only have a marginal impact; for the bigger fundamental problems of crime creation, health issues, the financial cost of law enforcement, and the consequent criminalisation of drug users, remain intact.

Long-term effective change

To achieve effective long-term change, there needs to be ongoing discussion and debate about drug policy and reform at local and global levels. Key stakeholders, academics, government and NGOs need to collaboratively determine how responsible

policy can be combined with harm reduction to reduce damage to individuals and communities in Australia and internationally. Meanwhile, rhetorical anti-drugs campaigns and cries for harsher penalties tend to be underpinned by neo-liberal, moralistic ideology of protecting communities and individuals. For example, while governments around the globe call for harsher penalties for drug offenders, the UN's 2008 slogan for its ten year drug strategy is "A drug free world - we can do it!" (Rulles, Kushlik and Jay, 2006). This misleading and unachievable claim is little more than a righteous and counterproductive crusade, which does nothing to protect individual or community rights, or safety. Rather, it justifies the punishment and human rights abuses of those identified as being a hindrance to the achievement of a utopian drug-free society. Effective change can only occur when there is harm reduction combined with major policy reform, not based on rhetoric, morals or ideology, but on realistic strategies to reduce harm and prevent the criminalisation of drug users.

In 1924, the American political commentator Quincy Wright referred to the debate on the prohibition of opium as 'mankind's fight against his own desire for narcotics' (Wright, 1924). There is little doubt that most people enjoy using various types of drugs, not least of all alcohol, even though we do not know all the reasons why. What we do know is that as long as there is a demand for illicit drugs there will always be supply and regular users will need to break the law to maintain their use. We also know that as long as there is drug prohibition, prison populations will continue to multiply. Also known is that drug law enforcement policies such as the War on Drugs are not eliminating drug production, ending illicit drug markets, or preventing drug use. None of this is especially new or surprising. What is surprising is that, despite so much evidence to the contrary, there remains a persistent assumption in law and order discourse that the criminal justice system holds the solution to illicit drug use.

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Trafficking in persons as labour exploitation

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Introduction

In Australia interest in trafficking in persons has come in waves following the concentrated attention over 2002/2003 which culminated in the Federal Government's announcement of a four-year 'comprehensive' police package aimed, no less, at eradicating trafficking in persons (Minister for Justice & Customs, 2003; Segrave, 2004). Mirroring developments internationally (see Berman, 2003), the Australian response to trafficking has made reference to this issue as a contemporary transnational organized crime (see Minister for Justice & Customs, 2000). However, the detail of the policy commitment and the 'anti-trafficking' framework implemented in Australia reveals the 'traditional' nature of the response that is founded upon a 'commonsense' logic of law and order, where it is the domestic legal regime and the pursuit of prosecutions that remains the primary focus (see Hogg & Brown, 1998). While there are references made to trafficking in persons as a practice that may manifest in a range of industries, attention has been and continues to be focused on the trafficking of women into the sex industry (Attorney-General's Department, 2004).

Since the policy announcement in late 2003 it has primarily been the announcement of arrests, prosecutions and appeals, particularly the most recent appeal and decisions regarding the Wei Tang case to the High Court of Australia, that have captured the attention of the media (see for example, O'Brien & Wynhausen, 2008; Gallagher, 2008; Kissane, 2008; Violante, 2008; O'Brien, 2008) . In the reports on

Australia's efforts to address trafficking, the introduction of the expanded trafficking in persons Commonwealth legislation and the criminal justice arrest and investigation data are referred to as evidence of our effort to address this issue, with references also to Australia's benevolent commitment to support victims of trafficking during the investigation period (TIP, 2008: 61-63).

Academic engagement with this issue has been steadily increasing since the first published examination of Australian efforts by Kerry Carrington & Linda Hearn in 2003 (see Segrave, 2004; Segrave & Milivojevic, 2005; Burn & Simmons, 2005; Burn et al, 2005; Burn et al 2006; Gallagher, 2005; Munro, 2006; Piper, 2005; Putt, 2007; David, 2008) however research remains limited and the discussion and debate has been narrow, especially with regard to its critique of the existing response. This paper argues that it is critical to engage and examine alternative understandings of and responses to human trafficking, as the existing response in Australia presents a number of concerns not least of which is the narrow definition of exploitation and the limited provision of compensation, support and assistance to victims of trafficking. Specifically, this paper will identify key concerns with the current response to people trafficking in Australia, drawing in part on research the author conducted in 2005 and 2006 that examined the implementation of the Australian response to people trafficking in Australia and Thailand. The paper concludes with a proposal for an alternative framework for understanding and responding to human trafficking- a proposal that is captured within the title of the paper.

Australia's response to people trafficking

For the purposes of this discussion only a brief overview of Australia's response to human trafficking will be provided (see for further information, Attorney-General's Department, 2003). As noted above Australia introduced a national action plan in 2003, the *Commonwealth Action Plan to Eradicate Trafficking in Persons*, to be implemented over four year period by a number of government departments and

agencies (including the Australian Federal Police, the Commonwealth Attorney General's Department, the (then) Department of Immigration and Multicultural and Indigenous Affairs, the (then) Office of Women's Policy and the Australian Government Overseas Aid Program [AusAID]). In 2007 an announcement was made for an additional A$20million (approximately) over three years again targeted primarily towards criminal justice avenues, including funding for immigration compliance, investigation and prosecution in addition to increased funding for new research to be undertaken by the Australian Institute of Criminology (Attorney-General's Department, 2007). The core components of the Australian response remained the same and were reinforced as appropriate and necessary tools to "build on the success of the existing initiatives" (Attorney-General's Department, 2007).

The Commonwealth Action Plan to Eradicate Trafficking in Persons was introduced as a whole-of-government policy response designed to "focus on the full cycle of trafficking" (Minister for Justice & Customs, 2003). Primarily, the implementation has focused heavily on enhancing immigration and criminal justice efforts, including the provision of a new visa system for victims and a support system. The focus of these efforts has been to maximise successful prosecutions, which remains a key indicator of the success of the policy nationally and internationally (see TIP, 2004; Attorney-General's Department, 2007).

Subsequently in Australia a response to trafficking has been developed that is clearly founded upon a 'law and order logic' (see Hogg & Brown, 1998)- a point I have argued elsewhere (see Segrave, 2004; Segrave & Milivojevic, 2005; Segrave, in press) - where trafficking in persons is treated as a criminal justice issue involving independent offences that requires a whole of government response geared towards investigation and prosecution, while victims receive welfare-driven support that is predicated on involvement in the criminal justice process. Within this framework, victim support effectively operates to support key informants and witnesses and is available *only* to those involved in criminal investigations (see Burn & Simmons, 2005; McSherry,

2007). Thus, while the national and international rhetoric situates trafficking in persons within the transnational crime assemblage, it is *not* the movement of people across and within borders for the purposes of exploitation that we deal with in Australia, rather the focus and reality of the policy response and the everyday work of Australian officials implementing this response primarily revolves around policing exploitation within the nation.

Outcomes to date

From the perspective of policy makers within Australia and the international community, the dominant approach after five years of implementation is to consider what has been achieved to date and to prioritise a framework that produces evidence-based process and outcomes-driven data. Given the current framework of the policy response, it is unsurprising that the primary 'evidence' used to ascertain Australia's effectiveness in responding to this issue is predicated on investigation and prosecutorial data (see for example Putt, 2006).

Briefly, in Australia the AFP has investigated 125 cases of human trafficking between 2004 and 2007, with the majority of these cases involving women trafficked into the sex industry. These women have primarily been citizens of South-East Asian countries, particularly Thailand, but also from Indonesia, Malaysia, South Korea and China, and to a lesser extent, Hong Kong and the Philippines (Putt, 2006; AFP, 2007).

The most recent data available identifies that 29 defendants have been charged with offences related to trafficking under Australia's anti-trafficking laws (Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)), of which around 14 have led to prosecutions and only a handful have resulted in successful convictions. In its annual report the AFP identify three 'significant sentencing decisions' in the 2006-2007 reporting period, two of which involved sex trafficking cases (involving slavery and

sexual servitude offences) and one of which refers to a labour exploitation case in NSW (AFP, 2007: 33).

In contextualising and explaining the results to date the AFP provided the following explanation of their efforts:

> "The majority of victims identified were sex industry workers in their country of origin and were aware they would be working in the sex industry in Australia, prior to their being trafficked. However, until they arrived in Australia, many were not aware that they would be exploited. The groups detected in sex trafficking have been small rather than large organised crime groups. Australians using family or business contacts overseas to facilitate movement and visa violations continued.
> Human trafficking continued to involve other crime types, including immigration fraud, identity fraud, document fraud and money laundering. Offenders active in this area have shown adaptability to law enforcement activity and migration governance. Successful prosecutions rely on victim and witness first-hand accounts of exploitation." (AFP, 2007: 25)

There are many issues raised within this statement. For the purposes of this discussion, however, I want to explain how this is suggestive of and reflects the challenges facing authorities in Australia and beyond in trying to respond to people trafficking. Issues that were echoed by state authorities involved in these processes who were interviewed in Thailand and Australia (see Segrave, 2007). Their major concerns relate to: finding victims of trafficking (i.e. they are rarely detected in transit); identifying 'real' victims (i.e. those who fit within the legal definition); moving from investigation to prosecuting (particularly in terms of securing evidence often including obtaining victim cooperation to appear as a witness) and convicting offenders (i.e. a number of cases have resulted in hung juries in both Melbourne and Sydney, the cases are complex, lengthy and expensive). Currently much of the focus

in discussions with research and policy makers around improving the response to trafficking revolve primarily on how to address these issues and how to improve the criminal justice process.

However, this data requires much closer analysis and greater consideration. There is a need to identify how *little* this information tells us about trafficking patterns, practices and experiences and how little it tells us about the impact and implications of these efforts. There are a number of concerns arising from the framework, its implementation and the reporting to date. One critical issue is that the current response to trafficking and the official information produced about this response functions to maintain a gendered mythical narrative around trafficking- whereby it appeals to an idea of the transnational organised criminal sexual exploitation of third world women (i.e. innocent, 'ideal' victims). This narrative is not reflected in the complicated circumstances of exploitation that occur in reality within Australia and elsewhere. Only a few cases make it through the selective filtering process from identification to investigation to prosecution. Consequently, the criminal justice knowledge and data that is produced is partial and incomplete, we know nothing of cases that are deemed not to be strong enough to prosecute, of victims who are willing to cooperate but who have little information for authorities to work with or cases that have significant evidence but victims who are unwilling or unable to participate as informers or as witnesses. Critically we also know little about those who are simply deported when picked up by immigration authorities and identified as illegal non-citizens and/or non-citizens who have breached visa conditions- that is, those who are not identified as potential victims and/or who intentionally or otherwise remain outside the purview of the Australian government's anti-trafficking machine. The criminal justice data, including the number of victims, becomes the 'truth' of the trafficking problem that is difficult to prove or disprove, we focus on numbers- numbers of victims, numbers of prosecutions, numbers of offenders. This tells us very little about trafficking in persons- it tells us more about the efforts of authorities, about their priorities, their understanding of the issue and the

interpretation of the law and the direction of their resources. Yet it is used by nations to demonstrate their commitment to the moral outrage that is trafficking in person, particularly, of course the trafficking of women into the sex industry (see also Kelly, 2005). Thus it is clear that it is essential that we engage critically with the narrow operation of national and international responses to this issue that adopt and rely upon a criminal justice approach. Through doing so we can recognises that trafficking in persons is one part of a much broader pattern of exploitation of non-citizens within destination countries that requires a more complex and considered response. In order to advance this argument it is necessary first to locate trafficking in persons within a more complex framework, beyond the boundary of criminalisation and victimisation.

Alternative perspectives

Reflecting its location within the conventions of the popular law and order policy rhetoric, the response to trafficking in persons begins at the point of exploitation, that is, when and where the offence or the victim comes to the attention of authorities most often within Australia, through Immigration officials (see Segrave, 2007; Segrave, in press). The offences that are concentrated upon are focused not on the movement of people (i.e. deception or kidnapping to enable individuals to be transported across national borders) but primarily on issues within the country of destination- issues relating to the conditions within which individuals have worked, discrepancies between the agreements made before they began their work and their working conditions when they arrive in Australia (including in some instances the type of work but more often deception related to the conditions of work) (Australian Federal Police [AFP], 2007; Segrave, 2007). It also includes issues related to debt bondage based on fees related to travel, to job placement, and accommodation that are escalated to significant amounts of money that are required to be repaid through working off the debt (TIP, 2008).

Clearly there is the dominant narrative of trafficking as is inconsistent with the complexity of the issues and circumstances of the situations immigration compliance authorities assess in practice. Issues relating to implementation and the determination of cases that may be potential cases of trafficking require serious and careful research and attention. However, the primary concern here is relation to the problems associated with implementing a response that is primarily driven by a desire to successfully prosecute cases. When criminal justice outcomes are the first and foremost priority, there is limited room for recognising that trafficking in persons is an issue that arises from the 'specific interaction of gender, race, immigration, economics and globalisation' and that, as a consequence, it is an issue that is not simply identified or addressed via law enforcement (Berman, 2003: 58).

Instead of beginning with exploitation then, the beginning point is the broader context of contemporary globalisation and the accompanying social, political and economic changes that have arisen over the past few decades (see Sassen, 1998). Within this context the changing nature of contemporary migration flows are intricately connected to the increasing degrees of coercion and exploitation that are occurring in migration process (Berman, 2003). The gendered nature of these practices of exploitation have recently become the subject of serious investigation, as researchers recognise that it is women's bodies and the movement of women's bodies, with or without their consent, which has become a significant vehicle for economic growth and a source of dependable income and profit for a range of actors (Sassen, 2000). Importantly, however, it is for both men and women as they embark upon cross-border journeys, as they seek out opportunities to migrate and respond to the need for various forms of low-skilled, low-wage employment to be fulfilled, that others seek to exploit them. Indeed over the past two centuries we have witnessed the emergence of a new industry of underground entrepreneurship surrounding irregular and illegal migration tailored to work around shifting border regimes that operates internationally (see Andreas, 2000).

From this perspective, the trafficking of women, including the trafficking of women into sexual servitude, can be identified as one example of the increasing degrees of coercion and exploitation that have accompanied the contemporary patterns of gendered migration flows (Berman 2003, 58; Ehrenreich & Hochschild 2003; Sassen 2003). The tendency to isolate trafficking from other issues and to deal with it independently is challenged from this perspective. There are clear interconnections between trafficking and other forms of exploitative labour and other forms of clandestine cross-border movement.

Identifying and understanding trafficking within this framework challenges the dominant discourses that seek to identify criminalisation and victimisation as the exclusive factors of trafficking. Thus while popular narratives of trafficking, including the assertions of the reality of trafficking in policy responses, focus on extreme gendered and sexualised forms of exploitation, the argument here is that such cases represent a small section of a much broader and more endemic practice of exploitation that is occurring within nations such as Australia. Further, it suggests that trafficking in persons is in many ways a redundant term, what we are dealing with most often is abuse and exploitation related to migration and migrant labour, and it is the abuse and the exploitation that is real and tangible and knowable, yet which remains largely ignored in discussion around trafficking. What is necessary, then, is to recognise the linkages between trafficking in persons in Australia and the exploitation of temporary migrant labourers, particularly low skilled labourers. It is from this basis, where we recognise the connections rather than the disconnections between these forms of exploitation that a more nuanced and effective response to addressing and reducing exploitation may be developed. The next section, then, will explore these linkages and build a case for an alternative approach to exploitation and to trafficking within Australia.

Migrant labour exploitation in Australia

The exploitation of temporary migrant labourers in Australia, particularly those on 457 visas (a temporary business visa that requires employer sponsorship) has been described in the last twelve months as "akin to slavery" and as an example of "modern-day slavery" (Moore & Knox, 2007). Prior to the emergence of this issue in the public realm, this terminology has been confined to the description and identification of trafficking in persons, particularly the trafficking of women into sexual servitude.

To date people trafficking and the exploitation of temporary migrant labourers have been the subject of separate examination and are treated differently by Australian authorities. As outlined above, this paper is focused on reconsidering this distinction and in so doing enabling an analysis of the experience of and response to non-citizens who migrate to Australia to work and experience a range of forms of workplace exploitation.

There are a number of avenues for exploring the interconnections between these two issues, however for the purposes of this discussion two will be addressed: the types of exploitation coming to the attention of authorities and the (policy/legal) response to exploitation particularly in terms of the processes for seeking assistance and redress for exploitation.

In 2007 the Commonwealth Joint Standing Committee on Migration reported that breaches of 457 visa conditions that have arisen in Australia have included: underpayment at minimum salary level; unlawful deductions from minimum salary such as for travel or medical costs, or deductions unapproved by the worker, such as accommodation costs; non-payment of overtime or working excessive hours; payment by workers of recruitment costs or migration agent fees; racial abuse and

threats of physical harm; and, overcharging for training and accommodation (Joint Standing Committee on Migration, 2007: 112-114).

The cases of trafficking in persons that have been encountered in Australia mirror the same range of experiences of exploitation. This was captured within a comment made by one participant interviewed in my 2005-2006 research into the response to trafficking:

> *There are a lot of women from South East Asian countries here [in Australia] lawfully, I mean what they do, prostitution, is in a lot of states of Australia a lawful occupation and they're on a working holiday visa, student visa etc, so it's a lawful visa, lawful occupation and they're happy to work in the industry....*
>
> *Most of them only really become a victim when things go wrong for them... there are very few people who... go to Australia... not knowing that they're going to be involved in the sex trade... and it's the law of the money, I mean it's only when that money is not forthcoming that they either decide to make a complaint or [they] go and talk to people they know in Australia who then go and report it to the authorities....* (Australian law enforcement officer, Thailand)

Primarily it is abuse and exploitation in relation to wages and employment conditions that dominate in both instances. Also in both trafficking and workplace exploitation we see other forms of abuse including violence, emotional and in some cases sexual abuse. These issues cross over in both realms and the distinction between what we label trafficking and exploitative labour is blurred. Conditions of forced labour as under the current trafficking legislation (Criminal Code Amendment (Trafficking in Persons) Act 2005) can exist in both contexts- yet researchers, the media, policy makers, the police and other authorities tend to engage with these issues as separate and distinct.

However, despite this distinction in terms of how we conceptualise and respond to the two issues, there are also some critical interconnections that researchers in particular have failed to examine and critique. In relation to both issues the focus is primarily on the offender- in the case of trafficking the criminal justice system steps in to pursue an investigation and ideally a prosecution. In relation to workplace exploitation the employer is subject to fines and, potentially, prosecution. In both cases the victim is solely the vehicle for criminalisation- that is, without a victim to identify what has occurred and to articulate their experience to authorities, the practices remain hidden and unknown. That is, the focus is primarily on a reactive model of responding to cases of exploitation based first on information and intelligence being provided to authorities and second on victims then providing evidence (through testimony and other forms of corroboration of their experience). It appears that there is a potential here to rethink how we understand and therefore respond to both issues by recognising these connections.

Currently we conceptualise victims of these crimes very differently and as a nation Australia is far more responsive to the provision of victim support for women who are trafficked into the country. In relation to trafficking the dominant understanding of victimhood and the needs of victims of trafficking is focused on a gendered trauma-based framework, where welfare and emotional support are the primary and immediate issues to be addressed. In place of this, based on the framework outlined above and the identification of the actual forms of exploitation that manifest within the nation, I would argue there is a need for a much broader recognition of individuals as active, economic transnational citizens. Identifying that these individuals who experience exploitation are in Australia to work enables a platform from which to appreciate that victims may be more interested in receiving their unpaid wages and compensation for the breaching of agreed working contracts and agreements, rather than only being recognised as individuals who need welfare and emotional support and who are provided with this, in part, to assist in maximising the potential for a successful conviction to be pursued. Similarly, individuals who have experienced

exploitation while in Australia on a temporary working visa may also require these forms of compensation *as well* as the opportunity to access other forms of welfare and emotional support should they require it. Currently there is no system of support operating that is as generous as the support given to victims of trafficking.

In addition, we need to engage with the way in which both issues are founded upon the management of the border regime, where the options for anyone who experiences exploitation and who is not a citizen of Australia, are ultimately determined by their migration status. In relation to both forms of exploitation, the individual is placed in the precarious position of being reliant on another party to provide them with the possibility of remaining in Australia if they report their victimisation. For victims of trafficking once they have been identified as a potential victim they are placed on bridging visa F to allow them to remain in Australia while the authorities determine whether there is a case that can be pursued. If there is no case or if they are uncooperative in the investigation they will be returned to their country of origin within a 28 day time period (Blackburn in JCACC, 2004: 23). For those who are in Australia with a 457 temporary visa, they have the option of leaving the employer who has exploited them but if they do so they have 28 days to find another employer willing to sponsor them and to submit an application for a new 457 visa on their behalf. During this period they cannot work, and they cannot work while the 457 visa is pending. If they cannot find a sponsor they have to return to their country of origin (advice received in communication with DIAC employee operating 'Immigration Dob In' telephone hotline, 17th July 2008). Such provisions play a significant role in increasing the vulnerability of individuals who are experiencing exploitation or abuse in any workplace. Indeed, the uncertainty of what may happen once you report your victimisation creates a disincentive for approaching authorities and/or for articulating your experience when immigration raids and checks are conducted.

It is clear that more research into how these processes and options are experienced by individuals who are exploited within Australia is required to develop a more nuanced understanding of the impact of such limited options.

Conclusion

A core concern with the development of this paper and others linked to is, it to recognise that if we approach trafficking in persons and labour exploitation from an alternative perspective we can begin to ask some very different questions about how these issues come to manifest in Australia and about the appropriateness of the current efforts to respond. In some locations arguing that trafficking in persons and exploitative labour should be brought under one banner has been met with a concern that this undermines and effectively silences the gendered, exploitative nature of sex trafficking. The central argument here is that we can only bring to bear a more comprehensive analysis of gendered and sexualised exploitation when we look *beyond* the sex industry and recognise that women experience these forms of exploitation in a wide range of industries. So too understanding trafficking as labour exploitation enables a more comprehensive analysis of the intersection of race, gender and exploitation within a range of industries. This approach also points to the limited knowledge made accessible by relying solely on criminal justice data and disrupts the logic of relying primarily on a criminal justice response to address these issues.

Further it points to the need for attention to also be focused on the increased regulation and securitisation of national borders and migration regimes and the concomitant rise in focus upon transnational crime. Indeed, it prompts us to ask questions about how nations such as Australia are responding to various forms of exploitation in ways that appear to be (and indeed, claim to be) victim focused that may ultimately be identified as exacerbating the vulnerability of non citizens within the nation. Finally it is clear that we need to challenge how we conceive of the responsibilities and obligations of destination countries in assisting non citizens who become victims of all forms of labour exploitation and to consider the role of nations

such as Australia in contributing to a context within which trafficking and exploitation in all its forms may proliferate.

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Stunning Developments : Some Implications of Tasers in Australia

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This paper considers the debate surrounding the introduction of the stun-gun or 'Taser' into Australian policing and cautions against their introduction as general issue weapons. This caution is set against concerns about the regulation of police use of force generally and in light of critical commentary on sub-lethal weaponry internationally, especially from the United States where Taser use by police is widespread. The paper traces the introduction of Tasers as general issue weapons in Australia and outlines the arguments for and against their introduction. Critical issues addressed include the number of deaths attributed to Taser use in the United States, the problems associated with identifying stun-guns as contributors to death, the capacity of such weapons to reduce the incidence of lethal force in policing and the potential impact of Taser use on over-policed populations.

Police scholars and other observers are currently watching the roll out of stun gun (or Taser) technology in Australia with some concern (Meehan, 2008; Singer, 2008; Law Institute of Victoria, 2004). While Tasers are being embraced by Australian police, international experiences indicate that this move is likely to be problematic. Research and media reports from overseas (especially the United States and Canada) show that stun guns have been used against children, elderly people, pregnant women and individuals who have already been restrained and/or who pose no danger to themselves or others. There are examples from the United States of Tasers being used by police to control protestors and otherwise obtain compliance from people posing no immediate threat to anyone (Pittsburgh Independent Media Center, 2005; Killian, 2007; Bobb, Barge and Naguib, 2007). They are evidently used in contexts where resorting to firearms would be entirely inappropriate, calling into question the

assertion that stun guns save lives. There are examples of police accidentally drawing and firing firearms when they intended to deploy a stun gun, with fatal consequences (see Bier, 2003). 'Childish horseplay' has also resulted in one officer 'tasering' another. A Florida Sheriff's deputy was suspended from duty for twelve days after one such incident (NBC News Channel, 2008). There is even a documented case of an officer being reprimanded after accidentally 'tasering' himself (Author unknown, 2007). Perhaps of most concern is an Amnesty International report concerning some 290 deaths following Taser use in North America alone (Amnesty International, 2007). Some incidents have resulted in legal action against police and also stun gun manufacturer, Taser International, the world's leading supplier of conducted energy weapons to police, including those Australian forces that have adopted the weapon.

'Taser' is a brand name of stun guns - hand held, gun shaped electronic weapons that shoot two needle tipped darts into the skin, trailing a fine wire electrical cable connected to the hand set. The firing range varies from 7 to around 11 metres (depending on the type of cartridge used), delivering an electric shock designed to temporarily paralyse the muscles of the recipient and immediately incapacitate them. The open-circuit (or arcing) voltage of a Taser is 50,000 volts, although Taser argues that the peak voltage delivered to the body is 1200 volts, in five second bursts and the average voltage delivered is 400 volts (Kroll, 2008). Compressed nitrogen is used as the firing mechanism. Stun guns can also be used in 'drive stun mode', in direct contact with skin, causing severe pain but not muscle incapacitation. While the Taser company itself continues to claim that their weapon has never been identified as a cause of death, Amnesty International (and other civil liberties groups) have serious concerns about the validity of this claim, recording over 290 deaths following Taser deployment in Canada and the United States (Amnesty International, 2007). Scientific evidence regarding the capacity of a stun gun's voltage to cause death is cloudy. While some studies have shown that heart rhythms can be affected, many others show the opposite. The majority of the latter are either partially or fully funded by the market leader, TASER International and hence the uncertainty and conjecture that

surrounds the issue. There are most certainly serious difficulties presented to Coroners required to identify Tasers as causes, contributors or correlates in cases where death has occurred (Vilke, n.d.). At present, it would seem that the facts are simply not clear on this matter: this alone is good reason to support a cautionary approach to the general issue of Tasers to police in Australia.

Stun guns, or Tasers, are at the cutting-edge of policing technology and are currently being introduced as general issue weapons for police in several Australian states. The police view on the matter is generally that this technology is invaluable in terms of making the job easier, and safer for officers: allowing them to avoid using other types of force, such as hand to hand combat, baton use and at the far end of the spectrum, lethal force. Of concern to many observers is the range of options within the 'force continuum' that Tasers can replace and their ability to considerably ramp up police reliance on using force. This would perhaps be unproblematic if we were sure that use of force by police was always legitimate, well reasoned and accountable. Sadly, the record shows that it is not. One of the earliest and most influential American police scholars, Jerome Skolnick, noted the problematic outcomes of the combination of danger and authority in policing as follows:

> The combination of danger and authority found in the task of the policeman (sic) unavoidably combine to frustrate procedural regularity...Danger typically yields self-defensive conduct, conduct that must strain to be impulsive because danger arouses fear so easily. Authority under such conditions becomes a resource to reduce perceived threats rather than a series of reflective judgements arrived at calmly...As a result, procedural requirements take on a 'frilly' character, or at least tend to be reduced to a secondary position in the face of circumstances seen as threatening (Skolnick, 1975, p.44).

Such observations are key, as they make clear the reasons why the circumstances of sub-lethal weapon deployment require careful observation. Of particular concern are the circumstances considered as 'dangerous' by police, along with whom and what is being endangered. Where life is at stake, we have a clear reliance on police to prevent a fatal outcome (for police, offenders and especially for bystanders), but where it is merely authority that is endangered, there is a reliance on the agents of accountability (and other observers) to strive towards clear limits on police use of force.

Limiting use of force successfully is far from a simple task, scholars have often argued that we can't even be sure how excessive force ought to be defined (Klockars, 1996; Goldsmith, 2000). Despite this, such limits are crucial, having a clear link to the legitimacy of policing itself. Alienated populations are prone to the rejection of police authority, which may result in a downward spiral in police/public relations, exacerbating issues of law and order rather than ameliorating them. This outcome has concerned police managers from the earliest times. In his examination of policing in Victorian times, Wilson (2006) states "police authorities discouraged overt brutality, primarily because it undermined police legitimacy by shattering the desired image of the constable as a citizen-in-uniform" (p. 57). The potential of modern 'softer' weapons to shatter the cherished Peelite notion of policing by consent is significant, and in the absence of firm accountability processes there is a danger that their use will come to be seen (by both police and some citizens) as essential. The rapid spread of Tasers across the United States, and now Australia, suggests that this is already taking place.

Along with capsicum sprays, Tasers fall under the general term non-lethal weapon (the term used most commonly by the Taser company when marketing their product and also adopted by The United States Department of Defense) although there remains conjecture about the validity of this term, mainly because there is no certainty that such weapons are, in fact non-lethal (Feakin, 2006). Other terms

include 'less-than-lethal', 'disabling', 'incapacitating', 'worse-than-lethal' 'soft-kill', 'pre-lethal', 'paralysing', 'sub-lethal' and 'compliance' weapons (Feakin, 2006; Wright, 2002). The confusion surrounding correct terminology reflects the doubt cast over the notion that these weapons do not cause death. Much of the support for the introduction of Tasers into Australia is based on claims that they will reduce the instance of lethal force, and be used as an alternative to such force. The record so far, however, supports the fact that they will actually be used in addition, as a function of what has been termed 'mission creep' (Lewer and Davison, 2006).

The implications of introducing stun gun technology into Australian policing are the main focus of this discussion. There are several issues of concern including the assertion that such weapons will reduce the need for police to resort to firearms, the growing array of weapons available to police in any given situation (the issues here are both practical and philosophical), the adequacy of police training in using the weapon, the context within which they are used and the socio-demographics of their most frequent targets. It is potentially problematic for police to include Taser technology in their arsenal in the absence of strict accountability processes. History has already shown, especially in Victoria (the main field of this author's observations of policing), that the accountability of police for use of weapons is lacking in several crucial aspects (see Freckelton, 2000). The factors contributing to this are well established: evidence about the circumstances in which weapons are deployed is generally supplied by police, use of force is investigated by police who may be sympathetic towards the point of view of those under investigation and it is difficult to attribute culpability to police when those involved are often amongst the most disempowered (and unhealthy) groups in society. Finally, where death or injury is the result of police actions, the record shows that juries are reluctant to bring down guilty verdicts against police who are seen as only trying to do their jobs in the best way they can. There seems to exist a certain 'moral division of labour' that makes people reluctant to blame police for tasks that we are reluctant to undertake ourselves

(Alexandra, 2000). This not only makes accountability for weapons use problematic, but the notion of 'non-lethal' weapons also becomes especially appealing.

Introducing Tasers

The adoption of Taser stun-guns into Australian state police forces began with their introduction into specialist policing units in all states (Law Institute of Victoria, 2004). Western Australian police led the charge, introducing them to their Tactical Response Unit in 1999 and making them general issue for operational police by early 2007. Assaults on police in that state have reportedly dropped by 40% and no fatalities have yet been directly linked to the weapon, although at least one has occurred following the use of a Taser (Bennet, 2007; Eliot, 2007). The Northern Territory has also adopted stun gun technology; seventy-four Tasers have been introduced, with six in Alice Springs and one in each bush station (Barwick, 2008). Queensland is soon to follow suit, with Tasers having been trialled there (in Brisbane, Logan and the Gold Coast). The QLD Minister for Police recently announced that Tasers will become general issue in June 2008, following the twelve-month trial period (Crime and Misconduct Commission, 2008). This move has been criticised, however, labelled an "apparent impulse decision to satisfy demands for the weapon by the Queensland Police Union" (Meehan, 2008). Police in Queensland have already admitted to investigating a complaint that a handcuffed suspect (held in the Cleveland watchhouse) was repeatedly Tasered after swearing at police (Meehan, 2008). Police in New South Wales are on the verge of introducing the weapons, with the State Government recently approving the introduction of 229 Tasers at a cost of $1 million. It is expected that at least 2000 will be issued across the state (Linnell, 2008). The Victorian government established a working party on the issue on April, 2007 that looks "set to recommend their widespread introduction" (Singer, 2008). At the time of writing, however, no such introduction has yet occurred. Former Western Australian Chief Commissioner of Police, Bob Falconer has recently been quoted in Victorian press (Anderson, 2008), urging the Victorian Commissioner, Christine

Nixon, to stop dragging her feet on the issue and bite the proverbial bullet. In his view, she should "make a decision now and end this procrastination or avoidance" (Anderson, 2008). This was followed by an appeal from the wife of a deceased shooting victim who argues, "there would be more people alive if the police were using the stun guns" (Anderson, 2008).

Commissioner Nixon's cautious approach to the introduction of stun guns is not without merit. Although Falconer believes that the efficacy of Tasers has been well established, Amnesty International and other concerned groups beg to differ. That Coroners (and the marketing arm of Taser International) find it more difficult than Amnesty to see a link between Taser use and fatal outcomes is not the only issue. The contexts in which police resort to using stun guns are also important to consider. Many instances of stun gun use have now been recorded that appear disproportionate to the threat being faced. The use of Tasers in the United States shows they are frequently deployed against people who flee from police after minor offences such as shoplifting and traffic misdemeanours. They have also been used to break up brawls. Of further concern is their increasingly widespread use by prison officers and against those who are otherwise already held in police custody but refusing to comply with police (Meehan, 2008; Wray, 2008). Clearly, Tasers are not always used in place of lethal force, but as a compliance weapon, forcing people to acquiesce to police commands or respect their authority (Pittsburgh Independent Media Center, 2005; Meehan, 2008; Bobb, Barge and Naguib, 2007). While such use may have merit in some circumstances, that peaceful protestors and restrained, non-violent suspects have fallen victim to stun guns raises a separate set of concerns regarding appropriate limits on the use of force by police.

It is not without irony that the United States is leading the Taser charge given its history of striving to protect the individual from arbitrary displays of state power. The highly decentralised structure of policing, a legacy of a highly liberalised political philosophy, has now resulted in Tasers being widespread throughout the policing structure and used against citizens in circumstances not possible under a more centralised structure. For instance, there is much debate on University campuses

about the carriage of stun guns by 'campus police', and one particularly disturbing example of a university student being repeatedly Tasered after refusing to comply with commands to leave a University library (Bobb, Barge and Naguib, 2007). This incident has been subjected to serious criticism regrading the disproportionate nature of the Taser use and gives credence to the abovementioned concerns of Taser and 'mission creep'.

Canadian police have also had a less than smooth experience since the introduction of the weapons in 2001. Following the highly publicised death of a Polish citizen at Vancouver International Airport in November, 2007, an inquiry was launched by the Commission for Public Complaints Against the Royal Canadian Mounted Police which recommended, amongst other things, that Tasers be reclassified from 'intermediate' to 'impact' weapons on the force continuum, that far better record keeping practices be introduced and that quarterly and annual reports be produced to allow open scrutiny of the circumstances of their use (Commission for Public Complaints Against RCMP, 2008).

Too many weapons?

Other practical concerns regarding the introduction of Tasers include where they sit on the force continuum (as compared to capsicum spray, for example) and also the practicalities of carrying them routinely (given that police are already carrying firearms, sidearms, handcuffs, torches and capsicum spray canisters). There have already been examples in the US where officers have mistakenly drawn a firearm and fired when they meant to deploy their Taser. The city of Madera and an officer have filed a suit against Taser International arguing that the company 'provided related training and representations in such a manner so as to cause any reasonable police officer to mistakenly draw and fire a handgun instead of the Taser device.' (Bier, 2003). The victim in this case died from his injuries, although the death was ruled accidental and no charges were laid against the officer herself. In another case, a 25

year old Canadian man is suing police after he was shot when the officer mistakenly drew his gun instead of a Taser as he had intended (Author unknown, 2008). The officer has since resigned. The family of a Canadian man, Robert Bagnell, who died in 2004 after being 'tasered' is also pursuing the matter in the courts, although a Coroner's Inquest found that Taser use had not contributed (Canadian Press, 2006). Bagnell was drug affected and suffering a psychiatric condition at the time of his death.

These cases support a careful approach to the introduction of stun guns and show the dangers inherent in the rhetoric of lethal-force-reduction so often cited by Taser proponents. Media reports about the introduction of Tasers in Victoria suggest that while it is very probable they will find their way into general issue police weapons "it has not yet been decided how they will be carried" (Anderson, 2008). This measured approach is laudable, given the demonstrated potential for officers to make mistakes.

Following from this is the issue of how officers are expected to decide which sub-lethal weapon is most appropriate in a given circumstance. How could a capsicum spray worthy incident be distinguished from one requiring a Taser? Would the introduction of Tasers make capsicum spray use less frequent? The answers are as yet unclear but officers are certainly in an unenviable position when required to choose between a growing array of possible weapon alternatives, when it seems clear that most cases where top-end force is necessary require split second decision making. It may be that there are some compelling operational and tactical reasons why senior police should analyse their options carefully before adding to their officer's arsenals.

Police training

A related issue concerns the nature and extent of police training with regard to sub-lethal weapons. The quality of training can have a real bearing on the behaviour of police under pressure. This was aptly demonstrated during the Victoria Police shootings era (from 1988-94) where overly confrontational training modules (the Firearms Officer Survival Training Unit, borrowed from the FBI) were identified as a significant contributor to the disproportionate number of fatal shootings attributed to Victoria Police officers at that time (see Task Force Victor, 1994). This brings to mind an old and revered adage amongst use of force scholars: to a man with a hammer, everything looks like a nail (Chevigny, 1995). No officer wants to see good training hours go to waste and this mentality has the potential to increase the number of incidents in which Tasers become the weapon of choice, which in turn may increase the risk of injury or death.

As mentioned above, inadequate training is beginning to be identified as the precursor of problems for US police mistakenly drawing firearms instead of Tasers, although the apparent remedy is to insist that the stun guns be made to look and feel less like guns as opposed to a careful consideration of the necessity of such weapons at all. The family in the Bagnell case mentioned above have specifically identified inadequate training in their lawsuit against Taser International, Vancouver Police Department and their Chief along with five individual officers (Canadian Press, 2006). The Bagnell family has accused Taser International of failing to conduct adequate safety testing of its products and of promoting the Taser as non-lethal when it knew, or ought to have known otherwise (Canadian Press, 2006). It remains to be seen how this factor plays out within the Australian context.

Perhaps of more significance is the estimated cost of training police regularly in Taser use. Each Taser cartridge costs around fifteen US dollars, so for a police force of around 10,000 to fire one during training even just once a year would cost $150,000US (Brown, 2008). That comes on top of purchasing and maintaining the weapons. So

although Tasers might be the 'easy' policing option, they are certainly not going to be cheap.

Context of Use

As already mentioned, the fact of 'mission creep' and the nature and context of incidents during which stun guns are used is a key point for scholars to observe as Tasers roll out in Australia. In the absence of accessible record keeping practices by police regarding Taser deployment, it is probably going to be the media and public witnesses to events that will keep us informed about these issues. Reliable record keeping has been a key recommendation in several analyses of Taser deployment, capsicum spray use and also of specific incidents, though we are yet to see the extent to which such recommendations are brought to fruition (see Crime and Misconduct Commission, 2005; Commission for Public Complaints Against the RCMP, 2008).

The Crime and Misconduct Commission in Queensland has already provided clues to the possible outcomes of Taser deployment, finding that 33% of OC spray incidents have involved Indigenous Australians who make up just 3% of the overall population (Crime and Misconduct Commission, 2005). There are also indications from the US that African Americans are the targets of Taser use at higher rates than other racial groups (The Associated Press, 2008). Tasers are marketed as a safer option than capsicum spray and several US policing organizations report a sharp reduction in capsicum spray deployment after the introduction of Tasers. It is reasonable to predict that Tasers in Australia will result in the replication (and amplification) of patterns of over policing already well documented (Cunneen, 2001). Community representatives and health professionals in the Northern Territory are already expressing concern about the likelihood that Aboriginal Australians will potentially have severely adverse health reactions to Taser use due to already poor health standards (Author unknown, 2008b). There are clearly grounds for concern about Tasers as general issue weapons in a country with a history of unequal and

confrontational policing tactics (Cunneen, 2001; McCulloch, 2001). These patterns and methods ought to be acknowledged and corrected rather than ignored and repeated.

Also of concern is the potential for Taser use during incidents involving the mentally ill. There are countless examples in the US media of psychotic and severely drug affected individuals suffering adverse reactions after being 'tasered'. Many of those who have died following sub-lethal weapon use have been drug affected, or have a diagnosed mental illness (Amnesty, 2007). Such individuals sometimes pose a danger to themselves, but not always to others, and so the justification of using a sub-lethal weapon to contain the situation if far from clear-cut. A Melbourne man died after being sprayed with capsicum spray (reportedly to prevent him from stabbing himself) at the time of writing (Author unknown, 2008c). The issue of de-escalation of situations involving mentally-ill people is obscured in current debates about a condition known as 'excited delirium', which although it does not appear in the Diagnostic and Statistical Manual of Mental Disorders, is routinely touted as the actual cause of many deaths that follow stun gun use. This conundrum is the current focus of this author's research and will form the basis of ongoing work. Nonetheless, policing strategies that give due regard to human rights considerations would presumably seek to control critical incidents involving the mentally ill (especially) in ways that strive to avoid fatal outcomes rather than what appears at present to be rather risky tactics involving the deployment of electrical currents.

Potential for Accountability through New Technology

Despite the problems of accountability mentioned above, there are ways in which technological advancement may assist in controlling Taser use by police. A recent legal settlement in Utah, USA involved a man awarded $40,000US after his passive resistance of a Highway Patrol Officer resulted in him being 'tasered' twice (Bergreen, 2008). The video footage taken from the patrol car was posted on YouTube two

months after the event, and has had in excess of 1.7 million hits. An investigation was launched within two weeks of the posting and settlement subsequently reached (Nizza, 2008). The aforementioned Canadian Inquiry was also prompted largely by the posting of phone-camera footage on YouTube by a witness. This indicates the power of a (now enhanced) 'court of public opinion' to bring about previously unseen levels of scrutiny of police behaviour. This gives some hope regarding the public regulation of sub-lethal weapons use.

Another positive is that newer Taser models are potentially easier to regulate, as they are equipped with microchips with the capacity to log the date, time and duration of usage. Such data is regularly relied upon to assess police recall of events when called to account for their actions, though it is not yet clear how reliable or manipulatable this data might be. A further innovation is the 'Taser cam', which is a camera mounted on the Taser battery. It records up to 90 minutes of audio and video once the Taser is turned on, and functions in low light (Dondoneau, 2008). So far, less than ten US city police organizations have adopted the cameras, but as litigation against police increases their use may rise. While might help ensure that police remain accountable for their use of stun guns, they have not been adopted by the majority of Australian police using Tasers (with the exception of NSW). Budgetary constraints may well be responsible for this as the cost of the enhanced model is greater. While this might explain why they have not been embraced, it is also reveals something about the emphasis placed on accountability for use of force across jurisdictions. Police Chief Boisse Correa of Honolulu (where Tasers with cameras have recently been adopted) has been quoted as saying, "It's costly, but it's worth it" (Dondoneau, 2008). Perhaps, once a potential for abuse or misuse has been established, the enhanced models may become the preferred option. If Tasers are to be broadly embraced, this would be a welcome step.

There are clear grounds for concern about sub-lethal weapon use in Australia. In this brief comment I have been able to present only the tip of the iceberg and it is likely to

be the case that the ensuing decade will bring more deaths in custody, as a result of the over-policing of certain groups and the broadening of the capacity of police to restrain citizens through use of force. Though many police and their union representatives might be enthusiastic about the introduction of Tasers, other observers are well founded in their cautionary approach. It would be far better for police to wait for definitive data on this issue than to rush in blindly, only to regret being held to account later. Tasers are certainly yet to earn their stripes before being accepted 'non-lethal' and suggestions that their introduction is supported by an ability to reduce deaths and injuries at the hands of police should certainly be regarded with caution. It seems reasonable to predict that it will be the manner of their use rather than the simple fact that will raise problems in the future.

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Prisoners, Work and Reciprocal Reintegration

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Introduction

On March 20, 2006 the Category 5 Cyclone Larry ravaged the Innisfail and surrounding Atherton Tablelands townships in Far North Queensland. Property and agricultural crop destruction was widespread. Within a day, the army, police and emergency services were on the ground. Not long after, prisoners from Capricornia, Darling Downs, Lotus Glen and Townsville correctional centres were also in the area to assist with the vital clean-up efforts.

Learning from the experience of these prisoners, this paper discusses the positive possibilities for rehabilitation and reintegration into communities that stem from prisoners engaging in work that is meaningful to them and of importance to communities. The focus of this paper is prisoners, work and social obligation, and the ways in which these intertwine. We want to argue that given the socio-economic background of most prisoners, there are associated social obligations for society to address this disadvantage. Secondly, we assert that there are individual and social benefits from 'doing something' and doing something positive as a prisoner. Thirdly, we point to the challenge of working with offenders in ways that allow offenders to

work, and thereby to contribute to personal growth and community building. Overall, our arguments centre on reciprocal reintegration strategies between corrections and local communities – benefitting both prisoners' and community wellbeing.

The paper begins by briefly considering the socio-economic circumstances of the vast majority of offenders, and the various roles of the prison in relation to these groups. This is followed by consideration of the nature and possibilities of prisoner work. The paper concludes with a brief survey of new developments in rehabilitation and where ,and how, prisoner labour might fit into 'planning for freedom'. We mean here the release of prisoners from the shackles of the disciplinary regime of the prison (see Foucault, 1995). Fundamentally, we argue that reintegration of prisoners is a reciprocal process, involving both society (largely through local communities) and prisoners giving to others in a constructive and active fashion.

Socio-economic Status, Offending and Imprisonment

There is considerable evidence of a strong link between socio-economic status and street crime (see for example, Vinson, 2004; Michalowski & Carlson, 1999; Fajnzylber, Lederman & Loayza, 2002). Offending behaviour on the part of working class offenders is shaped by a series of interrelated factors (White, 2008). These include:

- *structural factors* such as the overall state of the economy, levels of unemployment generally, welfare provision and so on, and how the dynamics of the labour market are reflected in the 'warehousing' capacities of the prison;

- *situational factors* relating to the personal characteristics of offenders relative to their opportunities in the competition for jobs, and how marginalisation and the attractions of the criminal economy contribute to offending; and

- *factors relating to social disorganisation*, as manifest at family and community levels, as for example when the intergenerational effects of the unemployment-criminality nexus translates into less knowledge about ordinary work and concentrations of similarly disadvantaged people in the same geographical area.

These factors converge into various clusters of need and behavioural patterns, which can include entrenched dependency on the state, on the prison and on drugs/alcohol misuse. Consider, for example, the relationship between involvement in drugs and engagement in criminal and anti-social behaviour. We know that illicit drug use is high amongst police detainees. Table 1 provides some indication of which comes first, by gender, when it comes to other kinds of offending and/or drug use.

Table 1:

Sequence of Drug Use among Offenders

	Male	*Female*
Offending First	54%	34%
Concurrent	29%	31%
Drug Use First	17%	35%

[Source: AIC, Crime Facts No.90, 1 February 2005]

Basically, Table 1 indicates that drug habits may be linked to crimes designed to gain money for drugs; or engagement in crime may lead to increased substance use; or that those who take drugs and those who engage in crime have common characteristics.

A second and crucial issue, especially for criminal justice officials such as the police, is that the effects of drugs, legal (e.g., alcohol) and illegal (e.g. 'ice'), may reduce inhibitions and so increase risk-taking behaviour, especially violence. This can involve behaviours such as verbal abuse, creating a public disturbance, stealing or damaging property, and physical abuse. Indeed, the recently formed National Alliance Against Alcohol Related Violence estimates that 1 in 5 people are affected by alcohol related violence alone in 2008.

The nature of the clientele themselves illustrates the complexity of issues, and the strong association between social disadvantage and offending behaviour. Data collected about police detainees, for example, illustrate this point. Tables 2 and 3 indicate the rather huge problem of co-morbidity among those presenting to the criminal justice system. For instance, psychiatric wellbeing is intertwined with drug use, and these in turn are linked to issues of accommodation and income.

Table 2:
Police Detainees
1999 – 2006

	Homeless	*Non-Homeless*
Illicit Dependent	53%	36%
Alcohol Dependent	19%	12%
Psychiatric	31%	15%
Income (welfare)	84%	63%
Income (illegal)	38%	20%

[Source: AIC, Crime Facts No.168, 15 April 2008]

Table 3:
Psychological Distress & Alcohol/Drug Dependency among Police Detainees

Psych Stress	*Alcohol*	*Drugs*	*Both*
Low	14%	12%	10%
Moderate	18%	19%	17%
High	27%	29%	28%
Very High	41%	41%	45%

[Source: AIC, Crime Facts No.102, 19 July 2005]

In a nutshell, the issues arising from the drugs/crime nexus include the fact that poly drug use is prevalent among those most deeply embedded in the criminal justice system. The extent and nature of drug use is profoundly socially patterned, with the most public and harmful uses associated with low socio-economic background and those with few social resources. Again, it needs to be emphasised that harmful and problem drug use is intrinsically tied into issues of co-morbidity – that is, the overlapping problems of homelessness, abuse, family difficulties, mental illness and deteriorating physical health. This means that any prisoner program must be oriented toward provision of societal resources for offenders, as well as what prisoners can do to help themselves. We shall return to these considerations in the concluding section of the paper.

While specific issues and clusters of need are increasingly being responded to via various forms of 'diversion' (not from the system, but to alternative programs within it) and 'therapeutic jurisprudence' (where the law itself functions as therapist to address underlying problems), the prison continues to be an institution that is holding an increasing number of these offenders (Australian Bureau of Statistics, 2008). This

tendency toward use of incarceration is widespread throughout the world (Walmsley, 2007).

The Prison and Prison Labour

Depending upon the jurisdiction, the prison is either used as a 'warehouse' or a 'workhouse'. In the first instance, the prison simply acts as a container for society's presumed enemies. These reputed 'enemies' are various but the vast majority of inmates in our prisons are victims of, superfluous to or represent threats to the nation's economy (Irwin, 2007). The warehouse model, as evidenced by 'super max' facilities in the United States, pay little to no attention to work as a status enhancement approach for prisoner rehabilitation and reintegration.

Stories about the prison are usually bad news. Prison is about incapacitation – a place to put 'bad' or unproductive people. Prisons are also places to put bad and unproductive people to work. As a workhouse, the function of the prison is to deal with people who have not been engaged in 'legitimate' work prior to imprisonment. In this instance, prisoners are sometimes forced to undertake work in a regime designed to instil discipline in time and place terms (see Foucault, 1995). In this sense, prison labour itself is basically a repressive mechanism of control and punishment. The warehouse that is a workhouse can be a place of pain. The punitive nature of incarceration is part and parcel of the mandate of the prison to punish and constrain.

To us, the chain gang mentality of some US prison schemes is about stripping human dignity and using demeaning work as a means of humiliation. Work, in this context, is integral to punishment (rather than to rehabilitation or reparation) and is intended to inflict pain of some sort (both emotional and physical). Demeaning work is also symptomatic of a lack of innovation on the part of corrective services in forming partnerships with external organizations that might provide more innovative prison

industries. It is a punitive, vicious and lazy response to complex and entrenched social problems.

While less punitive, other types of prison work often involve work teams undertaking negative work, such as menial work, dirty work and work that nobody else wants to do. Ironically, such work frequently mirrors the work experiences and employment prospects of prisoners when they are on the outside. Even these kinds of work can be of advantage to prisoners, however, with many jurisdictions in the U.S. exchanging 'good time' work credits to ease off sentence time.

Such large questions about the use or value of prisoner work are evident in Australia (White, 1999). While much work assignments could be considered to be of a negative kind, there are other types of work, arguably of a more constructive type, including:

- construction of walking trails;
- construction of children's playgrounds and public bridges;
- vegetable harvesting;
- painting and undertaking minor repairs to an aged care facility;
- the maintenance of cemeteries and public parks;
- restoration of railway tracks; and
- removal of graffiti

In 1985, for example, prisoners from Risdon Prison in Tasmania supplied meals-on-wheels to pensioners, and constructed outdoor settings for children (Evans, 2004: 71). In 2008, the Department of Corrective Services in Western Australia celebrated the 10th anniversary of work camps in that state (WA Department of Corrective Services, 2008). The express purpose of the work camps is to foster reparation and rehabilitation, 'providing prisoners with the opportunity to get involved in meaningful work in a community environment, repay a debt to society, develop vocational and personal skills, and for those prisoners nearing the end of their sentence, increase

their chances of making a successful transition from prison to the community on release' (WA Department of Corrective Services, 2008: 13).

The role and place of work is, we would argue, a central question when it comes to consideration of issues such as community reintegration and rehabilitation. Are the above mentioned types of work a step in the right direction? Yes, we believe so, in that they represent ways in which communities can be improved and offer the potential for the enrichment of prisoners' lives. However, we need to go further in critical thinking about the reciprocity of interactions with prisoners and local communities in ways that enrich both. This is an essential element of being prepared to be free from the prison.

Prisoner Work

There are several arguments that support the provision of positive forms of work for prisoners. For example, it can reduce violence by addressing boredom and idleness. It can provide an opportunity to develop work skills, work habits, self esteem and preparation for community reintegration. For the taxpayer, it can provide benefits such as reducing the costs of incarceration, be used to help to support prisoner families and contribute to state taxation revenues depending upon the nature of the work. There are nevertheless important institutional issues associated with prison labour, such as workers compensation claims; calls for increased wages, statutory rights under labour laws and enhancement of public safety working conditions; and lack of equipment and operation of equipment. And, of course, the potential exploitation of an unskilled pool of prisoners is a perennial issue of concern to be watched (see Coventry and Westerhuis, 2009; White, 1999 for further details).

We view work as an essential part of preparation for freedom. Almost all prisoners are released from custody at some time. Many do not fare well in the early phases of their re-entry into various communities. Most are at some stage re-arrested, tried and sent

back into custody. Recidivism is very high amongst our prison population (Productivity Commission, 2007; Callan & Gardiner, 2007).

In light of this, we argue that there are benefits for prisoners to be 'doing something' constructive and positive, and for prisoners to be exercising active agency, *before* they are released from prison. We see this as important to the human condition generally, that includes things such as a sense of belonging, a sense of meaning, a sense of competence, a sense of usefulness, a sense of psychological security, a sense of financial security and a sense of the future (see Polk and Kobrin, 1972, for an earlier discussion of such quality of life principles).

In specific criminal justice terms, work can be viewed as serving three important social goals:

Reintegration

- Preparation for release by establishing social/family bonds
- Lower rates of recidivism, especially for low-risk prisoners on placement

Humanitarianism

- Work release may soften the incarceration 'experience'
- Allows prisoners to gain some attachment to society

Expanding Opportunities

- Opportunities for excitement- the thrill of discovery
- Opportunities for creativity- the thrill of invention

Positive work can provide inmates with an important sense of 'normality', self-esteem, and pride in a job well done.

In an examination of the role that prisoners played in responding to Cyclone Larry, it was found that, in fact, cyclone work works (see Coventry and Westerhuis, 2009). The

prisoners who volunteered to participate in the extended clean-up phase following the cyclone worked hard at their tasks. Who did what is interesting:

- 35 prisoners (almost 70% Indigenous) from Townsville Correctional Centre attended camps at Malanda and Innisfail;
- as of early May 2006, 1500 person work hours were undertaken by these prisoner;
- participation was voluntary and was restricted to those serving the tail end of their sentences at the prison farm of Townsville Correctional Centre;
- some prisoners were deemed to be ineligible (e.g. sex offenders, violent offenders);
- prisoners worked 6 hour days, 6-7 days per week;
- 40-50 (approx) farmers' properties were attended; and
- work included pulling down sheds, removing trees off fence lines, cutting trees, stacking roofing tin and repairing fences.

Many of the prisoners were interviewed about their experiences (Coventry and Westerhuis, 2009). Typical of the responses were the following:

- *We [prisoners] get little praise, like those on the Good Morning Shows[sic] flying them up here… but we CHOSE to come out and work'* (Prisoner 1)
- '[the farmers] *treat us like normal human beings'* (Prisoner 3)

- *'giving them a hand, feeling good'* (Prisoner 5)

- *'didn't treat us like prisoners'* (Prisoner 4)

- *'By going out we are paying back, not just the taxpayers … we don't do it shoddy'* (Prisoner 5)

- *'At Innisfail, they had a lot of pride, they bust their guts. You don't need to do that while you are in jail'* (Prisoner 4)

- [the work program] *helps reintegration into the community, and makes jail time easier'* (Prisoner 5)

Such positive responses from prisoners themselves reaffirm for us the importance of work to the re-entry process upon prison release. Coventry and Westerhuis (2009) tap into the emotional side of the reintegrative/rehabilitative process, consistent with notions about the quality of life required by all, not just prisoners re-entering communities. This relatively small group (almost all of whom have since been released) were proud of their work, felt strongly that they positively contributed to an area in crisis after a natural disaster and developed a sense of belonging with the Atherton Tablelands. For dairy farmers, their work thwarted the loss of herds to mastitis and the ensuing financial devastation of such herd losses. For prisoners, the experiences opened the door to the outside world and how they might connect to it. Working in the Cyclone Larry clean-up was about the exertion of labour power, some skill development and the opportunity to play a constructive and meaningful role in contributing to the community – no trite outcomes.

Rehabilitation and Re-entry

The 'rehabilitation' agenda is now being revisited in a variety of new frameworks that frequently share similar intervention principles. This is evident at a theoretical and therapeutic level by those who stress positive rather than negative interventions – preparation for freedom, good lives, social recognition, restorative justice. It is also demonstrated at a political level by those concerned with the sheer number of people re-entering the mainstream and the reality of recidivism – system contradictions and the financial and social costs of repression. How to stop people from re-offending is becoming increasingly important.

Dealing with clients with manifest and diverse clusters of needs is certainly challenging to all concerned. Many within the criminal justice and allied fields would be familiar with the Risk-Needs-Responsivity Model of intervention (Bonta & Andrews, 2007). The RNR Model consists of three key components:

- The need principle: the assumption is that the most effective and ethical approach to the treatment of offenders is to target dynamic risk factors.
- The risk principle: the assumption that the treatment of offenders ought to be organised according to the level of risk they pose to society – the higher the level of risk the greater the dosage or intensity of treatment should be.
- The responsivity principle: the assumption that we match the delivery of correctional interventions to certain characteristics of participations, such as motivation, learning style and ethnic identity.

However, the RNR Model is insufficient to really tackle the core issues of rehabilitation. Supplementary work has thus attempted to build upon it and to add further elements to what constitutes good practice in rehabilitation.

From within the sphere of criminology and criminal justice, the rejuvenation of 'traditional' concepts such as restoration, reparation, rehabilitation and recognition has major implications for how practitioners and theorists respond to issues relating to punishment, treatment and general responses to offending and offenders.

For instance, it is important to acknowledge the dynamic interplay of structure and agency – of how personal choices and personal values are made and experienced within the confines of certain external material constraints. Social intervention has to address those internal and external factors that impinge upon people's sense of self and their place in the world. By focusing on self-empowerment and self-determination through capacity development, models of intervention based upon the notion of positive strengths operate on the assumption that increases in the positives will naturally result in decreases in the negatives, for example, desistance from offending. This new 'old' thinking about rehabilitation and reintegration is premised upon a high degree of client participation, client choices and client engagement. It also highlights the essential need for collaboration and for a constellation of services across the board for diverse interventions.

Snapshots of recent thinking vis-à-vis rehabilitation and reintegration within criminal justice include:

The Good Lives Model

All human beings are naturally inclined to seek certain types of experience or human good, and they experience high levels of well-being if these goods are obtained. Offenders are essentially human beings with similar needs and aspirations to non-offending members of the community. Criminal actions are thought to arise when individuals lack the internal and external resources to attain their goals in a pro-social way. The GLM is an approach based on the pursuit of a better life, ways of living that are constructed around core values, and concrete means of realising their goals in

certain environments (Ward & Maruna, 2007). In order for individuals to desist from offending they should be given the knowledge, skills, opportunities and resources to live a 'good' life, which takes into account their particular preferences, interests and values. In short, treatment should provide them with a chance to be better people with better lives.

The Social Recognition Approach

Social recognition is vital for young people to gain a sense of achievement and social belonging as they move through the childhood and teenage years (Barry, 2006). The family of origin and one's local community provides the platform upon which capital accumulation grows and develops. In other words, resources and recognition of varying kinds stem in the first instance from what the family and friends can provide. Issues of poverty, unemployment, lack of income, homelessness and so on are relevant here. But it is the expenditure of accumulated capital that brings the rewards of individual gratification and social stability. Examples of this include such things as making your own decisions, buying your own clothes, engaging in volunteer work, and generally encouraging and helping others. Social recognition and self esteem, generally, are built through expenditure of capital (doing something for oneself and for someone else).

Restorative Justice

In many cases of restorative justice, there is an emphasis on active agency (Cunneen & White, 2007). This refers to the idea that people are to be held directly accountable in some way, and that they are meant to do things, themselves, rather than simply being passive actors in the criminal justice system. Importantly, when they engage in doing something (e.g., painting a fence), this is generally constructed as being to the benefit of somebody else (e.g., a victim of graffiti). Restorative justice thus involves acts of giving (on the part of the offender), as well as acts of forgiving (on the part of

victims). The offending act may be condemned, and respect for the offender maintained, but offenders are nonetheless expected to repair the harms they have caused.

Toward Reciprocal Reintegration

While some of the more recent rehabilitation and reintegration approaches emphasise the active agency of prisoners in the re-entry process, the nature of offending and its social circumstances demands a framework that provides for *reciprocal reintegration*. In other words, community-level intervention is required to address the structural underpinnings of much street crime and anti-social behaviour. For example, the penalties of social exclusion include having to deal with social stigma and economic marginalisation, both of which demand material and symbolic rectification as part of the processes of social justice.

While offenders are in many cases not *socially responsible* for their actions, they nevertheless bear a *moral responsibility* for the harms they cause. This **duality of responsibility** has certain practical implications.

First, it means that *offender rehabilitation is a societal imperative*, given the personal background and social disadvantages of most street or working class offenders. As such, rehabilitation demands that significant community resources be put into changing the life circumstances and social opportunities of offenders. Society has to give something to the offender in order for that individual to move beyond offending.

Secondly, responsibility of a moral kind requires that *individual offenders should have an interest in making things right, in repairing the harm, in addressing the wrongs which they have perpetrated*. Rehabilitation in this context thus demands something from the offender themselves, as well as from those in the community around them. The

offender has to give something to society – to someone else – if redemption and the creation of a new life are to be possible.

Contemporary discussions of rehabilitation, desistance and restoration are construed as being mainly about capacity building rather than personal deficits. The point of intervention is to achieve a result whereby the offender will be seen as a community asset rather than a liability:

> The capacity or capability aspect of rehabilitation directly involves providing individuals with the internal and external conditions necessary to attain valued outcomes in ways that match their abilities, preferences and environments. Internal conditions refer to psychological characteristics such as skills, beliefs and attitudes, while external conditions refer to social resources, opportunities and supports (Ward & Maruna, 2007: 174).

Hence the goal of intervention within these frameworks is to display the talents and skills of the offender in a useful and visible role, allowing the person to exercise a greater degree of individual agency.

The 'social recognition' theory, the 'good lives' perspective, and the 'restorative justice' approach all acknowledge the dynamic interplay of structure and agency – of how personal choices and personal values are made and experienced within the confines of certain external material constraints. For young people especially, social intervention based upon these approaches has to take seriously the narrative accounts of the juvenile offenders themselves. They also have to address those internal and external factors that impinge upon young people's sense of self and their place in the world.

By focusing on self-empowerment and self-determination through capacity development, models of intervention based upon the notion of positive strengths

operate on the assumption that increases in the positives will naturally result in decreases in the negatives, for example, desistance from offending. We would argue that opportunities to give, and in some cases actually learning to give, is an important step in offender rehabilitation. This requires development of spaces in which this might occur – as in the case, for example, of prison education mentor schemes, or volunteer work brigades that assist with disaster relief efforts (such as responding to cyclone damage in far north Queensland).

The challenge, therefore, is to acknowledge that institutional supports are needed for working with offenders in ways that allow them to work and thereby to contribute to society. **Reciprocal reintegration** means that the giving has to be on both sides of the offender-community relationship. We need to reconfigure prison work as an opportunity to 'be' someone of worth and value. That work should also bear some relation to the task of community building. In this way we extend the minimal value of the workhouse from the granting of good time for negative work to a reconceptualised and integrated correctional approach, whereby successful reintegration is couched in terms of opportunities for important work that develops skills to counter workforce marginalisation, enriched personal identity, enhanced quality of life, positive forms of community belonging and interactive engagement – a status enhancement approach to prison labour. Such an approach would emphasise expansion of opportunities and humanitarian values of social justice.

For instance, disaster relief has demonstrable benefits for offenders and communities alike. The bigger question, however, is how to link the prison work agenda to that of community building as such, and not solely as disaster relief. We might ask, for example, can 'disaster relief' be re-defined to include institutional efforts to overcome social disadvantage? Unemployment, poverty and declining opportunities continue to directly affect the physical and psychological well-being of people in our communities. Such social problems are entrenched at a spatial level, and are increasingly concentrated in specific locations within our cities. This is sometimes

referred to as a process of *ghettoisation.* The social costs of marginality are inevitably translated into the economic costs of crime. Disastrous lives and living conditions equally demands relief. Community building and physical rejuvenation of neighbourhoods is a social task that likewise can be addressed through innovative social planning and creative offender programs.

Many jurisdictions, for example, now demand some kind of involvement in restitution, reparation or restorative justice activities, both while an offender is in prison and while they are on leave from prison or on parole. Where appropriate, and where suitable, human and material resources have been put into place, such mechanisms can be usefully applied in relation to pre-release programs and strategies.

Practical examples of how community corrections can be imbued with a restorative ethic at a concrete level are still relatively few and far between, although this is changing in some jurisdictions. The usual emphasis in community corrections work is what can be done to better supervise the offender, or what can be done to assist them to make the transition towards being a law-abiding citizen (see for example, Nelson & Trone, 2000). Restorative justice inverts this relationship by making the offender an active contributor and participant. Thus, in the UK, 'Offenders in some programs carry out work for their own communities, which can help give the offenders a sense of social responsibility and an experience of social acceptance and recognition' (Marshall, 1999: 14). Seymour (2001) cites examples in the USA where the concept of 'restorative community service' has taken hold. Relevant community work has included such things as youthful offenders escorting Alzheimer's patients from a local retirement centre and their families for a day at the State Fair, through to a licensed pharmacist who was convicted of forging drug documents performing 500 hours of community service at the free clinic in the neighbourhood in which he had sold drugs.

Importantly, community service, as such, should not to be equated with restorative justice. Walgrave (1999) discusses how in some judicial settings, authorities use community service as a punishment (i.e., intended to inflict pain), while in other settings it is informed by a rehabilitative objective (as manifest in various forms of re-education and treatment). In contrast to these approaches, he argues that 'community service can also be used in a restorative sense, if it is meant to compensate for harm, restore peace in the community and contribute to safety feelings in society....Attention will now be turned to the harm and the restoration of it, including the reintegration of the offender, as this is an important item in restoring peace in the community' (Walgrave, 1999: 140). This type of community service demands a clear appreciation of the philosophical foundations of restorative justice, and how community corrections workers can achieve the potentials such a philosophy appears to offer.

A principled approach to planning for freedom demands certain practical safeguards, to protect the interests of offenders, victims and the wider community. This means addressing those bureaucratic, legal and political obstacles that need to be overcome for positive work experiences (e.g., work tickets, a range of correctional guidelines, restrictions on types of offenders, regulatory authorities, ACTU stances, ILO conventions etc). We also have to ensure that under no circumstances should prison work slide into exploitation or a new form of slavery. Opportunities to give on the part of offenders must be matched by opportunities to give on the part of correctional authorities and the wider community.

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Researching CCTV: Security Networks and the Transformation of Public Space

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This paper charts some of the directions that have emerged in the study of CCTV in the past decade, both within Australia and internationally. In doing so, my intention is to suggest an agenda for future research that will take account of this important development in security and develop a more sophisticated account that moves beyond either the instrumental 'what works?' paradigm or simplistically critical accounts engaging variants of the 'big brother' critique. Initially I wish to sketch some recent developments in the political context of CCTV, both internationally and within Australia, that I believe mark this as a topic of considerable interest to criminologists. I will then provide a critical account of some of the dominant explanatory frameworks that have been engaged to date in the study of CCTV. In doing so, the intention is to highlight a significant lacuna within Australian criminology. I suggest that our knowledge of how CCTV operates, and its broader social implications, are at present poorly understood. What is required is a research model that positions CCTV within a broader theoretical framework, while being sensitive to the importance of local organizational contexts and the ambiguities of surveillance. Critical scholars need to examine what the rise of visual surveillance may presage for experiences of citizenship and inclusion; how these experiences of surveillance are mediated by the specific local and national conditions encountered in Australia, and what the specific outcomes of visual surveillance are in differing contexts.

The Rise and Rise of CCTV

The growth of CCTV in Australian public spaces mirrors broader global trends. The most wide spread diffusion of such CCTV is in the UK. In 1999 it was estimated 530 town centre public surveillance schemes were operating or scheduled for establishment across the United Kingdom for which funding had been allocated. British government support for CCTV has not declined under the Blair Labour government, and new funding challenges with £50 million available in 2000 and £103 million in two future rounds were announced in 1999 (Williams et al 2000: 170). McCahill and Norris (2003) estimated on the basis of one London borough that there may be as many as 4.2 million cameras in the UK or 1 for every 14 of the population. In Europe there is also a notable diffusion of CCTV in public areas, although less uniform and pervasive than in the UK. The EU funded Urbaneye project documented the deployment of CCTV across Europe. Some nations, such as Austria and Denmark, were found to have no public space CCTV systems. Other nations, however, such as France, Hungary and Ireland were mirroring the British experience more closely (Norris et al, 2004; Urbaneye 2004; Hempfel & Töpfer 2002).

The particular political context of Britain, notably the abundant funding provided by the UK Home Office, has facilitated the expansion of CCTV in that country. However there are indications that in the wake of 9/11 many other nations are following similar patterns. The use of CCTV in the US has undergone a noticeable surge since 9/11 (Nieto et al, 2002). Likewise CCTV systems in public areas are documented in New Zealand, South Africa, China, Japan, Israel, Iran, Russia, the Czech Republic, India and Pakistan (Norris et al 2004). There is therefore an accelerating trend towards deploying CCTV in public spaces. This may be attributed to global trends in late modern societies. Increasing urbanization has exacerbated the anonymous nature of contemporary cities and towns, leading to concerns over how identity is to be established and verified (Norris and Armstrong 1999). The increasing centrality of risk management paradigms (O'Malley 2004), both within governments and corporations,

is accompanied by 'actuarial' practices in criminal justice such as 'opportunity reduction' and 'situational prevention' of which CCTV is a notable example.

The Politics of Australian CCTV

While Australia mirrors global trends in the deployment of CCTV, it is crucial that the local context of this global trend be critically assessed. David Lyon (2004) has noted that while surveillance techniques are increasingly globalized, local and regional social, political and cultural contexts mediate the experience of surveillance in different ways. An initial question of interest was why the expansion of CCTV in Australia was initially relatively modest – at least in comparison to its diffusion in the UK. Australia's first public area or 'open-street' CCTV system began operation in Perth in 1991. Open-street surveillance systems have subsequently expanded to cover public spaces in the capital centres of Adelaide, Hobart, Sydney, Brisbane and Melbourne and many regional locations. At the end of 2002 Australia had 33 schemes (Wilson and Sutton, 2003; 2004), which, while not insignificant, demonstrated a considerably more restrained roll out than the UK. Adam Sutton and myself have argued elsewhere (Sutton & Wilson 2004) that this was largely attributable to CCTV in Australia being funded at the local government level. A consequence of this was that CCTV was often strongly contested, mainly due its symbolic freight as a 'tough' security measure, viewed to be some to be invested in to the detriment of more inclusive programs of social crime prevention. In local councils where there was a strong dedication to social justice amongst those responsible for crime prevention, CCTV thus came to epitomize a narrow, socially exclusive 'law and order' vision of local crime control. We also warned, however, that the increasing distribution of funding from state and federal government could tip the balance of these vigorous local debates strongly in favour of the advocates of CCTV (Sutton & Wilson 2004).

This prediction has subsequently transpired. Prior to 2005 state governments had already become more deeply involved in the funding of CCTV through a range of

crime prevention funding schemes (Wilson & Sutton 2004: 215). Research conducted in 2005 indicated considerable expansion, with nearly 66 schemes reported around Australia (IBIS Research, 2005) doubling the number of systems that had existed in 2002 (Wilson & Sutton 2003). Following the London bombings enthusiasm for the installation of CCTV in Australian public spaces has accelerated. Federal political enthusiasm for CCTV intensified in 2005 following the return of then Prime Minister John Howard from a visit to the UK proclaiming 'the extraordinary value of surveillance cameras'. Such surveillance boosterism was echoed by other members of the Liberal Government Cabinet, with Alexander Downer, then Foreign Minister, claiming that CCTV had 'clearly proved to be very effective' (an assumption based only on the fact that surveillance cameras are widely used) (Humphries 2005, July 25). Subsequently substantial were funds were allocated towards the installation of CCTV in local communities. On 30 September 2005 then Prime Minister John Howard announced an additional $6 million of funding through the National Community Crime Prevention Programme administered by the Federal Attorney General's Department, under the special heading 'Funding for Security Related Infrastructure Including Closed Circuit Television Systems' (AGD, 6 October 2006). The Attorney General's Department also prepared a 'tip sheet' on CCTV, which pointedly failed to mention the ambiguous findings of existing evaluations (AGD, 2006). Enthusiasm – and funding – for CCTV is being continued by the Rudd Labour Government, with Minister for Home Affairs Bob Debus announcing $5.9 million allocated under the Safer Suburbs Plan for 'important community safety measures like CCTV' (Debus 2008, 26 May). These developments indicate that the diffusion of CCTV will continue apace in the near future. It is therefore imperative that Australian criminologists develop theoretical frameworks and a research agenda to explain how and why visual surveillance is being deployed, and what the implications of this deployment are.

Explaining CCTV

CCTV research is most developed in the UK, understandably given the rapid expansion of the technology there. However the scholarship remains sharply bifurcated between administrative accounts - what Garland terms the 'criminologies of everyday life' (2001: 127-131) - and critical accounts which situate CCTV within larger contexts of power, neo-liberal crime-control and spatial ordering. Criminological literature on public CCTV was initially concerned with the basic question of whether CCTV led to a reduction in offending. Nevertheless, overviews of CCTV evaluations (Phillips 1999; Welsh & Farrington 2002) confirm that, despite considerable research energy expended in this direction, results continue to be ambiguous. Quantitative and evaluative studies of CCTV 'effectiveness' continue to attract the attention of governments and some scholars (Farrington & Painter 2003; Welsh & Farrington 2004). Nevertheless, their narrowly technical focus renders these studies of little explanatory value for criminologists concerned with the broader social and cultural ramifications of CCTV.

It is critical accounts that have offered far more in terms of explanatory frameworks. However, as Norris & McCahill note, these have tended to be 'conducted at a very high level of abstraction' (2006: 98). One of the central images engaged in discussions of CCTV has been that of the Panopticon, drawing upon Jeremy Bentham's 18th century vision of an architecture where the promise of observation was as important as observation itself. For Foucault (1977) the Panopticon was a model for new configurations of discipline and power that reshaped individual subjectivities through inculcating a belief in the unbridled surveillance capacity of the state (Norris & Wilson 2006). Equally as influential, though less frequently directly cited in the academic literature, has been the metaphor of 'Big Brother' taken from the fictional totalitarian regime created by George Orwell in his novel *Nineteen Eighty Four*. Orwell's dystopian vision, in which telescreens continually monitor all activities, has had a strong influence on surveillance theory, particular in raising spectres of a 'total surveillance society' (Norris & Wilson 2006).

The Panopticon metaphor has proven particularly influential in the study of CCTV, with authors such as Reeve (1998) and Fyfe, Bannister & Kearns (1998) seeing in CCTV the dispersal of an 'electronic panopticon' across urban space. The panopticon metaphor is viewed as especially apt, as it is not possible to know whether or not one is being monitored by CCTV, facilitating 'anticipatory conformity' (Norris & Armstrong 1998: 5). As Norris & McCahill (2006) note however, other theorists view the emergence of new surveillance technologies as presaging novel forms of social control that move beyond the disciplinary power outlined by Foucault (1977). Some writers maintain that surveillance has moved from the observation of individuals whose identities are already known, towards a more generalized gaze across space, temporality and categories of persons (Marx 2002; Lyon 2002). CCTV is thus emblematic of a broader paradigm shift in crime control, identified by Feeley and Simon (1994) as the transition from the 'old penology' (in which the individual was identified for the purposes of assigning guilt and blame, and then imposing punishment and treatment) to the 'new penology' (concerned with identifying and managing groups classified by levels of 'dangerousness) (Feeley & Simon 1994; McCahill & Norris 2002; Norris & McCahill 2006). CCTV has also been theorized as being emblematic (if not constitutive) of an emerging 'pre-crime society' (Zedner 2007) in which actions are taken against potential criminal acts before they occur (Boyne 2000; Lianos & Douglas 2000).

There have also been useful critiques of the political context of CCTV. Williams and Johnston (2000), Norris and Armstrong (1998; 1999), Coleman & Sim (2000), Coleman (2004) and Fussey (2004) situate CCTV within a broader political milieu where the impetus for CCTV is underpinned by the rise of 'law and order' politics and neo-liberal urban economies. Mackay (2003) and Sutton and Wilson (2004) also note the importance of local political frameworks in the installation and deployment of CCTV. A further strand of critical scholarship has positioned CCTV more generally as an aspect of the rise of the 'consumer city' and the reconfiguration of public space for the purposes of mass consumption (Bannister et al 1998; Fyfe & Bannister 1996). Drawing

upon Davis's (1990) influential thesis on the urban fortification of Los Angeles, numerous scholars have suggested that CCTV contributes towards the commodification of public space, the erasure of social difference and the stigmatisation and exclusion of those Bauman termed 'flawed consumers' (1997: 14). That the gaze of visual surveillance falls unevenly and is mediated through the categories of race, gender and age is now well documented through detailed studies of CCTV operation in particular locations (Norris & Armstrong 1999a; Lomell 2004; Coleman 2004). As Norris & Armstrong (1999b) found 'male youths, particularly if black or stereotypically associated with the underclass, represent the fodder of CCTV systems' (172). Therefore the argument that CCTV has the potential to amplify existing patterns of discriminatory police practice and exacerbate social exclusion is convincing.

The Ambiguities of Surveillance

While critical accounts of CCTV raise important questions and possibilities worthy of exploration, they tend to make a number of major assumptions that are open to contention. As Norris and Armstrong noted, both the critics and promoters of CCTV often assume that CCTV actually produces the effects claimed for it. As they note 'both share a tendency towards technological determinism: an unquestioning belief in the power of technology, whether benign or malevolent' (1999: 9). Importantly also, as Smith notes, such critical perspectives frequently assume watchers as empowered agents while simultaneously conceiving the watched as passive disempowered objects (2007: 282). Thus critical accounts have tended conceptualize visual surveillance as a unidirectional exercise of power with negative outcomes for those surveilled. However, as David Lyon (1994; 2001) reminds us, surveillance is often 'Janus faced' – both enabling and constraining and riding a continuum between care and control. Critical accounts therefore need to be cognizant of the ambiguities of surveillance. The following sections of this paper will therefore outline some key areas where the ambiguous nature of visual surveillance becomes more apparent, including

tactics of resistance, the potential for the watched to harness surveillance for their own ends, the peculiar occupation of CCTV operatives and the importance of organizational context.

While most accounts stress the power residing with those monitoring cameras, there are several studies which indicate that resistance tactics are practiced by those monitored. As Scott (1985; 1990) has importantly noted, those subjected to relationships of domination respond in a range of creative, diverse and significant ways. Our knowledge of how CCTV is perceived by those monitored remains fragmentary. Nevertheless, there is evidence of overt resistance from surveillance subjects. In Smith's (2007) intriguing study from the UK, those monitored frequently waved and gesticulated at the cameras, often with defiant gestures. I have noted similar acts of defiance in Australian CCTV control rooms. In one Australian central city control room, a street level drug dealer flashed a bundle of high denomination bank notes at the camera – an act which directly challenged the camera operators, and perhaps one calculated to remind them of their minimum wage income. In another Australian location I was informed that many who regularly inhabited public spaces were well aware of the camera locations. As one officer noted: *'They know the cameras are there. There's no doubt about it. We've had them brown-eye the camera, we have them do dances in front of the camera. The cameras are very obvious'* (Senior Officer, SAPOL, 2002). Smith's (2007) research also reveals complex acts of what he terms 'entrepreneurial defiance' in which those monitored outwitted camera operators in cat and mouse games revealing advanced knowledge of the system and its limitations.

If there are acts of defiance, there are also innovative ways in which the subjects of surveillance engage the cameras gaze for their own protection and safety. For example, Smith notes that many beggars chose to sit directly in front of the cameras as would make them feel safer. Likewise, he notes that street prostitutes in urban red light zones chose to work in full camera view, where prospective clients number

plates and faces were recorded, to enhance their personal safety (2007: 309). Similar tactics have been noted in Melbourne, where some injecting drug users have chosen to inject near surveillance cameras in order to ensure emergency services are quickly alerted in the event of overdose (Malins 2000). This evidence is fragmented, and in no way undermines arguments that CCTV systems may be operated with exclusionary intentions. It does, however, point to the possibility that even the most marginalized may engage with surveillance systems for their own reasons.

As already suggested, one weakness of many critical accounts is to assume a one way relationship between empowered watchers and the disempowered watched. However recent studies make a point already apparent to anyone who has conducted ethnography within private security settings – namely that private security guards are not the idealized embodiment of the 'eye of power'. As John McGrath, in his fascinating contemplation of contemporary surveillance notes:

> The security guard is in a position of peculiarly abject authority. Within the corporate structure of the buildings and complexes they monitor security guards are amongst the lowest on the ladders of pay and prestige…the uniformed body staring at a bank of video monitors is likely to be underqualified, low paid and, not unusually, an ex-offender (2004: 186)

CCTV operators thus occupy a very peculiar position within the security hierarchy. While supposedly the agents responsible for administering the exclusionary impulse, they are themselves subjected to close managerial surveillance and the dull toil of a job that can be astoundingly monotonous. Smith (2004) reported that one of the key findings of his research was what he termed 'the boredom factor', where he found that concentration after 60 minutes was extremely difficult. This was compounded by the fact that it was a job paying only a minimum wage and with little chance of occupational advancement or flexibility (388).

The important studies of McCahill (2002) and Norris and McCahill (2006) reveal the importance of organizational context in the deployment of surveillance. McCahill (2002) notes, for example, that human mediation of surveillance systems places severe limits on their potential to function as mechanisms of disciplinary power. Indeed in his study, McCahill observed that many CCTV operators used the system itself to create 'spaces of resistance' to counter or evade the managerial structures controlling them (2002: 145-6). Thus the potentially disciplinary and exclusionary potential of visual surveillance is always mediated through particular organizational contexts and through individual human agents – both of which exert not a single 'gaze' but a multitude of variable gazes. While some operatives may enthusiastically engage in the task of crime prevention and view themselves as undertaking important security work, others will be far more varied in their efforts (cf Norris & McCahill 2006). Indeed Smith (2007) goes further, noting that 'much of the observational literature on CCTV seems almost to neglect the fact that operators can exercise in their gaze care, empathy and compassion as well as prejudice and intolerance' (2007: 301).

It was the landmark study of Norris and Armstrong (1999a) that firmly established the importance of control room observation as a research method for the study of CCTV. Since then, other studies have confirmed the importance of this method to understand the particular contexts in which CCTV operates (McCahill 2002; Smith 2004; 2007; Goold 2004; Lomell 2004). One central issue raised by these studies is whether the exclusionary impulse outlined in larger theorizations is operationalized within specific contexts. As Lomell suggests 'for CCTV to contribute to increased social exclusion, it is not enough that some categories are targeted more than others. This targeting must also have the consequence of excluding the unwanted' (2004: 351). And yet the evidence that exclusionary potential is mobilized, at least in public settings, is to date uneven. Even in the major study conducted by Norris and Armstrong (1999a), which observed operators for a total of 592 hours, police were deployed only 45 times resulting in only 12 arrests. Other studies, such as that conducted by Goold (2004), also suggest that we need to exercise caution in

assuming that vision itself is sufficient to bring about panoptic power. Troubled relationships between police and CCTV operators, disgruntled workforces and poor managerial practices all serve to curtail the power of the surveillance gaze in public spaces.

Conclusion

In considering the limitations and ambiguities of CCTV, it is therefore imperative that criminologists are sensitive to the particular organizational and cultural contexts in which the technology is deployed. 'CCTV' is not a unitary phenomenon whose impacts are replicated regardless of geographic or organizational context. While the abstract theories of 'actuarial justice' 'the electronic panopticon' or 'the consumer city' have much to contribute, this must balanced against the need for detailed empirical observation of particular contexts. What is required then in the study of CCTV is – to use Merton's famous terminology – a 'theory of the middle range' with the capacity to cut 'across the distinction between micro-sociological problems...and macro-sociological problems' (1968: 68). Moreover, I believe it is vital that Australian criminologists not simply rely on British scholarship assuming that the same applies within the local context. As I have argued elsewhere (Wilson 2007), local and regional cultures still play a part in fashioning the experience of surveillance, even if mirroring broader global trends. This is particularly poignant in the case of CCTV, which is so conditioned by the local organizational context both in its deployment and impact. Lastly, critical scholars need to interrogate and interpret the ambiguities of surveillance, as this will provide far more credible and nuanced accounts that have the capacity to transcend the pull of the time-worn metaphors of the Panopticon and 'Big Brother'.

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