

Deviance, regulation and the sex offender.  
Perspectives on the regulation of sexual offending  
in Australia and Sweden

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A thesis submitted for the degree of Doctor of Philosophy at the Australian National  
University

February 2016

## **Declaration**

I hereby declare that this thesis is exclusively the result of my own work.

Nina Marie Katarina Leijon

## **Abstract**

Sexual offending legislation has undergone sweeping changes in the Western world in the past three decades, dramatically changing the conceptualization of women's, children's and victims' rights and slowly doing away with the tradition of male sexual entitlement. The result is a shift away from the focus on violence in sexual violence, and towards a corresponding increase in the focus on victims' sexual dignity. This thesis is a comparative investigation of how perceptions of deviance have influenced legislation pertaining to sexual offending and sex offenders in two countries over the past thirty-five years (1980-2015). Those two countries are Australia and Sweden.

Though the manifestation of these values appears different between the various jurisdictions of Australia and the Scandinavian countries, there are also deep similarities that point to a merging of sexual mores across countries. The framing narratives are converging towards a similar approach to regulating sexual offending. There is a 'globalization of sexuality' that can at least in part be explained by greater mobility, transnational cosmopolitanism and the hegemony of Western culture. A driving force behind this has been global and regional conventions, including European Union directives and regulations concerning the criminalization and punishment of sexual offending.

The rise of the 'crime as politics' discourse has had profound effects on how crime is regulated. The politicalization of crime policy shifts the knowledge basis for policy from politicians and experts to media and the community, and adjusting crime policy to 'current values' in society becomes an explicit political goal.

The law can be thought of as a messenger and one means for framing threats, by first creating them, then legitimising them by the enactment of protective legislation, and finally offering a solution. The social construction of the sex offender and the political benefits of responding to the sex offender threat link together to produce symbolic forms of regulation that favour appearance over effectiveness and ethical considerations. A key component in this is media portrayals of sexual deviance.

The legal shift towards more punitive responses to sexual offending goes hand in hand with an individualisation of deviance, where individual rights and responsibilities are

paramount in establishing guilt and innocence. Individuals are given both the responsibility to avoid becoming victims of sexual violence and the responsibility to avoid committing such offences.

To want to shield and protect one's loved ones from danger is a strong, immediate human instinct, and so to fear and loathe those who sexually prey on children is a natural response to a threat. However, those who offend are statistically also likely to be persons known to and loved by the child. Moreover, the introduction of invasive, detailed and restrictive legislation to control, track and manage sex offenders in custodial settings and in the community is not unproblematic. The effects of these introductions will be discussed in this thesis and illustrate the complexities of relying on the law in order to keep communities safe.

## **Acknowledgements**

This thesis is not only a tale of two cities but of three institutions, and it is perhaps symptomatic of my research and my life that my time at Stockholm University was spent in a divided and somewhat fragmented state. Juridicum offered a geographical and intellectual home to a homeless in 2010. Lars Heuman, the captain of the ship that was the doctoral students' research course, made me reflect on my research in ways hitherto avoided. It was not always comfortable, but it was always for the better. Thank you also to my fellow doctoral students in the group: I will miss our discussions.

The Institute of Criminology gave me a place of belonging in a spiritual sense and made me appreciate the possibilities that criminological research can offer. Eva Johnsson and Jerzy Sarnecki generously shared their time with me and let me audit their courses. A special and heartfelt thank you to Eva who not only read the entire thesis and offered constructive comments but became an honest intellectual sounding board throughout the difficult passages of the thesis. I could not have completed it without your help, Eva.

Despite my travels, RegNet was and continues to be 'home'. It is an intellectual hub without parallel, but it is also something more. A home is a place where one can grow, get nourishment, a soft place to fall. RegNet has been all of that to me and it is beyond me to adequately verbalise just how much I owe all those who work there. A few must be singled out, however. Robyn Holder, my office mate and brownie companion in the early years challenged my arguments and brought new insights on a daily basis. The thesis is all the better for it. Jin Kwee Ho never lost his cool in the face of my numerous questions and requests for computer-related assistance and support. Jin, you're the bee's knees. Paulina Piira went above and beyond her duties to offer administrative support and be my champion against unbending university rules. Hilary Charlesworth, as then-Director of RegNet and once-employer, offered me my first research assistant job in 2003, and opened my eyes to the wondrous world that is academic research. Clifford Shearing, Jennifer Wood and Monique Marks became my inspiration as I could see excellent research crafted from idea to publication. It is not an exaggeration to say that I would not be where I am today without all of you. Thank you.

My research supervision panel was headed by Peter Grabosky, with Rod Broadhurst and Val Braithwaite cheering me on from the sidelines. Val seemed to intuitively sense when it was time for a coffee and a chat, and without fail managed to pick me up just when I needed it most. To Peter, I owe a great intellectual debt. You have believed in me and my topic from the very beginning, and constantly spurred me with questions, literature suggestions and humour. Most of all, your unwavering support and belief in me when I was at my lowest enabled me to pick up and carry on over and over again. I owe you, Peter.

My family have been, and continue to be, my other soft place to fall. This global bunch of extraordinary people keeps me (mostly) sane. Paul and Judi, Brett and Daniela: your support means the world to me. Per-Erik, Mats and Mona are my best friends as well as my family. Ann-Sofi, Jenny, Lisa, Maria and Patrik – you know what you mean to me.

Samuel and Anna – I love you more than I will ever be able to express. Mark: you are my rock. Thank you for the talks, for the coffees, for helping me understand statistics (well, at least a little), and the endless formatting and reformatting of the references. Thank you for being in my life.

This thesis is dedicated to my parents, Taina Marjatta Silokallio Persson and Erik Anders Bertil Leijon. You taught me the meaning of unconditional love. My dad inspired in me a love of knowledge and learning that flows through the generations. Mum was the strongest person I knew. I miss you both.

## **Abbreviations**

ACT – Australian Capital Territory

ANCOR – Australian National Child Offender Register

CCTV – Closed Circuit Television

CEM – Child Exploitation Material

CETS – Child Exploitation Tracking System

CPTED – Crime Prevention Through Environmental Design

CRC – United Nations Convention on the Rights of the Child

CWLTH/CTH – The Commonwealth of Australia

DRC – Democratic Republic of Congo

EU – The European Union

GPS – Global Positioning System

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICTY – International Criminal Tribunal for Former Yugoslavia

MPS – Managed Person System

NCOS – National Child Offender System

NPM – New Public Management

NSW – New South Wales

NT – Northern Territory

QLD – Queensland

RH – Rättsfall från Hovrätterna

SA – Southern Australia

SÖ – Statens Internationella Överenskommelser

SOR – Sex Offender Register

SOU – Statens Offentliga Utredningar

SFS – Svensk Författningssamling

TAS – Tasmania

UK – United Kingdom

UN - The United Nations

US – United States

VIC – Victoria

WA – Western Australia

## **Table of legislation**

### **Australia**

*Criminal Code Act 1899 (Qld)*

*Commonwealth of Australia Constitution Act 1900 (Commonwealth)*

*Crimes Act 1900 (New South Wales)*

*Criminal Code Act 1913 (Western Australia)*

*Crimes Act 1914 (Commonwealth)*

*Criminal Code Act 1924 (Tasmania)*

*Criminal Law Consolidation Act 1935 (South Australia)*

*Crimes Act 1958 (Victoria)*

*Marriage Act 1961 (Commonwealth)*

*Crimes (Overseas) Act 1964 (Commonwealth)*

*Criminal Code Act 1983 (Northern Territory)*

*Australian Capital Territory (Self-Government) Act 1988 (Commonwealth)*

*Community Prevention Act 1990 (Victoria)*

*Crimes (Child Sex Tourism) Amendment Act 1994 (Commonwealth)*

*Human Rights (Sexual Conduct) Act 1994 (Commonwealth)*

*Criminal Code Act 1995 (Commonwealth)*

*Child Protection (Offenders Registration) Act 2001 (NSW)*

*Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 (NSW)*

*Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*

*Child Protection (Offender Reporting and Registration) Act 2004 (NT)*

*Child Protection (Offender Reporting) Act 2004 (Qld)*

*Community Protection (Offender Reporting) Act 2004 (WA)*

*Sex Offenders Registration Act 2004 (Vic)*

*Community Protection (Offender Reporting) Act 2005 (Tas)*

*Crimes (Child Sex Offenders) Act 2005 (ACT)*

*Child Sex Offenders Registration Act 2006 (SA)*

*Crimes (High Risk Offenders) Act 2006 (NSW)*

*Crimes (Serious Sex Offenders) Act 2006 (NSW)*

*Dangerous Sexual Offenders Act 2006 (WA)*



*Northern Territory National Emergency Response Act 2007 (Commonwealth)*  
*Marriage Equality (Same Sex) Act 2013 (ACT)*

## **Sweden**

*Rättegångsbalk (SFS 1942:740) ('rättegångsbalken')*  
*Brottsbalk (Svensk Författningssamling 1962:700) ('brottsbalken')*  
*Lagen med förbud mot könsstympning av kvinnor (SFS 1982:316)*  
*Yttrandefrihetsgrundlagen (SFS 1991:1469)*  
*Lagen om förbud mot köp av sexuella tjänster (SFS 1998:408) ('sexköpslagen')*

## **Other jurisdictions**

*The Convention on the Rights of the Child* (adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 44/25 of 20 November 1989; entry into force 2 September 1990) ('CRC')

*The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force on 18 January 2002) ('the Optional Protocol')

## **Table of cases**

### **Australia**

*R v MJR* (2002) 54 NSWLR 368  
*DBW v R* (2007) NSWCCA 236  
*Fardon v Attorney-General* (2004) (Qld) 223 CLR 575 HCA 46  
*McEwen v Simmons & Anor* (2008) NSWSC 1292

## Sweden

*NJA 1961 s. 461*

*NJA 2007 s. 201*

*B4646-03 ('Tumbafallet', High Court)*

*B6344-09, Uppsala tingsrätt, 2010 ('mangadomen', Uppsala Lower Court)*

*B 6389-10 (Svea hovrätt) 2011 ('mangadomen', Svea Court of Appeal)*

*B 990-11 (Högsta Domstolen) 2012 ('mangadomen', High Court)*

*B 5865-13, Lund tingsrätt, 2014*

## Other jurisdictions

*Toonen v. Australia, Communication No. 488/1992, U.N. Doc*

*CCPR/C/50/D/488/1992 (1994) (United Nations Human Rights Committee)*

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## CHAPTER 1: INTRODUCTION

‘Every real decision (such as one’s evaluation of other persons or how society should be organised) implies a judgment concerning good and evil, concerning the meaning of life and mind.’

(Mannheim 1936/1991:17)

### Introduction

On June 30, 2010, a 37-year-old Swedish man was convicted in Uppsala lower court (*tingsrätt*) of possession of child pornography.<sup>1</sup> The man, a professional translator between Japanese and Swedish, had 51 animated cartoon pictures, in a style called *manga*, depicting children in erotic situations actively saved on a computer and hard drives in his home. He was sentenced to a 24 800 SEK fine as per the Swedish Criminal Code (*16 kap 10a § 1 st 1 p brottsbalken*).<sup>2</sup>

In the ensuing media debate, arguments both to support the conviction and to question it were heard. The Swedish Minister of Justice at the time, Beatrice Ask, defended the inclusion of cartoon or animated material in the Code by stating that the definition of child pornography applies not only to individual children but

‘to children as a group. If one uses or exploits children and serves it up in animated images it can be degrading. One cannot degrade children and childhood as one pleases’ (Bering and Svennebäck 2010, personal translation).

The court verdict quoted the legislative proposition to the Child Pornography Act (Prop. 1997/98:43:79) which states that crimes that relate to child pornography should be inserted into Chapter 16 of the Swedish Criminal Code – Crimes against public order – rather than Chapter 6 pertaining to sexual offences. The reason behind this is that the purpose of the criminalization is to protect not only depicted children but children *in general* from degradation: ‘Every instance of a child pornographic image

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<sup>1</sup> Case file no. B 6344-09, Uppsala Tingsrätt.

<sup>2</sup> Svea Court of Appeal (*Svea Hovrätt*) upheld the conviction on the basis that 39 of the 51 pictures could be classified as child pornography but reduced the fine to 5600 SEK upon appeal on January 28, 2011 (B 6389-10, Svea hovrätt). In June 2012 the High Court of Sweden acquitted Simon Lundström of all charges (B 990-11, Högsta Domstolen).

constitutes a degradation worthy of punishment of children in general' (*Uppsala tingsrätt* case file B6344-09:5, personal translation).

The prohibition of animated child pornography rests on two fundamental ideas about sexuality: one, that sexual fantasies are corruptive of the mind, which goes from a state of 'not-knowing' to an irreversible state of 'knowing' (Arendt 1963/2006) and that thinking about or watching deviant sex alters a person's conception of sex; two, that sexual fantasies are harmful to the object of desire – that it harms children to be fantasised about, irrespective of their awareness of the fantasy. Animated or cartoon pornography thereby threatens not single individuals, but children *in general*, and societal values or morality in a wider sense. Others, however, have referred to the legislation as a result of a moral panic<sup>3</sup> and a threat to the constitutionally protected freedoms of speech and thought (Modin 2010; Strage 2010), or argued that the law is more concerned with portraying a normative sexual morality than with protecting children from sexual assaults (Troberg 2011). With the demand for child pornographic images now a global enterprise, those involved in the production-distribution-consumption chain are now held legally responsible in countries across the Western world (including Australia, the UK, most states in the United States and all Scandinavian countries, to name but a few jurisdictions) (Sulzberger 2010; O'Donnell and Milner 2007). The criminal ban on animated child pornography is a manifestation of the type of symbolic regulation of sexual values that has created new categories of risk and harm, normalcy and deviance in global sexual norms.

Sexual offending legislation has undergone regular and sweeping changes in the Western world in the past three decades, which dramatically changes the conceptualization of victims' rights and is slowly doing away with the tradition of male sexual entitlement. The result is a shift away from the focus on violence in sexual violence, and towards a corresponding increase in the focus on women's, children's and, increasingly, male victims' sexual dignity.

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<sup>3</sup> The term 'moral panic' has come to signify an exaggerated emphasis on a particular societal group that is held responsible for the ills befalling a community. The phrase itself was coined by Jock Young in 1971, in referring to perceived rapid increases in illegal drug abuse, but it was Stanley Cohen who brought it into general use in his account of violence between mods and rockers in the 1960s to 'characterize the reactions of the media, the public and agents of social control' (Thompson 1998:7; see also Jewkes 2004; Valier 2004; for an account in Swedish, see Mathiesen 1990). The original idea, however, can be traced back to sociologists such as Svend Ranulf, whose hypothesis was that 'the expansion of criminal law is attributed to moral indignation; and moral indignation in turn is connected with the rising power of the lower middle class' (H.D. Lasswell, foreword to Ranulf 1938/1964:xi).



Though the manifestation of these values appears different between the various jurisdictions of Australia, New Zealand, Canada, the United Kingdom and the Scandinavian countries, there are also surprisingly deep similarities that point to a nearing of sexual mores across countries and continents. Put differently, while the legal wording differs, the framing narratives are increasingly converging towards a similar approach to regulating sexual offending. There is a ‘globalization of sexuality’ (Binnie 2004) that can at least in part be explained by greater mobility, technology, transnational cosmopolitanism and the hegemony of Western culture. A driving force behind this has been global and regional conventions and agreements such as the United Nations *Convention on the Rights of the Child*<sup>4</sup> (hereinafter called CRC) and its *Optional Protocol on the sale of children, child prostitution and child pornography*<sup>5</sup>, as well as European Union directives and regulations concerning the criminalization and punishment of sexual offending.

In Australia, normative changes of the symbolic sexual autonomy each person holds have come about through an introduction of consent<sup>6</sup> in rape legislation in most states and territories, while in Sweden the legal definition of rape has been redefined to more and more inclusive definitions.<sup>7</sup> Though different in their regulatory technicalities, both countries move towards a *scope expansion* of both those defined as victims (such as clauses that include male victims of rape) and those sexual acts that are punishable (Frank, Camp and Boutcher 2010). The move towards a normative protection of personal sexual dignity is also evident in the changes in the regulation of the purchase

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<sup>4</sup> Adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 44/25 of 20 November 1989; entry into force 2 September 1990.

<sup>5</sup> The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography was adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, and entered into force on 18 January 2002.

<sup>6</sup> Consent is defined under NSW legislation as actively given by a person: ‘A person *consents* to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse’ (Crimes Act 1900, section 61HA (2), italics in original). Consent needs to be freely and voluntarily given; Australian legislation variously emphasises subjective fault elements (such as the defendant’s recklessness or honest belief) or objective fault elements (such as reasonableness and the circumstances under which the criminal act occurred) in order to establish whether consent had been sought and obtained. For a summary of the legislative debate around consent, see Australian Law Reform Commission (2010).

<sup>7</sup> The wording has changed from ‘having intercourse with a person with the use of force’ (the wording in 1981) to definitions that cover a wider range of sexual situations, such as ‘the exploitation of a person’s helpless condition’ (2005), to, most recently in 2013, ‘exploitation of a person’s particularly vulnerable condition’. Sweden has instigated inquiries as to the consequences of consent-based regulations (in 2011 and again in 2014; see also Prop. 2012/2012:111), but no such legislation has to date been introduced.

of sexual services. Though regulated differently in Australia and Sweden (in the former, it is legal in most jurisdictions; in Sweden the purchasing of sexual services is prohibited though not the sale), the two countries share an ideological shift away from the woman/prostitute as the punishable criminal, with male sexual entitlement taken for granted, to one where women's right to make sexual choices (including selling sex) has been de-stigmatized and awarded some legal protection.

In the case of child pornography, the move is clearly in favour of more punitive legislation for those producing, distributing and consuming prohibited material in both countries. Based on the CRC, Sweden and Australia have introduced remarkably similar legislation concerning child pornography. 'For their own protection,' a child over the age of sexual consent but still a minor (aged 14/15-17) cannot voluntarily participate in the creation of pornographic imagery. This protection ethic, and how it plays out in the negotiation of adolescent sexuality, rests upon traditional dichotomies between 'childhood' and 'sexuality' as mutually exclusive concepts. Similarly, child sexual abuse (intra- and extrafamilial) has been given a great deal of media attention and led to both governments and courts acknowledging the severe and long-ranging effects of child sexual abuse. Recent years have also seen governmental inquiries held in both Australia and Sweden into the pervasiveness of physical and sexual abuse committed against children in foster care or in state or religious institutions.<sup>8</sup>

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<sup>8</sup> The first Australian inquiry into this matter was held in Western Australia in 1996, and Queensland launched its *Commission of Inquiry into Abuse of Children in Queensland Institutions* in 1999. These were followed by the *Protecting Victoria's Vulnerable Children Inquiry* in the state of Victoria in 2011 and the 2012 *Special Commission of Inquiry* in New South Wales. In 2013 the *Royal Commission into Institutional Responses to Child Sexual Abuse in Australia* was launched. In Sweden, several governmental inquiries have led to publications on the subject of child abuse and neglect in institutional settings, including SOU 2009:99 (*Vanvård i social barnavård under 1900-talet*), SOU 2011:9 (*Barnen som samhället svek*) and SOU 2011:61 (*Vanvård i social barnavård; Slutrapport*), that all mention pervasive and at times systematic sexual abuse of children in foster care or in state care from the 1950s to present day. About a quarter of cases mapped by the inquiry concerned sexual abuse, the majority of which were rape or other forms of serious sexual violence (SOU 2011:9, p.26).<sup>8</sup> Sexual assault perpetrated by other children was also common both in institutional care and in foster homes (SOU 2011:9, p.217-218). Aggravating risk factors are developmental and cognitive disabilities in the victim, and previous sexual abuse experienced by the victim (SOU 2011:9, p.218), and older children (13-20 years of age) are more likely to experience sexual abuse than younger ones. The Australian Royal Commission into Institutional Responses to Child Sexual Abuse (*the Royal Commission*) similarly found that sexual violence had been extensive and ongoing in institutional settings such as foster homes, religious organisations and orphanages. Here also, a person with a disability, who has experienced previous abuse, or are in out-of-home care or 'tightly controlled settings [without]...public scrutiny such as some closed religions' (*Royal Commission Interim Report Volume 2:9*) faced a greater risk of sexual victimisation.

The legal shift towards more punitive responses to sexual offending goes hand in hand with an individualisation of deviance, where individual rights and responsibilities are paramount in establishing guilt and innocence. Put differently, individuals are given both the responsibility to take steps to avoid becoming victims of sexual violence and the responsibility to avoid committing such offences. A key component in this is media portrayal of sexual deviance which, in an increasingly snippet-based reporting landscape, cuts out lengthy reflections in favour of snappy sound bites. One-dimensional portrayals of offenders through the use of emotive language (such as the referring of sexual offenders as ‘monsters’, ‘sick’, ‘sex fiends’ or ‘evil’) further exacerbates the ‘responsibilization’ (Shearing and Stenning 1981; Garland 1996)<sup>9</sup> of the individual, who is simultaneously given sole blame for the offending and a moral responsibility to rehabilitate in order to avoid further penal consequences. This is evident both in the media landscape and in the regulatory systems of Australia, which rely on notions of risk and dangerousness in ascertaining the likelihood of recidivism in particular offenders (sexual and/or violent offenders) deemed to be posing a particular danger to the community. The foundational principle of Swedish criminal law, as in Australia, is that of *proportionality*; however this is interpreted in rather different ways in the two countries. The Australian move towards risk assessment on actuarial grounds in the classification of sex offenders follows a trend that holds true for many liberal democracies: that of seeing particular classes of offenders as outsiders in the community, that need to be controlled in ways that other offenders do not.

Sexual offending is problematised in terms of age, geographical location, the presence or absence of physical violence, the relationship between offender and victim, and a number of other external, or objective, parameters. The shift in legislation from seeing rape as ‘taking sex by force’ to ‘having intercourse with someone against their will’ or ‘without their consent’ is indicative of a larger problematisation of normative expressions of sexual boundaries and behaviours in a globalised postmodern society. Authors such as Anthony Giddens (1991) have pointed to the fragmented morality of secular postmodernity such as it is played out in the United Kingdom, Scandinavia, Australia and New Zealand, and how establishing one’s identity in cosmopolitan

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<sup>9</sup> Processes of responsibilization initiate accountability in actors increasingly expected to take responsibility for their own and their community’s safety (see also Shearing and Stenning 1983; Wood and Shearing 2006).

liberal democracies comes down to creating active identities that are moulded and shaped by current events.

However, there is also an opposite trend of nationalism that goes hand in hand with restrictions on individual sexual liberties. Right-wing nationalism has become ideologically coupled with a decreased tolerance for homosexuality in Russia, Uganda, Malawi and Eastern Europe, where gay and lesbian activism is denounced as ‘anti-nationalist propaganda’ or ‘foreign terrorism’ and where active homosexuals risk persecution, being victimised in hate violence or imprisoned for ‘recruiting’ youth by seducing them with information about homosexuality. A resurgence of the procreation prerogative has led to limitations in the right to abortions in Spain, Poland, and Eastern Europe, and in Sweden the right-wing party the Sweden Democrats have similarly advocated a restriction on the rights to abortions. Homosexual men and women have become a much-needed ‘enemy within’, and drumming up support to eradicate ‘foreign influence’ on the sexual lives of citizens is a time-tried political classic.

To summarise, there are two competing strands of development in sexual offending legislation globally: increasing tolerance for individual rights and contractions in the criminal regulation of certain kinds of sexual acts (sex work, adultery, sodomy and oral sex) on the one hand; and more punitive criminalization of deviant, harmful or violent sexual violence and a decreasing tolerance that is marred by nationalist sentiments of self-preservation and protection from ‘foreign’ deviance on the other. In the midst of this fragmented secularity, the individual body has become the postmodern regulatory battleground. In increasingly secular societies, traditional and social media have become the new sites of moral debate; using celestial language of ‘good’ and ‘evil’, punishment and penitence, criminal law is the site of morality around which communities can gather and find common ground.

### **The criminalization of sexual offending: a balancing act**

Societal responses to sexual offending can include preventing, punishing, regulating and monitoring offenders. Responses can occur on three levels simultaneously: a systemic, or societal level, a group level, and an individual level. Though all three

levels are involved in current responses to sexual offending both in Australia and Sweden (as in other Western countries), there is a push towards individual and group responses, but by reference to system technologies. Put differently: the language used is that of systematic responses, but it is applied to individuals.

When the net is cast widely, many are caught. Overly inclusive sex offender legislation ('better safe than sorry'-legislation) constitutes a threat to individual human rights, such as the right to freedom from state involvement in one's private business, the right to a sexuality and freedom of thought, among others.<sup>10</sup> On a societal level, overly restrictive legislation concerning sexual imagery threatens the freedom of information and freedom of press, freedom of association and ultimately constitutes a threat to the democratic enjoyment and participation in civic life. Over-regulation carries high costs – financially, socially and ethically.

On the other hand, under-regulation of harmful sexual practices harms its victims and constitutes a threat to citizens who cannot reasonably rely on state protection from sexual violence and a legal system to offer retribution, compensation and deterrence from future violence. The criminalization balancing act between freedom and protection, between competing rights and values, between the rights of victims and those of offenders, is one that has concerned political philosophers since Aristotle and Plato and continues to be of importance today.

The regulation of sexual offending in a particular jurisdiction tells us something about the overarching values of that society. There are human and social dimensions to the attribution of criminality to behaviour, to the criminal status and to the victim status. The regulatory approaches to sexual offenders and sexual offending are a gateway to how that jurisdiction's decision-makers, politicians, media and public view not only sexuality but issues of autonomy, civil liberties, the legitimacy of state hegemony and social order. In a sense, then, sexual crimes legislation is a signifier for how a jurisdiction views not only sex and violence but how it views humanity, because sex offenders are often considered the lowest of the low. This is particularly true when it

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<sup>10</sup> Moreover, Murray Lee and colleagues note that criminalizing activities such as *sexting* may in fact render them more attractive to teenagers, and thereby have the adverse consequence of increasing the likelihood of young people inadvertently risk becoming both perpetrators and victims of crime. See Lee, Crofts, Salter, Milivojevic and McGovern (2013).

comes to the nexus between the regulation of deviance on the one hand, and children on the other.

Child sexual offending has been given an enormous amount of media and public attention in the past decade in all Western countries, including Australia, the United Kingdom, the United States and Sweden. In Australia, the UK and the US, horrific cases of child sexual abuse, abduction and murder have led to the introduction of new legislation aiming to protect children from sexual violence largely by focusing on convicted offenders and restricting their right to work, live and operate around children in society. The most famous of these legislative acts, Megan's Law, enacted in the state of New Jersey in 1996 makes community notification mandatory when a convicted sex offender moves into a neighbourhood. Other types of sex offender management laws include surveillance and restrictions on the rights of offenders, mandatory Working with Children checks (and automatic bans on any work where the convicted offender may come into contact with children) and the development of Sex Offender Registers that keep track of the whereabouts of offenders by making their reporting of residential and work addresses mandatory, as well as notifying authorities of any travel plans, change of work place, or changes in civil status. However, the introduction of invasive, detailed and restrictive legislation to control, track and manage sex offenders in custodial settings and in the community is not unproblematic and it does not come without a price. The effects of these introductions will be discussed throughout this thesis and illustrate the complexities of relying on the law in order to keep communities safe.

## **Thesis statement and area of inquiry**

This thesis is a comparative investigation of how perceptions of deviance have influenced legislation pertaining to child sexual offending and child sex offenders in two countries over the past thirty-five years (1980-2015). Those two countries are Australia and Sweden. What is regarded as deviance has shifted tremendously over time, but the tendency to Othering is consistently prevalent in the area of perceptions of deviance when it comes to sexual offending (in particular, though not only, child sex offenders). The thesis posits questions as to the nature of sex offender management in light of greater issues of regulation and governance, and asks how

comparative criminology can find its place in an oft-assumed ‘global’ world with ‘global values’. Sketching an argument from Émile Durkheim’s (1893/1933) work on crime as a function of social order, via Michel Foucault’s (1980) power/crime discourse and David Garland’s (1996) theories around social control as being bound and negotiated through criminal justice, to Jonathan Simon’s (2007) idea of governments ‘governing through crime’ and Hans Boutellier’s (2000) thoughts on penal populism and morality, the thesis poses the question: in our ‘liquid’ modernity (Bauman 2007)<sup>11</sup>, has crime become the new normative morality? Or put differently: has the specificity of regulatory responses to crime – in particular violent and sexual crimes – come to signify representations of meaning that in a pluralist and secular society are no longer expressed in wider frameworks such as religion or national identity?

The inclusion of legislation relating to child pornography offences in this thesis exemplifies one contested arena where approaches to regulating crime differ substantively between Australia and Sweden. While in the former these offences would be classified as sexual crimes, in the latter they are included not in Chapter 6 of *brottsbalken* (which includes sexual offences) but in Chapter 16, which are crimes against public order. The creation, distribution and possession of child pornography would not lead to a person being classified as a sex offender (though depending on what occurred during the creation of the pornographic material the person may also sexually offend against the child or other victims, and thus be liable to conviction as a sex offender).

The placing of these offences in Chapter 16, justified by the reasoning that the child/victim often remains unknown and that the offence is therefore not primarily against one person but against society as a whole, seems counter-intuitive in its somewhat arbitrary separation of sexually motivated acts. The production and distribution of child pornographic material may well stem from other motivations than sexual desire (such as greed or revenge) but the viewing of the material becomes sexualised by its very content. Moreover, sexual grooming (contact with children for sexual purposes) is a sexual offence since 2009 (*brottsbalken* Chapter 6:10) and this

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<sup>11</sup> Bauman (2007:1) defines this ‘liquid’ phase of modernity as ‘a condition in which social forms (structures that limit individual choices, institutions that guard repetitions of routines, patterns of acceptable behaviour) can no longer (and are not expected) to keep their shape for long...’

can include references to pornographic material in order to normalise sexual behaviour as part of the grooming process. A wider conceptualisation of child pornography as *sexualised violence* against the victim rather than *sexual violence* might be more in tune with community sentiments of whether a person with an interest in sexual material involving child victims should be viewed as a sex offender.<sup>12</sup>

It is for these reasons – that Australian regulations of sex offences include child pornographic offences, though Swedish law does not, and that there are both symbolic and material links between child pornography and sexual offending – that this thesis includes references to child pornography in its discussions of sexual crime.

I argue that Norbert Elias, in his work on the development of sexual manners as a marker of civilisation, can be meaningfully applied to this development of recent criminalization reforms in Western Europe, Australasia and, to a lesser degree, North America. The main thesis of Elias' study of Western European normative ideas around chivalry was that as a society progressed, its citizens would become increasingly secretive around, and protective of, their bodies and their bodily functions. This was evident in the way that ideas of modesty and hygiene travelled from the higher echelons of society down to the lower classes and over time, modesty in all matters that involved the body – from urination to washing to nudity and sexual habits – were increasingly closeted. There began the process of internal normative self-discipline picked up by Michel Foucault, whose work links practices of discipline with body functions and sexual expression.

My theoretical underpinning to the comparison of regulatory reforms in the field of sexual offending in Australia and Sweden – two in many respects very different countries across the globe from one another which nevertheless share a striking similarity in this regard – therefore incorporates Elias' thesis that sexuality is becoming increasingly regulated, regimented and problematized in legal terms. This is paired with Foucault's radical view on the body as a centre of state regulation and the

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<sup>12</sup> Community sentiments are notoriously fickle and difficult to measure in any systematic way. However, to illustrate the cognitive link between sexual offending and child pornography, see the website *Brottsrummet* (<http://www.brottsrummet.se/sv/startside>, downloaded 2015-01-31) which is published by the Swedish Crime Prevention Council, *Brå*. Under the heading '*Sexualbrott*' (Sexual crimes), statistics for the number of sexual crimes, including trafficking and child pornography (sic), brought to the attention of the police 'in the last decade'.



focus of intense scrutiny. Elias' work was decidedly Euro-centric, but in recent years there has been a trend towards a globalization of sexuality, or more precisely, of sexual values and norms. Dennis Altman was an early proponent of the 'globalization of sexuality' thesis, specifically as it pertains to the regulation of homosexuality and its nexus between gay identities and the political economy, but it is primarily the work of Jon Binnie (2004) that forms the ideological bridge between the Eliasian theory of sexual manners and the contemporary Western (if not 'global' in a true sense) convergence of sexual norms.

This thesis is situated in a tradition of critical research, relating theoretical perspectives to policy. Theory without application quickly becomes irrelevant; praxis without theory easily becomes shallow. The triangulation between theory, case studies and implications for future research can situate theory in ethically grounded realistic policies. It draws on conceptualisations of ideology and power in contemporary discourse (see Jupp 2000:18-19), moving between particularities of current legislation and structural-level interpretations, seeking to link specificities to their underlying values and philosophies. It poses questions as to current understandings of the 'knowledge' underpinning regulatory choices in the management of sexual offending and in particular to sexual offenders and how this 'knowledge' has led to particular, problematic consequences.

The regulation of sexual crimes and criminals can be used as a lens through which the development of crime politics itself is analysed. Based on a Durkheimian functionalist tradition, the thesis asks what *function* criminalizing sex serves in the maintenance of social order in modern contemporary societies.<sup>13</sup> Does his century-old notion of crime and (the threat of) criminalization as an essential regulator of collective behaviour still hold true under postmodern liberal conditions, and if so, how does this vary across cultures? And how does global norm-making blend with national law-making (Halliday 2009; Halliday and Carruthers 2009)?

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<sup>13</sup> This thesis focuses on the criminalization process itself. How particular law is, or not, played out in the prosecutorial and judicial process can be interesting and illustrate sentiment, but it is not the focus of this thesis. I have therefore only included such material in order to illuminate a sometimes complex reality.

## Hypothesis

I argue that the modern preoccupation with sexual deviance and the legislative focus on the sex offender as a symbol of deviance and evil in both Australia and Sweden is the result of dramatic changes in these two countries over the past thirty-five years. These include an expansion of women's rights, initiated and in part sustained by feminist movements, which has trickled down to a deeper respect for children's physical and sexual autonomy; a drastic reconceptualisation of the role of politicians who are increasingly seen as individually responsible for their portfolio's policies; shifts in the media landscape that allows for news and information to travel at ever greater speed and reach the electorate in minutes and with less control of the information flow; a decrease in the trust of the church as a moral authority (in part due to the allegations of sexual abuse at the hands of clerics and church leaders, in particular in Australia); the search for secular alternative sources for ethical and moral questions; and the disappearance of overt class societies where traditional societal stratification is replaced by the rise of celebrities as the new upper class.

More specifically, the changes in the regulation of sex offending were brought on in part by both religious and secular moral entrepreneurs as well as by political movements, including feminist movements that fundamentally changed the way that sexual violence is conceptualised, legally and socially. In both countries, a strong and pervasive feminist movement put issues such as domestic violence on the political agenda in the 1970s, followed by a stronger focus on the rights of children in the 1980s. This led to greater understanding of the precarious situation of children in terms of sexual victimisation both in the home and elsewhere, and to efforts to improve the way the legal system treated both child and adult victims of sexual assault. Feminist understandings of exploitation at the boundaries of consent and voluntariness increasingly influence regulatory understandings of sexual offending, and perceptions of sexual deviance increasingly hold a focus on *males* as sex offenders (buyers, clients, rapists, makers and consumers of 'visual sexual exploitation'). Male sexuality no longer has supreme hegemony – men no longer define the norm. This is mirrored by legal protection of women and minors (as sex sellers or posing in sexual imagery) 'for their own good'. In this, however, the state

continues to define and rely on traditional understandings of ‘normalcy’ that influence community perceptions of deviance.<sup>14</sup>

Combined with this, there has been a globalization of sexual manners that is traversing the Western world and replacing formerly held differences stemming from religious, social or legal norms. Applying Elias’ sexual manners hypothesis on a global scale would be both bold and futile since a country’s collected mores are a complex web of events, thoughts, beliefs and characteristics. Nevertheless, the case that Binnie puts forth is convincingly in favour of the hypothesis that there is a streamlining of sexual manners across the Western world: the ‘globalization of sexuality’ (Binnie 2004) stems from a coherent construction of sexuality that is increasingly similar across liberal democracies in the West. This world-society perspective (Frank *et al.* 2010) holds that one effect of the globalization of norms and the transference of mores – codified in regional and global agreements, such as European Union directives and UN conventions – is that regulation is increasingly similar both in scope and in what it targets.

Looking at the recent changes in sexual offending legislation in each respective country (Australia and Sweden) and the similarities and differences in the community debates on sexual consent, I argue that sexual values – what Elias described as sexual manners – are in fact converging despite seeming differences. Though, for instance, sex work is regulated differently, the two countries share a shift in focus from the prostitute as the blame-worthy criminal to a person with rights and in need and worthy of legal protection. Similarly, though Sweden has not introduced consent-based legislation as of yet, the move towards an understanding of victims’ responses to a threatening sexual situation has led to a focus away from ‘objective’ rape definitions (where elements of violence or force plays an essential role), to subjective components of helplessness, fear and other subjective understandings of whether the victim was, or believed themselves to be, in a sexually vulnerable or helpless state.

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<sup>14</sup> An example is the Swedish regulation of child pornography where it is ‘normal’ for two 15-year-olds in a romantic relationship to pose sexually for each other, but where it is ‘deviant’ if one of the parties is 25 (see *Barnet i fokus*, SOU 2007:54). The ‘protectionist discourse’ Ost (2009:10) is particularly strong when it comes to children, but others ‘worthy’ of protection include intellectually and physically disabled persons, and the elderly (Ost 2009:8-11). In Queensland, Australia, the age of consent for anal intercourse is set at a higher age – 18 years – than for vaginal sex, a remnant of regulation aimed at homosexual sexual activities that indicates that the legislator still believes anal sex to be more harmful than vaginal or oral sex..

Though worded differently, the various juridical definitions of the crimes under the banner of sexual offending – exemplified in the thesis by rape, child sexual abuse, child pornography offences (with the proviso that these are not currently classified as sexual offences under Swedish law) and incest/intrafamilial sexual offences – share a common ideological ground. It is a move away from rape as ‘sex by force’ towards rape as ‘sex with a person against their will’<sup>15</sup>; towards a protection ethic of sex workers/sellers of sexual services; away from any stigma attached to *being* a sex worker/seller of sexual services; towards sexual protection of children, irrespective of their consent; away from definitions of child pornography as ‘pornography with child actors’ to child pornography as ‘sexual exploitation of children, depicted in imagery’<sup>16</sup>.

State formation in the new millennium, increasing urban crowding and increasingly culturally diverse populations have all contributed to new cityscapes, where strangers have to live in peace alongside one another without necessarily sharing much of a mutual language, worldview or religious outlook. Elias’ thesis of the development of sexual manners as a response to changes in the demographics and the increasing proximity of strangers can be applied to the new global society we now live in. When a shared childhood, language, class or religious affiliation can no longer be taken for granted among neighbours and community members, a new common bond is needed. In this vacuum, it has become a politically thankful task to rely on perceptions of right and wrong – formalized and institutionalized through the legal system – to create bonds of solidarity among groups. Politics has always been about emotion management, though not all emotions are as important or politically salient. In today’s political landscape, reassurance, feeling safe and ‘being heard’ are crucial community emotions to manage for anyone aspiring to political office. With the importance of the church waning, the politician has emerged as the new community leader to offer moral and spiritual leadership, and through imagery of ‘good’ and ‘evil,’ has created a familiar feeling of simplicity and reassurance.

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<sup>15</sup> In *brottsbalken* this is defined in the opposite; if there is duress, there is no consent. Se BrB 6:1.

<sup>16</sup> See, for instance, the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (2000) which defines child pornography as ‘any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes’ (Article 2).

History is filled with accounts of sexed otherness. The sexed body has always been the object of intense moral scrutiny; it is the site of both virtue and vice.<sup>17</sup> Wars have been started and cities invaded over unfaithful wives preferring Trojan company; queens have been beheaded and state religions changed because of desire. Sex and marriage has forged alliances, created countries, divided and unified populations. Or rather, sex has served as the overt reason that enables a great many other societal changes to take place.<sup>18</sup>

Nevertheless, something has changed in recent years. Populism has chipped away at the *Rechtsstaat* and our protection *from* the state has given way to an expectation of protection *by* the state. There is a ‘covert disciplinatio’n’ (Mathiesen 1978:23) that is done by political rather than physical means and has a legal element to it. Mathiesen argued, in a Foucauldian vein, some thirty-five years ago that legal hegemony relies on its combination of exclusionary language that acts as a barrier between those ‘in’ and ‘out’, and the ability to turn the ‘political’ into the ‘legal’; that is, matters that should be seen to be about values or morality or right and wrong become ‘value-free’ as they are transformed into ‘neutral’ territory of legal versus illegal actions (Mathiesen 1978:35). This is a salient point even in contemporary politics, when Australian governments seek to stamp out domestic violence by requiring abused mothers to take action to leave the abuser or risk losing custody of the children, or when Swedish parliamentarians propose legislation to criminalize ‘organised’ begging in public spaces.

In order to situate my thesis in a domain of discourse, a starting point may be Karl Klare’s definition of the classical distinction between ‘law’ and ‘politics’:

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<sup>17</sup> Descriptions of paradisiacal societies startlingly often have a sexual element to them: the radical postmodern Islamic suicide bomber expects 77 virgins to await him in the afterlife and it was sexual innocence that was lost when Adam and Eve were banished from the Garden of Eden. Sex is posed as a reward for good deeds but unfettered sex is also a threat. The sexual liberation of the 1960s and 1970s that spread throughout educated North America and Europe was framed as a problem on par with the use of drugs and political radicalism (Sjöberg 2007:15; Milton 2002).

<sup>18</sup> Sexual mores have been intimately linked with social mores since early human history. ‘Marriage’ as a euphemism for sexual activity, has served as a useful social marker. In India, for instance, marriages between members of different castes was prohibited in law until 1949, and in the United States interracial sex – and marriage – was considered a grave crime in the slavery era (the remnants of which can still be felt today, though The US Supreme Court held anti-miscegenation laws unconstitutional in the case of *Loving vs Virginia* (1967)). Priests of various religions have oftentimes been excluded from marriage and expected to remain celibate, as is still the case in the Catholic Church in present time. Marriages between nobility and commoners has been expressly forbidden in many cultures, in particular if the woman is nobility though the opposite can sometimes occur (such as when the Swedish King Erik IX married 14-year-old commoner Karin Månsdotter in 1533).

‘Virtually all of modern jurisprudence rests on a distinction between legal reasoning and politics. Legal analysis and reasoning, on the one end, and political argument or philosophy, on the other, are thought to be recognizably distinct discursive practices.’

(Klare 2001:1076)

The *de facto* kinship between these two children of the human mind is equally well recognized, of course, by writers such as Aristotle, Plato, Niccolò Machiavelli and Thomas Hobbes. A safe and sound home for ideas can be found in the field of inquiry Scandinavian criminological researchers call ‘crime politics’ (*kriminalpolitik*), clumsily translated sometimes as crime policy (a term which does not fully capture the political nature of the process: where policy is the final product, politics is what happens before). When politics manifest as crime politics, the debate becomes concerned with appeasing voters (as if they were angry consumers threatening to take their business elsewhere if satisfaction is not guaranteed). Simple solutions to systemic problems tend to pay scarce attention to expert knowledge, evidence, research data and those politically less salient features of the complex landscape of regulatory approaches (Sarre 2011).

Rather than assigning the legislative process a formal, closed definition (‘law is enacted by politicians’) or a dynamic, open one (‘the function of the law-making process is to sustain the political order’<sup>19</sup>) where the relationship between ‘apolitical’ law and ‘political’ normative integration is one of self-interest, Mauro Zamboni bridges the dualistic gap by introducing an epistemological aspect to an ‘intersecting model’ of law-making (see also Gordon 1984).<sup>20</sup> Zamboni speaks of two opposite forces operating in this landscape: on the one hand, the increasing *politicalization of the law* places law-making in the hands of politicians (though in a strictly formal sense, has it not always been there?). On the other hand law is becoming increasingly

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<sup>19</sup> Zamboni (2008:17) defines ‘the political order’ as ‘the complex of actors, both in their institutionalized forms and in the looser form of interest groups, and their relationships interrelating in the production of politics, i.e. of values then to be implemented into the community using the law-making.’

<sup>20</sup> In US and European 19<sup>th</sup> century legal debate, a distinction was sometimes made between ‘law’ as in the common law, ‘something that was above mere politics’, and ‘legislation’ as ‘the “politicians’ law”,...the importation of inappropriate foreign ideas or the mere reflection of temporary alliances of particular political pressure groups.’ (Zamboni 2008:126) ‘Law’ in this sense stood for something greater than what was reflected in statute books and functioned almost as a moral checkpoint (Savigny 1867/1979; Reiman 1989).

dependent on technological and specialized jargon with scientific solutions to problems difficult for the layperson to comprehend and competently resolve, resulting in a *specialization of the law* that alienates the voter from the debate (Zamboni 2008:3; see also Möllers 2004 on ‘the politics of law and the law of politics’ in the European context). The politicization of the law happens, Zamboni argues,

‘...when the actors involved in the law-making process (both in its legislative and judicial forms) tend to reason more in terms of substantive rationality than of formal rationality. This happens when the legal production is reached and justified looking primarily to the observation of criteria and the fulfilment of needs positioned outside the system of law and traditional legal reasoning (e.g. the reach of a political goal at the expense of the logic of the political order).’

(Zamboni (2008:132)

## **Research questions**

The thesis uses current regulatory approaches to the management of sexual offending in Australia and Sweden as a frame through which issues of shared collective meanings, constructions of identity, representations of power and legitimacy and the mythology of law as the guardian of social order can be meaningfully understood. The starting point for the inquiry stems from five interlinked questions:

1. What are the current regulatory responses to sexual offending in Australia and Sweden?
2. How, and why, did these regulatory responses develop?
3. What are the similarities and differences in these approaches and what explains them?
4. What can these similarities and differences tell us about the society in which they operate?
5. What is the function of the criminal regulation of particular sexual behaviour, and how does this vary between Australia and Sweden?
6. Based on the answers to the above questions emerging from the research, can some elements of a theory of crime politics across jurisdictions and cultures be usefully defined?

Jurisdictions around the world are constantly redefining the definitions, boundaries and legal ramifications of sexual offending. These vary not only in material definitions of the criminal act but also in their penal ideologies, that tend to centre upon either a *moral model* or a *medical model*. These influence issues of penal severity as well as penal options. Though legislation by definition has legal/judicial definitions, this thesis focuses instead on the sociological and criminological justifications for such legislation to be written. It is situated in a firm sociology of law tradition of viewing law not as an entity with a life of its own but a living, growing and shifting feature of society, responsive to community events and in turn influencing community action.

Legal definitions and regulatory responses to, for instance, child pornography, child sexual abuse and to the management of convicted sexual offenders are areas that illustrate the complexities of regulating sexual offending. They are fields of law where there is movement, where the goalposts are moving and boundaries shifting. They are sites of emerging regulatory responses. A closer study of these sites of contention brings up different aspects of criminalization and regulation.

On the other hand, incestuous or intra-familial sexual abuse of children has been met with a strong moral consensus of condemnation across time and space, so while there may be regulatory corrections at the edges, there is little debate as to whether it should be criminalized at all. Moreover, when Sweden introduced legislation in 1999 that criminalized the purchase of sexual services but not the sale, it created a new category of sexual offenders by a press on the regulatory button. This was a symbolic move that shifted the focus from the prostitute as the embodiment of crime and vice to the client. With it came a new framework for deviance, illustrating that deviance and stigma are socially constructed and politically malleable features of crime politics.

## **The rationale behind a comparison of Australia and Sweden**

There are several objectives behind choosing a comparative format for this thesis. Australia and Sweden share many similarities. They are both plural democracies, with a relatively homogeneous ethnic population but with growing numbers of migrant minorities. They both share a Judaeo-Christian heritage and their value foundations



originate from Christian teachings. They are both officially monolingual but with much linguistic competence and diversity in the community. Despite this, there are fundamental differences between the political, judicial, societal and, importantly, historical developments of these two nations.

Australia, an offspring of English colonial rule, has a history riddled with tension, conflict, ethnic and religious diversity and continuing conflicting ties with the English motherland, whose legal and political systems the former colony has adopted, albeit with some modification. Today's Australia rests culturally somewhere between the old England and the modern United States; its parliamentary system is a blend of both, that retains the British monarch as Head of State (and as such continues to be a member of the Commonwealth of nations) but whose military and strategic alliances reflect both its political proximity to the US and its geographical proximity to South-East Asia.

Sweden, founded as a state monarchy in the 14<sup>th</sup> century has evolved as a determinedly mono-cultural community with a strong state apparatus, an overwhelmingly Lutheran population from the 16<sup>th</sup> century (despite large waves of migrants, in the past three decades largely from Africa and the Middle East) but a secular state rule. Contemporary Sweden is technologically advanced, linguistically increasingly diverse (but with one official language, Swedish), highly egalitarian both in law and in practice and with strong constitutional guarantees for freedoms of religion, thought and association. Sweden has enjoyed an uninterrupted period of peace for more than 150 years, remained neutral in both World Wars and has elected impartiality over involvement in international associations such as NATO (though it became a member of the European Union in 1996).

Sweden and Australia also differ in terms of trust. The World Values Survey (a global network of social scientists conducting a survey of people's beliefs, values and motivations in nearly 100 countries<sup>21</sup>) suggests that in-group trust and out-group trust stem from different sources but may influence one another. Put differently, modern society is built around institutions providing much of society's needs, reducing the need for inter-group cooperation but requiring trust in out-groups (Delhey and Welzel

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<sup>21</sup>For more information about the World Values Survey see <http://www.worldvaluessurvey.org/wvs.jsp> (accessed 2015-04-01)

2012:47). Sweden ranks highest of all surveyed countries for out-group trust (and second in the world after Norway for in-group trust). Australia, meanwhile, ranks highly in both categories – lower than the UK, France and Canada but higher than the United States – but considerably lower in both in- and out-group trust than Sweden.

This has much in common with Jock Young's (1998) division of the world into 'inclusive' and 'exclusive' societies where 'the Other' is represented differently. In 'inclusive' societies, the deviant is the minority representative with distinct and objective features that confirms, rather than threatens mainstream society and its values (Young 1998:66-67). The goal for the inclusive society is to rehabilitate the deviant in order to bring them back into society, whereas in the 'exclusive' society those deemed to be outsiders are positioned as inherently different, who need to be controlled and expelled. Public sex offender registers, the 'outing' of convicted offenders by publishing their names and photos, and restrictions on where they can live, work and congregate are all features of 'exclusive' societies. Whereas Sweden can, following the World Value Survey parameters, be labelled an inclusive society, Australia sits closer to the exclusive definition. Interestingly, they are both moving towards becoming, under Young's definition, more exclusive.

Sexual mores, taboos and practices tell us something about the dominant values of a community. Why, for instance, is prostitution allowed (and regulated) in the Australian Capital Territory, but same-sex marriages are not? Why are same-sex marriages allowed in Sweden, while the buying of sex has been criminalized since 1999? Why did the legislator choose to criminalize the buyer, but not the seller, of sex in Sweden, while in Iowa both are committing an offence? Why is the legislation in Uganda and Nigeria that criminalizes homosexual activity becoming increasingly punitive, whilst in Western countries there is a strong trend towards increased tolerance and decriminalization? Why is adultery considered a more heinous crime than rape in Pakistan but not in France? How can these questions tell us something about how people live, feel, make decisions, participate, and connect, in their country and to their community?

Constructing the national profiles of countries can 'generate comparative insights' (Johnson and Zimring 2009:40) to deepen one's understanding of both. There is a synthesis that occurs when similarities and differences are fleshed out. One looks for

consistent themes as well as variations, aiming to discover, in the process, what is distinctive for each and what is common to both (Johnson and Zimring 2009).

That is all well and true, but this still does not tell the reader why I chose these particular two countries. My reasons are simple, and personal. I am a dual Swedish-Australian citizen. I was born in Sweden and lived there throughout my childhood and early adulthood. I studied law and social sciences, amongst other things, at several universities there. At the age of 26, I moved to Australia for what turned out to be (though I had not intended it so) a 12-year sojourn. I studied at three different Australian universities, gained permanent residency and later citizenship. I lived, worked, and raised children in Australia. Whilst some elements of Australian life still intrigue me with their eccentric nature, I believe I understand Australia's culture deeply. Australia is my second home, both geographically and culturally. One must speak of what one knows, and remain silent on all other things, to paraphrase Wittgenstein (Wittgenstein 1922). I cannot guarantee that ignorance will keep me silent, but I will endeavour to speak to the best of my knowledge on what I do know.

### **What the thesis will not cover (delimitations)**

This thesis is grounded in the constructing end of the chain of state authority that sees parliaments enact legislation, and not the reactive side that constitutes the lived law – how this legislation is interpreted and used in courts. The principles that underlie decisions to criminalize are contextualised from a sociological and criminological perspective rather than purely juridical. In other words, the focus is on legislative definitions of sexual offending and does not discuss (other than for illustrative purposes) courts or criminal justice approaches to punishing or treating sexual offending. It does not discuss penal sanctions, such as the particular punishments of various crimes, other than to highlight their symbolic value as a measure of severity. The question of *why* society criminalizes certain sexual behaviour (and not other) and how this changes over time is closely linked to the question of *how* such regulation is carried out, though at times the logical links between these two questions appear tenuous at best.

Moreover, the thesis is not focused on the aetiology of sexual offending: ‘who they are’, ‘what they do’, or ‘why they do it’. It is not about psychological or psychiatric approaches to sex offenders, such as why they commit crimes, to what degree they recidivate, whether they can be treated or which forms of treatment that ‘work’ better than others. However, to highlight the influence of beliefs around these issues on criminal legislation, a short summary of some of these issues can be found in chapter 4. It is rather about ‘how we see them’ and the function that regulating sexual behaviour through the criminal system serves in the global postmodern Western world.

Other possible approaches might have been feminist theoretical understandings of the links between sexual violence and conflict and how sex is constructed in the space between ‘normal’ domination and ‘deviant’ expressions of patriarchy. Certainly, the failure to acknowledge systems-level meanings of criminal sex has been addressed by feminists as well as queer theorists, and efforts to ‘queer development’ (Lind and Share 2003) implore a rethinking of how sexuality and gender permeate and influence development outside the narrative representations of institutionalized heterosexuality (Rich 1986; see also MacKinnon 1987; Sedgwick 1993; Balderston and Guy 1997; Ingraham 1999). This thesis will not, however, incorporate feminist, queer or Marxist class understandings of sexual offending as it rather takes a functionalist and social constructivist perspective on the formation of regulation.

## **State and federal legislation in Australia**

Australia is a federation of states and territories, each with its own legislative assembly or parliament. State and federal (Commonwealth) legislation regulate different aspects of public and private life. As a rule, creating, implementing and reforming criminal law is primarily the responsibility of each of the six States (New South Wales, Tasmania, Victoria, Queensland, South Australia and Western Australia) and two Territories (Northern Territory and Australian Capital Territory) which legislate independently of one another, with full political sovereignty in criminal justice matters. However, should there be inconsistencies between federal and state or territory law, the former takes precedence: ‘When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former

shall, to the extent of the inconsistency, be invalid' (*Commonwealth of Australia Constitution Act 1900*, Chapter 5, s.109; see also Crofts 2011:2).

Moreover, the criminal law in Australia is layered, with criminal laws at State and Commonwealth levels operating in parallel with each other. The Commonwealth is limited in its legislative powers by the Constitution and needs to justify the creation of any criminal law on a federal level.<sup>22</sup> There is, however, a body of Commonwealth criminal law including the *Criminal Code Act 1995 (Cwlth)* and new legislation can, when justified, come into being.

Federal legislation regulates specified areas concerning matters of national significance such as national security (customs and border issues; illegal drugs; sex tourism and other forms of sexual offences occurring overseas; terrorism; military and defence issues) and foreign relations (export, trade, international obligations, diplomacy and international criminal law). The 1994 *Crimes (Child Sex Tourism) Act* was the first piece of Commonwealth legislation relating to sexual offences, and in the same year the *Human Rights (Sexual Conduct) Act* was enacted to enable the Commonwealth to override State legislation, specifically the Tasmanian criminalization of sodomy in its Criminal Code. Following a ruling that the Criminal Code was discriminatory against same-sex relationships<sup>23</sup>, it was the first time that federal government used its power to override State criminal law.<sup>24</sup>

While common law is relied on extensively in those states defined as common law jurisdictions (NSW, SA and Victoria), there is also state-wide criminal legislation (Crofts 2011:2). Traditionally, 'common law is based on cases decided and administered in courts, and was received upon establishment of the colonies in Australia... Thus, the prevailing law in these States is that originally introduced from England, and later modified by the statutes of the State legislatures' (Crofts 2011:3). This is exemplified by the NSW *Crimes Act 1900*, Victoria's *Crimes Act 1958* and

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<sup>22</sup> There have, however, been occasions where the States have jointly agreed to defer their constitutional powers to legislate to the Commonwealth in matters that are seen to be of national interest (such as the 2001 corporations regulation and, in 2002, national anti-terrorism legislation).

<sup>23</sup> Nicholas Toonen, a resident of Tasmania, successfully filed a complaint before the United Nations Human Rights Committee that the Tasmanian Criminal Code (Sections 122 a) and c) and 123) violated the *International Covenant on Civil and Political Rights (ICCPR)*. See *Toonen v. Australia*, *Communication No. 488/1992*, *U.N. Doc CCPR/C/50/D/488/1992 (1994)*.

<sup>24</sup> [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Browse\\_by\\_Topic/Crimlaw/Historycrimallaw](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/Crimlaw/Historycrimallaw) (accessed 2015-01-01)

South Australia's *Criminal Law Consolidation Act 1935*. On the other hand, 'Code States have enacted criminal codes which operate to replace the common law. In these States, for an offence...to be established it must be in the law. These codes can also alter basic common law principles....For both historical and practical reasons, the codes reflect parts of the common law inherited from England' (Crofts 2011:3).

Bearing in mind that 'Australian' sexual offending legislation is enacted on a state/territory level, is it nevertheless meaningful or even relevant to speak of (and research) 'Australian' approaches to sexual offending? This thesis argues that it is so, for several reasons. While specifics differ between jurisdictions in Australia, I argue that they nevertheless embody and display a greater Australian cultural narrative that rests on a collective social memory not dissimilar in concept to the Swedish, French or British social memory that constitute the cultural foundations of those jurisdiction-specific reforms (Fentress and Wickham 1992). There is a growing 'Australian' body of jurisprudence and legal doctrine: 'the High Court's willingness to pronounce on sentencing, the increased reporting of lower court sentencing decisions, the publication of academic treatises and the enactment of sentencing statutes across Australia have led to a national (albeit, arguably still nascent) sentencing jurisprudence' (Gans 2012:167). Put differently, although the wording of statutes and case law differs across the Australian jurisdictions, the principles are for all intents and purposes the same (Gans 2012:167-168).

'The last decade or so... has seen a convergence in this randomness towards a more uniform sentencing jurisprudence throughout Australia. This change has been led by the High Court of Australia, which has enunciated a number of sentencing principles that have been applied throughout Australia. By doing so the High Court has repudiated its previous stance that such matters were for state and territory courts of criminal appeal....It is this trend towards a loose uniformity that makes this book [entitled 'Australian Sentencing. Principles and Practice'] necessary and possible.'

(Edney and Bagaric 2007:3-4)

In other words, drawing on Maurice Halbwachs' collective memory theory (Halbwachs 1925; Halbwachs 1950; see also Durkheim 1893/1933 on the formation of a social solidarity and collective consciousness), individual identity is absorbed and

structured around larger group identities so that one views and responds to law-and-order issues as an Australian rather than as an individual, a Victorian or Queenslander. Law is the ‘visible symbol’ (Durkheim 1893/1933) of social solidarity and relies on collective emotions. This social memory in turn constitutes the foundation for how regulatory responses to social issues are constructed. The social memory of a society is constantly undergoing a transformation with regard to the acceptance of sexual normality and deviance attribution, as norms slowly change. Issues and problems wax and wane in political consciousness. An issue considered a threat in one state may find resonance elsewhere, creating political impetus to incorporate similar policy; other times, the same or similar issues are dealt with and resolved by different regulatory means in jurisdictions where cultural sensibilities and traditions of governance necessitate different solutions.

Moreover, some incidental examples include:

- The continuing work to create a *Model Criminal Code* to synchronise the State and Territory approaches to criminal law legislation and serve as a guideline for how this legislation could be codified to achieve consistency across jurisdictional borders.
- The release from prison of high-profile sexual offenders such as Dennis Ferguson in 2004<sup>25</sup> and Brian Keith Jones (aka Mr Baldy) in 2005<sup>26</sup> made headlines in both national and regional newspapers across States and Territories, and pointed to the need for interstate cooperation and information sharing between police forces as offenders moved across state borders.

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<sup>25</sup> Mr Ferguson had a long history of sexually abusing young boys and girls. Following his conviction for the abduction and sexual abuse of three children in 1987, he was sentenced to 14 years’ imprisonment. Upon his release in 2004, Ferguson moved multiple times to various Queensland communities before settling in Ryde, NSW in 2005. Following the angry reactions of Ryde residents as well as discoveries that Ferguson had sold children’s toys for the benefit of various charities under an alias which could put him into contact with children, Ferguson eventually moved to a public housing flat in Sydney. He was found dead in his home in December, 2012.

<sup>26</sup> Mr Jones had been convicted of multiple sexual assaults of children and was sentenced to a period of 12 years and 4 months imprisonment in 1993. Upon his release on parole in 2005 his residential whereabouts were revealed on public radio by talk show radio host Darryn Hinch, prompting multiple moves amid a heated media campaign on the right of local communities to know whether a convicted sex offender lives in their neighbourhood. Jones was again imprisoned in 2006 for multiple breaches of his parole conditions and will not be eligible for parole until 2020.

- The Australian National Criminal Offender Register (ANCOR) is a nation-wide system for gathering information on convicted and released sex offenders, operating from a perspective that since offenders can travel across jurisdictions, so must cooperative measures to keep track of offenders be national.
- The above-mentioned introduction of Commonwealth legislation to combat so-called ‘sex tourism’ whereby persons who engage in sex with children and young people in a foreign jurisdiction can be tried and convicted in their home State upon their return home requires State judiciaries to interpret and work under Commonwealth law.
- Growing public and media awareness of the widespread sexual abuse in religious institutions (including, though not limited to, the Catholic Church), has led to a heightened focus on the victims’ plight and the systemic failures of these institutions to act on allegations of abuse. Following several State-based parliamentary inquiries, Prime Minister Julia Gillard, in March 2013 announced a national inquiry into the sexual abuse of children in foster care and other state institutions (the *Royal Commission into Institutional Responses to Child Sexual Abuse*).<sup>27</sup>

All of these examples point to the emerging nature of a national approach to the combat of sexual offending in Australian communities, and a growing role for the federal government in this. This thesis will show that there is in fact an emerging ‘Australian’ jurisprudence regarding sexual offending, in part due to public media discourse and the highly publicized nature of these crimes which help shape public opinion, in part due to the political consensus in these issues.

To summarise, ‘Australian’ legislation in criminal justice matters consists of nine separate and distinct legal systems (six State-based, two Territory-based, and one Federal). This thesis nevertheless presumes to speak of ‘Australian’ approaches to the regulation of sex offender management, using examples from other states and

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<sup>27</sup> The six members of the Royal Commission were formally appointed on 11 January 2013 by Her Excellency Quentin Bryce, then Governor-General of Australia. See <http://www.childabuseroyalcommission.gov.au/> (accessed 24 January, 2014).



territories to highlight particular issues or illustrate how regulatory initiatives have spread across the continent from one place to another in a short space of time. This does not represent a methodological inconsistency but can add richness and depth to the material, as long as the following caveats are respected and kept in mind.

- A thorough introduction to the State and Federal legal systems in Chapter 5 of the thesis should establish to the reader where the regulation of sex offenders is situated in Australian criminal justice;
- The thesis focuses on cultural and social approaches to regulation rather than juridical or administrative/procedural jurisprudence. Whilst there are political and legal differences between Australia's States and Territories, culturally and socially there is more to unite than to divide; it is therefore meaningful to speak of 'Australian' values or approaches in the context of public opinion or social activities;
- Specifying which state/territory particular legislation stems from each time it is mentioned should highlight the jurisdictional limitations of the legislation in question.

### **An overview of the thesis structure**

Chapter 2 offers conceptual and theoretical frameworks for our understanding of sexual offending as legally, culturally and socially constructed. Chapter 3 sets out the methodology used to approach the various perspectives, a qualitative text analysis through which the data is interpreted. Chapter 4 offers an overview of some key perspectives on sexual offending and sexual identity – and the link between these – and illustrates the idea of law as a discursive arena (Andersson 2006) full of negotiated meanings and where definitions and solutions are contested and developed. Chapter 5 offers a more in-depth illustration of the prevalence and distribution of sexual offending, and how these offences have been regulated in Australia and Sweden from historical times until today. Chapters 6 sketches how a theory of crime politics applied to sex offending and sex offenders may look like and points to some of the important trends in how deviance is constructed as part of this theory. Its findings weave theory and practice together as some of the consequences of criminalizing sex are discussed, and discuss how regulatory solutions to crime can

balance the various ethics of care, efficiency, evidence and respect for human rights. Chapter 7 concludes the thesis with some thoughts on how the regulation of sex offending and sex offenders can reflect a deeper understanding of ethics, choice and fairness.

### **Thesis structure - detailed**

Little other human behaviour, with the exception perhaps of murder and heresy, has inspired such constant and continuous debate in virtually every society on earth as defining the acceptable parameters for sex. Moral panics (Young 1971) and societal censure of sexual offenders are not postmodern phenomena, though contemporary politicians claiming to be ‘tough on crime’ would have it that their particular mode of condemnation is unprecedented. Chapter 2 makes an inventory of the historical, political, religious and cultural contexts in which sexual behaviour has become sexual offending in Western Europe, the United States and Australia over the past century. It poses the question – what is the function of codification in this field? More specifically, using a Durkheimian structural-functionalist perspective, what is the function of an age of consent, an incest taboo and a ban on child pornography? The examples all have different answers but they overlap in terms of the function of norm transgressions, and rules that are particularly strongly enforced when it comes to sexuality and the protection of children.

Difference and otherness link closely with deviance and blame, of which millennia of pogroms and religious or ethnic genocides are stark reminders. The current denunciation of paedophiles and other sex offenders in Australia, the US and elsewhere has been described as a modern-day version of the witch hunts across Europe of the 17<sup>th</sup> and 18<sup>th</sup> century that saw hundreds (primarily women) executed when fear and fury unleashed a community’s hatred of those Others (Guillou 2002). Sex as an expression of Othering has a long history: sex has always been used in different societies around the world to differentiate and alienate as much as to liaise and create kinship. Sexuality permeates taboos around marriage, the formation of alliances and determinations of in- and out-groups. Conversely, African and Asian discourses around same-sex relationships have in recent years been advancing the narrative that homosexuality is something introduced by ‘foreigners’, ‘Westerners’ or

other outsiders<sup>28</sup>, when national identity is linked to traditional values of family, matrimony and heteronormativity.<sup>29</sup> Sex offenders have become a politicized entity, a homogenous sub-group in society along the traditions of *lumpenproletariat*, football hooligans, mods, rockers and, dating back further, workers and the poor, witches, Jews, Cathars, Roma and other ‘Others’. Indeed, in regard to all sexual matters there is a polarity according to whether they are described from the point of view of the participants or from that of jealous outsiders (Russell 1929/2009).

Sex has always been a marker to denounce difference. It is fertile ground for moral panics, and sex has rubbed shoulders with deviance in outbreaks of moral panics from witchcraft trials to threatening youth groups. Sex lurks as the dirty component of exclusion and social control. Chapter 2 looks at how moral panics and the sociology of fear posture around the idea of in/out groups and difference. To place tags on a group and then display them as icons or symbols of all that is wrong in our society is to repeat an age-old tendency to separate ‘us’ from ‘them’, where ‘they’ typify the inferior, the criminal, the suspect, the corrupting, the threatening and the dangerous. It seeks to answer the question of why ‘Othering’ has endured as a political and community strategy, its structural and psycho-social foundations and the role of the state in the Othering process.<sup>30</sup>

Shared memories rely on a common language, agreed-upon definitions to describe what took place. Legislation is created by language and linguistic signifiers: a newly enacted law establishes what we now see as rape, or child pornography, or other forms

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<sup>28</sup> Thai Buddhist monasteries reported in 2003 that some monks had been ‘corrupted by ‘rich gay men’ and ‘foreigners’ (BBC Radio 4, Today, August 2003 quoted in Baird (2004:35), while in India members of the ‘traditionalist Shiv Sena movement hold the view that homosexuality is un-Hindu, un-Indian and has no place within the history, religion and traditions of the subcontinent’ (Baird 2004:35-36). Ugandan MP David Bahati in October 2009 sought to introduce a bill to make ‘aggravated homosexuality’ punishable as a capital offence; despite national and international protests the bill has resurfaced several times. Comments on the BBC News website supporting the criminalization include denunciations such as ‘Gay recognition and rights is a Western thing. African culture and tradition does [not] support nor encourage such things.’ (Osa Davies on BBC Online June 28, 2002). Others link homosexuality to colonial histories of oppression: ‘If Africa is willing to throw away its culture and ethics only to the Western culture and principles and be a fool for the second time, then yes, Africa should to respect the right of the homosexuals’ (Andrew A. Daramy on BBC Online June 28, 2002).

<sup>29</sup> Some Western Christian missionaries and aid organisations in Africa have at times also fuelled this homophobia with fundamentalist interpretations of Christianity as being incompatible with homosexuality. See Msibi (Msibi 2011) 2011 and Tangri and Mwenda 2005)

<sup>30</sup> By the state I mean the legal and jurisdictional entity that dominates a geographical locality. This will naturally have different connotations across space and time. Modern ‘Western’ liberal states such as Australia and Sweden share a cultural-political heritage that makes it meaningful to talk about state power and hegemony, though this of course played out rather differently in 16<sup>th</sup> century Sweden or colonial Australia.

of blameworthy sexual behaviour. It sends a message: what used to be acceptable is no longer acceptable. Criminalization creates a new language, such as in the Swedish case of ‘the purchase of sexual services’. It is an example of Levinas’ (1981) act of signification which facilitates dialogue – we cannot engage in meaningful conversation if we question the definitions of each word that is spoken. But the illusion of a shared understanding can also distort meaning. When words such as ‘paedophile’ or ‘dangerous sex offender’ are used in legislation or in mass media, these become signifiers of evil and danger. Othering relies on distancing, of seeing the Other as ‘less-than and below me’. These signifiers become ingrained into the collective social memory as symbols of those who are ‘not like us’. They are imaginary words, used by different people who assume they are talking about the same thing though their interpretations are contested and diverse. Emotions and language contribute to constitute a bridge over this contested landscape in the form of law – clear, uncomplicated legislative definitions that settle the doubt once and for all.

The thesis is less a comparison of actual legislation between two jurisdictions, than a comparison of the trajectory of legal development. It is also a trajectory of two journeys of thought, and about competing priorities positing and positioning themselves in a postmodern world. It is about *the codification of norms*: norms around deviance, sexuality and the purpose of legislation. Societal values go through constant changes in paradigm shifts (Kuhn 1962/1997) and the pendulum swings between punitive ideals, treatment and inclusion thoughts, and exclusionary practices.<sup>31</sup> At the same time, the world is shrinking. Communication, travel and other facets of that which we glibly call ‘globalization’ has streamlined criminal justice practices and shifted the goal posts for what a community deems to be acceptable treatment of offenders. I take as a starting point Durkheim’s atomised society theory which argues that urban rule-setting is done differently from collectively made rules in primitive societies. As a consequence, law would become more important as social norms fade. I analyse his contributions to our understanding of collective behaviour in light of contemporary approaches to the regulation of sex offending to see if the idea of the atomised society can meaningfully contribute to our understanding of what drives criminalization reforms of sexual behaviour.

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<sup>31</sup> The past ten years has seen a swing in the US and Europe towards public disclosure of sex offenders’ criminal past and the creation of Sex Offender Registers, something that seems to resonate with a public believing they have a right to know so as to take steps to protect themselves and their children from dangerous offenders.

Sexuality discourses have both social and material components (Binnie 2004:1); they are also, as a rule, overwhelmingly heteronormative (even when touching upon homosexual patterns and practices), and stem from patriarchal productions of knowledge that acknowledge some discourses as being legitimate and thereby valid whilst dismissing others. The result is not only a legal, but also (and perhaps even more importantly) social, cultural and linguistic convergence of the various sexuality discourses.

The Other in the heteronormative sexuality discourse is the gay man or woman, but also others who challenge the procreation imperative: the paedophile, the sexually active female, bigamists, inter-racial couples (where stereotypes such as the over-sexed foreigner 'stealing' or 'luring' local women can be found both in folklore and in contemporary right-wing, political mythmaking), the ostensibly celibate priest, or the philandering woman. All of these stereotypes are aberrations from the monogamous straight norm, and have for centuries been subject to particular regulation in order to control and subject the 'deviant' sexuality and to mould them into a form of (family-centred) normality. Foucault's theorizing on the nexus between family and sexuality, and the control and disciplination of sexuality that takes place when it is confined to the walls of the family home, opened up for interesting explorations of normalcy and deviance which have yet to be adequately defined.

Chapter 3 discusses the methodology chosen as a lens through which these explorations can meaningfully add to our understanding of the complexities of sex offending. Chapter 4 then connects the 'sexual' in sexual offending with a wider reading of sexuality as an intrinsic part of human life and collective experiences. Moreover, the chapter discusses how sex is conceptualised and problematised in current societies, including the continued existence of rape myths and the emergence of male sexual victimisation as a global field of study. Jon Binnie has convincingly theorized 'the links between globalization, nationalism and sexuality' (2004:1). The increasing similarities in sexual discourses around paedophilia, trafficking, sex work/prostitution, gay rights, sex tourism, child pornography and Internet predatory sexual behaviour from the US, the UK, Australia, New Zealand, Scandinavia and the EU are more than a coincidence. Do the similarities arise from a deliberate convergence of the legal norms of various jurisdictions, or is the codification of

similar approaches to the regulation of sex offending a result of increasingly similar sexual mores around the world? Put differently: what came first, the attitudes towards sex crimes, or the legislation defining and punishing sex crimes?

Chapter 5 sketches the legislative approaches to regulating sexual offending in Australian and Swedish jurisdictions. This section analyses similarities and differences in cultural and social views on sexuality and how a variety of influences determine the resulting legislation. In the second part of the thesis, the focus lies on the social processes by which we make decisions as a society, and the function that sexuality, crime and criminals serve for social control, for social entertainment, and for social rallying against a common enemy. It charts the regulation of the sexed body through sociological and legal means. Irrespective of human action, it is the labelling that creates crime in a formal sense. Following this perspective, crime is not a given: it is informed, defined, inspired and sanctioned by those who perpetrate it, those affected, those who observe, those who punish and those who care from afar, the media and the ‘concerned public’. If crime is socially constructed, why is this done and by whom? Does the Durkheimian tradition of viewing crime as an inevitable feature of social order still hold true in a secular social order – or have these societies selected deviant offenders as the markers of boundaries between good and bad? Pursuant to David Garland’s idea of the meaning of crime in modernity, has crime politics become the bearer of morality in an otherwise pluralist and liberal global society?

This theoretical philosophising has an applied purpose, which is what occurs in Chapter 6. It charts how crime politics can be conceptually and theoretically understood as it relates to contemporary criminalization efforts. It weaves theory and data together to form a practical analysis. Based on the literature review and the comparative case studies, I theorize that the regulation of sexual offending well reflects these disparate views on sex in society and the dichotomy between ‘good’, ‘bad’, ‘deviant’ and ‘criminal’ sexuality. National, historical and cultural legacies determine regulatory reform options that occur in a society, based on what is deemed acceptable not only by reference to the view on offenders but also by the view on sex in general. There is a cultural stability that forms the value platform for these regulatory options which is informed by the greater socio-political view on law *per se*.

Consequences of regulating sexual offending can take adverse or counterproductive forms. Tougher sentences and other forms of harsher punishments, popular as they seem to be in blitz media are at times greatly at odds with research evidence and expert opinion as to their effectiveness. In a political climate where candidates seek re-election by taking a strong stand on law and order issues and getting tough on crime, does criminalization occur differently and for different reasons than in party-based political systems where no individual politician stands to gain popularity points for vilifying sex offenders and other loathed criminals in the community? In the concluding chapter of the thesis I theorize as to the differences in regulatory approaches to sex offender management in Australia and Sweden, the causes for these differences and how these differences impact on community safety – real and imagined. What are the implications for democratic involvement and civic engagement when one approach is selected over another?

Throughout history there have always been two social constants: first, the presence of deviance, and second, the censure of deviance. This holds true for every society, despite political formation or democratic design. The next chapter explains the chosen theoretical framework used to investigate how deviance is currently being played out in the criminalization of sexual offending in Australia and Sweden.

## CHAPTER 2. THEORETICAL FRAMEWORK: THE CRIMINALIZATION OF SEXUAL DEVIANCE

### Introduction

The prohibition of deviant sexual behaviour, as defined by a society according to its social, cultural and religious mores, is one of the most prevalent and enduring features of law throughout history. Taboos around sexuality have led to criminal and social sanctions in every epoch and society, though the particularities of the taboos vary. The taboo has both a reflective and a normative function – to represent community or authority sentiments as to the wrongness of the behaviour, and to guide and steer people away from the undesired behaviour. Similarly, the criminal law functions both as a mirror and a guide, reflecting and steering at the same time. Should behaviour be absolutely and uncompromisingly condemned, there would be little need to formally prohibit it; as a *toujours-déjà* it would be pointless to codify what is already an uncompromising given in people's minds. Rather, it is behaviour that is condemned yet practised that gives cause for concern for lawmakers.

For instance, while the incest taboo has at least in theory been timeless, universal and constant, there seems to be a continuing need to also criminalize the behaviour – meaning that its wrongness is not so natural and absolute that breaches do not occur. Other forms of sexual encounters, such as fornication or adultery, or types of sexual behaviour, may have been prohibited by law and still be relatively commonly practised (Australia and Sweden both had criminal laws in the 19<sup>th</sup> century prohibiting fornication, and yet paradoxically also relatively stable numbers of children born out of wedlock during the same time).

If every jurisdiction on earth today has some form of criminal sanction of at least some forms of sexual behaviour, but these prohibitions vary wildly as to the targeted behaviour, are there still unifying parameters as to what the purpose of criminalising sexual offending (as defined by each jurisdiction's legislative forum) is? Put differently, what are the overarching functions of the regulation of sexual offending (and by extension, of sexual offenders) of contemporary societies?



This chapter takes as a starting point the key criminological term *deviance* in order to situate the function of contemporary regulatory landscapes in the area of sexual offending. By accepting that norms around sexual behaviour centre upon the idea of normality and deviance as a key predictor for how the behaviour is regulated by the lawmaker, the function of regulatory prohibitions can be lifted out of the supposedly objective statute books and highlight how contemporary regulatory dictates are in fact far from neutral. Rather, startling similarities begin to come into view from two such different countries as Australia (with its several jurisdictions and traditions) and Sweden (with a strong history of value-free positivism in its legal systems). Deviance, as a concept, emerges as *the* normative and moral basis for the efforts to regulate sexual behaviour.

### **Defining sexual deviance**

That crime is socially and politically constructed, alongside its legal constructions, is not a new idea, and its origins can be traced back to work by 19<sup>th</sup>-century sociologist Émile Durkheim. Decades later, Talcott Parsons (1962) and Herbert Blumer (1969) linked the political need for social control with the legal categorization of acts as either desirable or undesirable. Kai T. Erikson (1966) convincingly traced the human tendency to construct deviance throughout the ages in his seminal study *Wayward Puritans: A Study in the Sociology of Deviance*, while Murray Edelman's 1964 publication *The Symbolic Uses of Politics* was ground-breaking in asserting the conscious and deliberate use of symbols and iconography in political constructs of good and evil. Habermas' (1987) idea that society is self-producing helps to discover the cyclical nature of these constructs: the object varies but the process endlessly repeats itself.

At times different paradigms have been used to diagnose and explain behaviour which falls outside the normative sociological-legal definitions of 'acceptable' or 'normal' sexual behaviour. Two major frameworks to explain sex offending are *moral models* and *medical models*. In short, *moral models* assume that sexually criminal acts are the results of individual rational choices, stemming from a deficiency of character or cognitive development on the part of the offender (the offender as 'evil' or 'bad'). The focus has been on individual or group characteristics such as socio-economic status,

family issues, health variables or other more or less scientifically agreed risk factors. *Medical models*, on the other hand, seek bio-medical explanations for the urge to act out deviant behaviour (the offender as ‘sick’ or ‘mad’).<sup>32</sup> This has at times included such things as measuring a person’s head circumference or noting their facial characteristics under the assumption that ‘criminals’ have particular physical traits that differentiate them from other, ‘ordinary’ people. For instance, 19<sup>th</sup>-century bioresearch aimed to establish scientific evidence that certain women displayed facial or bodily characteristics that predetermined their descent into prostitution. There is today a plethora of books on the management and/or treatment of sexual offenders, the result of a formidable explosion in the last decade of literature that problematized the crime and the criminal.<sup>33</sup>

The medicalization of crime has blurred the boundaries between crime, deviance, dangerousness and medicine. A treatment paradigm that assumes that sex offenders can be ‘rehabilitated’ or ‘treated’ also inherently assumes that they are ‘sick’ to begin with (why else would they need rehabilitation, which implies a return to the original state)? The contemporary treatment paradigm acts as a modern version of the classical Lombrosian school of bio-anthropological explanations of crime and deviance and has gained legitimacy in both Swedish and Australian legislation and policy pertaining to the treatment of sex offenders.<sup>34</sup>

Punishment tends to follow in the wake of these models: those who believe in rational choice theories towards offending tend to emphasize either longer, harsher prison sentences or even the death penalty. Those who believe in the medical model, tend to support models of treatment and rehabilitation where it is hoped that the offender will be ‘cured’ and safely allowed back into society.

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<sup>32</sup> Talcott Parsons’ (1951) so-called ‘sick role theory’ undoubtedly springs to mind here. Parsons viewed illness as a form of deviance *per se*, in that illness brings with it a role which the patient is expected to play. The role of the medical profession, on the other hand, is to monitor the patient and thereby control the deviance.

<sup>33</sup> Many of these use an integrated approach of explaining the question ‘why’ people sexually offend, treatment options and management options. Literature that leans on the side of psychiatric and treatment-focused approaches include Flora 2001; Prendergast 2004; and Salter 2003. Management of offenders in the community is the dominant focus in Craissati 2004 and Matravers 2003 and to name but a few. La Fond (2005) offers normative perspectives on both the psychiatric aspects of offending and risk management approaches. For justice-related issues in sexual assault, see Temkin and Krahe 2008; for treatment of sex offenders from a Restorative Justice perspective, see Yantzi 1998.

<sup>34</sup> As a philosophical quandary, one might ask why we do not similarly attempt to rehabilitate car thieves, shoplifters or human traffickers. Or put differently: why is the rapist in need of psychiatric treatment for his or her defunct mind and deviant view on humanity, but not the drug lord, the weapons dealer or the refugee smuggler?

A third model can be seen as the emerging *responsibilization model*. This is similar to classical rational choice models but goes a step further. An individual is expected to act and make rational choices with access to full and complete information. Criminality and deviant sexuality become ‘choices’ for which the individual must accept full responsibility (and bear full blame, and receive full punishment accordingly). Following this logic, punishment can (and is, increasingly, in Australia) both starkly restrictive and invasive, blending medical ordinations (such as the offending being ordered to undergo counselling or partake in offender treatment programs) with criminal sanctions (such as being ordered to carry electronic monitoring equipment so as to be able to be tracked at all times) and civil/administrative orders (such as being ordered to report to police at regular intervals, avoid drinking alcohol or being prohibited from living near schools or parks).

The key difference between the rational choice model and the responsibilization model, however, is that the latter pairs punishment with treatment, making it the moral and legal responsibility of the offender to find, undergo and successfully obtain a ‘cure’ for their offending. Treatment forms part of the punishment and lack of willingness to partake in rehabilitation becomes evidence of the offender still posing a risk to society, justifying ongoing classification as a ‘dangerous’ offender. Motivation to participate in treatment programs and successfully ‘rehabilitate’ thereby remains the domain of the offender’s responsibilities, not the treating professional’s.

Being listed on a sex offender register, whereby police are informed of an offender’s residential address, place of employment and travel plans, is not considered an additional punishment in this model, but rather an administrative aid to police and judicial authorities in keeping track of known previous offenders (and, supposedly, to assist police in finding and assessing known suspects when new sex offences occur). In the responsibilization model, convicted sex offenders must and should accept ongoing restrictions to their social, financial, professional and personal life as the unfortunate but inevitable result of their initial offending.

Citizens who think about crime in their jurisdiction do so from any number of starting points, ranging from the intensely private circumstances of experienced victimisation

to detached observations, philosophical reflections or political standpoints. Ideas about who 'is' a criminal or what constitutes a crime victim also influence both personal and societal convictions. Stan Cohen notes that people tend to exhibit more empathy towards those who are more like themselves or towards a person one likes (Cohen 2001). Conversely, true altruistic empathy is rarer, and so there is an inability 'to identify with the victim...people are either "like us" or...excluded from our moral universe' (Ibid: 16). Drawing on Albert Cohen's (1965:6) work on moral indignation, Jock Young notes that a form of 'disinterested' moral indignation concerns itself predominantly with 'punitiveness (whether in terms of formal law or informal fury) about the behaviour of groups who do not directly harm one's interests' (Young 2009:9): a modern form of Othering. It is an arbitrary, but appealing, division of the world into 'us' and 'them', where one's own values are propped up by a sense of righteousness. Moral indignation and 'moral passage' (Gusfield 1963) thus give rise to moral panics, the 'acute form' (Young 2009:10) of indignation and Othering.

### **Constructing sexual deviance**

It is useful, therefore, to think of deviant sexual behaviour, and the resulting criminalization of certain sexual acts and dispositions as both *legal and social/cultural constructs*, with particular values both underlying and driving the legislative process. While the grounds for criminalization remain relatively steady over time, the values shift and change and play out differently in different geo-cultural, religious and political cultures and societies is clear, and can account for the difference in the resulting (actual) legislation. The majority rules when it comes to defining normalcy and deviance. For instance, in a Durkheimian vein, deviance is defined by Tittle and Paternoster as '...behaviour that the majority of people in a given group views as unacceptable or that evokes a collective negative response' (Tittle and Paternoster 2000:13).

This definition places a great deal of emphasis on the temporal and geographical boundaries of the 'given group', asserting that what is considered 'deviant' behaviour in one jurisdiction, society or community may not be so in another (deviant behaviour is of course different from behaviour conducted by a deviant person; most activities carried out by a 'deviant' person in a day may be non-deviant, such as driving a car or

walking past a school) (Tittle and Paternoster 2000:22). Definitions along these parameters certainly would indicate that deviance is socially constructed and as much based on community concerns as legal principles. Moreover, Ryken Grattet (2011:189) notes how medico-legal techniques of control that initiated in the management of deviant offenders/patients over time came to spread into the management of non-deviants. This diffusion of labels (such as ‘sex offender’) combined with socially constructed understandings of what sex offending entails and by whom it is committed, has shaped social control discourse relating to sex offenders – at times with problematic consequences. For instance, a common assumption in social media is that all sex offenders are mentally ill and thereby by extension dangerous to the general public obscures nuance in discussions on punishment and treatment.

A key variable in this construction is the feeling of *shame*, something Norbert Elias highlights as an increasingly pervasive feature of human sexual relations (Elias 1939/2000):142). Elias chronicles how familial and social approaches to educating children in matters of sexuality, for instance, have over time gone from matter-of-fact exposure of children to the realities of sex towards a ‘conspiracy of silence’ (Elias 1939/2000:148). There is a fear of ‘soiling’ (Ibid.) the child’s mind by allowing them to hear of, or witness, outward forms of sexuality such as prostitution. This is evident to this day in ACT regulations of sex work which stipulate that brothels cannot be set up in residential neighbourhoods but are to be confined to industrial areas.

This aspect of the civilizing process creates feelings of shame that surrounds those body matters that are done in seclusion, including sexual behaviour. What was done in relative openness five centuries ago, then, is now considered an intensely private matter and exposure to sex – one’s own, unwillingly (such as when a former partner posts sex videos on the Internet as revenge) or others’, creates uncomfortable feelings of shame and violation.

Taking Elias’ thesis of sexuality as socially constructed, it is useful then to proceed to Talcott Parsons’ idea that social change occurs in waves (Parsons 1964).<sup>35</sup> Parsons believed that societies tend to exist in a state of relative equilibrium, which is then

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<sup>35</sup> Parsons developed this idea in several publications, including *Essays in Sociological Theory* (Parsons 1954) and in *Economy and Society* (1956 (Parsons and Smelser 1956) co-written with N.J. Smelser.

disturbed by a force ('a violation of the social norms, a breach of conformity'; Elias 1939/2000:456) that leads to a new equilibrium of sorts eventually occurring, as the change settles down. The introduction of new legislation would be one such shock to the system that would create ripple effects throughout society but where the change would gradually be accepted and a new status quo would be found.

Australian and Swedish criminal justice systems each determine criminality along three overall characteristics: *context*, *motive* and *intent*. Whether or not a sexual act is considered a deviant or criminal act depends on a number of variables. For certain acts, it is the *consent* of the parties involved that determines whether a sexual activity is consensual and therefore legal, or non-consensual and consequently illegal. As children are deemed incapable of giving full and informed consent to engaging in sexual activity, the law aims to protect children and adolescents from making decisions concerning their sexuality before a certain age. Other groups in society deemed incapable of consenting to sexual activity include mentally disabled persons in care, and those in relationships of unequal power (such as teacher-student relationships) where consent is deemed irrelevant to the illegality of the act. Intrafamilial, or incestuous, sexual relationships between siblings are also criminalized irrespective of consent.

More precisely, it may be useful to think of a 'matrix of deviance', where on the one hand there are objective values:

*Locality*: (spatio-geographical locality): a sexual act can be classified as illegal in one jurisdiction but legal in another; sex that takes place in the outdoors may be seen as constituting an offence against public order;

*Who is involved*: the age of the people involved matter (the age of consent; age difference between the people involved), as does the gender (some jurisdictions ban male homosexual acts but not female), relationship between the participants (in some jurisdictions extramarital sexual acts are illegal) and sexual background of the participants (young women with multiple sex partners are seen as promiscuous more so than young men);

*Why it is performed:* some faith-based groups and religions consider non-procreative sex sinful and therefore ‘deviant’; prostitution and production of pornography are also two commonly regulated areas of sexuality;

*How it is performed:* consensual spanking between two consenting adults may constitute a criminal offence under Swedish law, whether or not it takes place as part of a sexual act or for other motives<sup>36</sup>;

*When it is performed:* certain religious groups ban, for instance, sex with a woman during specific times of her monthly cycle, or for a specified time after childbirth, as sinful; other cultures prohibit sex during religious festivals or events;

*How often it is performed:* strong normative judgments around ‘normal’ sexual behaviour means that frequent sex can be seen as evidence of a ‘perverted’ or ‘obsessed’ mind.

Along the other line, there are subjective values:

*Physical, emotional or social harm* to the participant/victim (actual or perceived)

*Underlying values* such as religious, political, social or family values

*Emotional linkages* such as attitudes to sex in general and taboos

*The role of the state* in influencing and criminalising behaviour: whether one sees power as hegemony or advocates participatory democracy; whether one favours ‘big’ or ‘small’ government influences whether one thinks the state should steer and legislate on what happens ‘in the bedroom’.<sup>37</sup>

Bearing all this in mind, it seems that it is not a simple task to find a universally acceptable definition of what constitutes a sexual offence, or, by extension, who is a sex offender.

Criminological theories attempt to theorize human behaviour within a framework of what is socially and legally acceptable and unacceptable, and how the legislator

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<sup>36</sup> See *brottsbalken* chapter 3:5 but also 3:6.

<sup>37</sup> In the Swedish debate on the ban on the purchase of sexual services, an oft-repeated mantra is that the state should steer clear of prohibiting sex work if all parties involved are adult and freely consenting to the transaction.

responds to actions considered unacceptable. Here, deviance plays a key role as a theoretical framework for explaining the origins and classificatory whereabouts of crime. Deviance theory and its follow-on, Jock Young's 'new deviancy theory of the 1960s' (sic; Young 2009:7) were ground-breaking in explaining the out groups on the fringes of society: hippies, mods and rockers in the original study by Stan Cohen (1972), drug users and musicians by Howard Becker (1963), muggers and bikies later in studies by Jock Young (Young 1971) and Stuart Hall and colleagues (Hall, Critcher, Jefferson, Clarke and Roberts 1978).

Deviance is a criminological, not legal term to describe behaviour that for some reason or another is deemed to be outside the norm; where law focuses on individual responsibility, criminology focuses on systemic functions of crime. Legislation codifies the management, punishment and treatment of criminals; criminology sees the function of deviance from a social order perspective, deviance as a form of symbolic interaction between citizens, and criminalization as the symbolic interaction between the citizen and the state. The two systems influence and rely on one another but have distinctly different foci and theoretical underpinnings. Deviance is understood criminologically but regulated legislatively. Deviant behaviour sometimes, though not always, leads to classifications of particular actions as criminal. Deviance, like the concept of crime in a wider sense, is a social construction.

With sexual offending, there is no 'evolution of deviance' but rather a constant and continuous shift and reconstruction of what is and is not considered 'deviant'. The 'new deviancy theory' of the 1960s redefined deviance in a move away from an emphasis on absolutist notions of value towards a form of moral relativism. Here, deviance 'is not inherent in an action but a quality bestowed upon it' (Young 2009:7).

Marxist criminologist Richard Quinney (1970) was among the first to point to the social construction of crime. In his pioneering work, Quinney's theory of crime as socially engineered and maintained merged criminology with sociology in the vein of Roscoe Pound (1922/2010). An early protagonist of labelling theory, Quinney pointed to the political action behind the attribution of criminality labels – determining



deviance is above all a matter of choice, by the powerful against the powerless.<sup>38</sup> However, modern deviance differs in some respect from the old offenders collectively labelled and classified. Today's deviants are simultaneously individually pathologized *and* collectively assigned a status as dangerous through actuarial measures. This is reminiscent of Frank Tannenbaum's 'dramatization of evil' – the act of labelling a person a deviant, criminal or pervert is what transforms the person into embodying those characteristics (Tannenbaum 1938).<sup>39</sup>

What is considered normal, deviant, abhorrent and sick has for millennia influenced the criminalization process in every society, from early primitive societies to modern-day global waves of criminalization. Youth, foreigners, migrants and other subgroups are easy targets to assign difference and, by extension, deviance to. Sexuality often plays a role in the assignation of deviance – it was the 'liberal' free love of the hippies that, together with their supposed drug use, that was seen to threaten established ways of life across the Western world in the '60s. Homosexuality is often seen as a foreign influence on traditional society in Africa, such as in Uganda whose penal code states carnal knowledge with another person 'against the order of nature' to be an offence punishable by life imprisonment or death.

In the 1990s a shift occurred, however. Whilst sex has always been seen as, and to some degree has been, a threat to 'traditional mores', the discovery of child sexual abuse as a societal problem also led to the discovery of a new threat: the predatory stranger, or sex fiend, abducting and sexually abusing children. For this new threat, classical deviance theory is inadequate in explaining societal responses to the stranger paedophile. A postmodern deviancy theory that situates the criminalization of deviant sex offenders in a wider framework of deviance also needs to posit it against classical and modern ideas on the purpose of law.

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<sup>38</sup> Quinney's assertion that it is the criminal law that creates criminals was by no means new – Jerome Michael and Mortimer J. Adler had pointed to this some 40 years earlier - and his work was heavily criticized as being too simplistic (see Trevino 2001). The criminalization of acts such as murder and rape cannot be merely for the protection of the powerful, even if one adds gender or feminist analytical perspectives (which are entirely lacking in Quinney's work). Nevertheless, even with its shortcomings the work is seminal in understanding law as a dynamic, human system of meaning.

<sup>39</sup> Edwin Lemert's (1967) distinction between primary and secondary deviance undoubtedly still remains a useful concept in the field of convicted sex offenders. Secondary deviance entails a self-fulfilling narrative on the part of the person committing the deviant act, who over time begins to self-characterise as being deviant.

## **Othering and social cohesion: enemy-creation as social order**

The conflict between good and evil has existed as long as humankind and has featured as a key component of social relationships, culture and literature and polarised debates about right and wrong for equally long. Ancient Zoroastrian moral ideas of good and evil have influenced the leading world religions millennia ago and symbols of right and wrong, from Biblical tales of Cain and Abel throughout the Middle Ages to present day (see Jackson 1896). In his *Poetics*, Aristotle believed in the cleansing and healing *catharsis* that could be achieved by watching a tragedy involving strong emotions resulting in the triumph of good over evil, and in medieval England the morality play was a popular codification of moral transgressions and inevitable punishment.

More recently, the criminal trial has been described as a contemporary version of the morality play, whereby ‘popular culture smoothes out the complexities of famous trials to tell a story with a simple message that best suits the moment...the smoothed-out story produces a morality play that fits the culture that does the re-telling’ (Thomas 2011:1406). Contemporary accounts of convicted sex offenders rely on timeless simplifications of opposing polarities: the innocent victim and the guilty offender. The discourse of Good versus Evil narrates tales of offence and defence to this day, in internet forums discussing current events, in talkback radio threatening to ‘out’ convicted paedophiles, in media campaigns to reveal the ‘truth’ behind popular figures convicted of heinous crimes and, of course, in the classical domain of polarity, the court, where judgements assign guilt and innocence.

Social relations are dominated by the tension between two competing ideas: the Other as friend (in a Levinian (1981) sense, it is a moral obligation to treat the stranger as a friend), and the Other as enemy (whom Carl Schmitt (1925) saw as an essential feature of politics<sup>40</sup>). Western democracy is founded on a normative idea of competition and difference, and the adversarial judicial system with two sides plays out dichotomies of prosecution-defence or claimant-defendant (Åhs 2007:44; Votinius

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<sup>40</sup> Schmitt's ‘friend/enemy’ principle did not primarily mean to say that the enemy is crucial to the formation of state legitimacy (although that may be one aspect of its creation). Rather, it is the *distinction* itself that matters, more so than the features of the enemy itself (Wrange 2007). An enemy is a relative negation: their most important feature is that they is not one of us. Enemies are constructed, not born.

2004; Posner 1998). ‘A pluralistic democratic order’ (Young 2000:49) ‘is based on a distinction between “enemy” and “adversary”. It requires that, within the political community, the opponent should be considered not as an enemy to be destroyed, but as an adversary whose existence is legitimate and must be tolerated’ (Mouffe 1993:4). Othering negates trust and replaces it with tolerance, at best. The Stranger is a threatening but useful addition to the political lexicon that sees benefits in consciously Othering migrants, criminals, sex workers and others who do not fit in (see Hudson 2007; see also Grewcock 2007 on the routine Otherisation of so-called illegal migrants in Australia).

Young notes that ‘[t]he folk devils conjured up out of moral indignation and prejudice are actually constructed by the forces of social control’ (Young 2009:7). But for what purpose? Albert Cohen (1965:6-7) posits that there are inherent rewards for those who engage in being indignant and intolerant:

‘In several ways, the virtuous can make capital out of this situation, can convert a situation with a potential for strain to a source of satisfaction. One can become even more virtuous letting his reputation hinge on his righteousness, *building his self out of invidious comparison to the morally weak*. Since others’ wickedness sets off the jewel of one’s own virtue, and one’s claim to virtue is at the core of his public identity, one may actually develop a stake in the existence of deviant others, and be threatened should they pretend to moral excellence...One may also join with others in righteous puritanical wrath to mete out punishment to the deviants, not so much to stamp out their deviant behavior, as to reaffirm the central importance of conformity as the basis for judging men and to reassure himself and others of his attachment to goodness. One may even make a virtue of tolerance and indulgence of others’ moral deficiencies, thereby implicitly calling attention to one’s own special strength of character. If the weakness of others is only human, then there is something more than human about one’s own strength.’

(Cohen 1965:6-7, italics in original)

In Cohen’s reasoning, it is by comparison to the ‘morally weak’, the defective, that the virtuous can forge a sense of identity and order. Reminiscent of the ‘sound of one hand clapping’ argument, it is the comparison and, perhaps more so the contrasting, of character, that allow law-abiding citizens to develop a sense of self-righteous supremacy. Central to the idea of ‘community’ is conformity (Walker and Heyns

1962): community is strengthened either through a positive process ('this is who we are') or a negative process ('that is what we are not', i.e. we are not-Danish, not-Muslim, not-criminal). It is not surprising then, that every community and nation needs a scapegoat; folk devils and mythical constructs of the 'dangerous other' move in cycles and sex offenders fill the role at regular intervals.

Othering dates back to time immemorial. Durkheim makes a convincing case, in his 'The Elementary Forms of Religious Life' (1912/2001) that religious totemic symbolism – in the form of clan formation – is the original form of Othering. 'The Universe can now be divided between that which belongs to the Kangaroo and that which does not, and from this spring all other classification systems.' (Cladis 2001:xix). Totemic belonging forms the basis for religion, and for community – they are inseparable, the primary us-them. As the importance of religion waned in modern society, Durkheim argued, the need for religious idolatry and symbolism continued. Morality needed a different foundation than religious markers, but its place in society remained.

Social control relies on consensus-building, in contemporary society increasingly via mass media (Melossi 1998:52). 'New' nations or constellations lack given structures of identity and social control through informal regulatory modes such as shaming or exclusion; this must be created. The forging of a European unity, for instance, occurs through identity-development – a conscious building of 'us'. This is not dissimilar to what is described by Kai Erikson (1966) to have taken place in colonial settlements in 17<sup>th</sup> century New England. Problematic minorities – witches, migrants – offer a new nation or community a chance to debate and air their values and norms through the lens of a particular case (Melossi 1998:57): if 'they' do this, how do 'we' feel about it?

Contemporary media discourse around paedophiles and recidivist rapists offer similar opportunities to find new social norms in increasingly secularized countries. Creating 'identity is always related to what one is not – the Other ...identity is only conceivable in and through difference.' (Sarup 1996:47) In a world where 'identity-construction is increasingly dependent on images' (Sarup 1996:xv), iconic representations of Others – the terrorist, refugee, the unshaven and unkempt convicted sex offender, the priest found guilty of child molestation – rapidly send subliminal messages.

Othering has a rational aspect to it in its definitional ascribing of ‘us and them’. Slavery can serve to illustrate. In order to comfortably engage in the purchase and sale of human beings, in the 18<sup>th</sup> century as well as today, one must first convince oneself that the person is ‘not-us’. Africa became a convenient warehouse of human goods to whites because Africans were different enough to not constitute ‘real’ human beings: white ideology reduced them to ‘others’, ‘not-us’, ‘not-Christian’ and therefore ‘not-really-human’. This supposed inferiority facilitated transactions. In contemporary human trafficking, racism and gender discourse reduce Asians, East Europeans and women and children to the ‘others’ that are ‘not-us’ (that is: not white, male, European) and therefore not worthy of the same considerations and respect afforded to one’s own.<sup>41</sup>

Othering is a linear reductionist process from complexity to simplicity, reducing people to one-dimensional labels. A difference in clothes, skin colour, behaviour, expression, sexual preference or other randomly chosen characteristics begin to define the entire Other person: he or she *becomes* ‘an Aborigine, ‘a homosexual’ or ‘a paedophile’. As labeling theory would hold, it can also be self-fulfilling, to a degree: the person begins to view themselves as an outcast and begins to act accordingly (Lanier and Henry 2010). Once the person has been reduced to a label – a beggar, a homosexual, an Arab, or a feminist – and others begin to treat them accordingly – what Everett Hughes (1945) referred to as their ‘master status’, differential treatment follows. Donald Black (1993) observes that bias and discrimination is inherent in humankind: others are always dealt with more harshly than one’s own. The ‘relational distance’ determines how a person’s actions are interpreted: one is more likely to find excuses for loved ones than for strangers who are relationally distant and thus easier to hate. Genocide is the ultimate example of Othering: a reduction of human beings to mere collectives, representations of their ethnicity or race, where dignity and worth are conceptually inconceivable.<sup>42</sup>

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<sup>41</sup> In nineteenth-century Australia, Social Darwinism enabled colonial settlers to view Aborigines as less-than real humans; the ‘fact’ that they ‘failed’ to protect themselves ‘proved’ their inferiority; ‘natural selection’ and ‘survival of the fittest’ provided a comfortable ideology to restrict the rights of Indigenous Australians.

<sup>42</sup> Two factors prevalent in the Othering process are poverty and race/ethnicity which have always been ideologically coupled with crime. The links between accommodation and poverty, such as the concentration of the poor in specific neighbourhoods which is prevalent in many major European, Australian and American cities (Young 2000:196-204; for Britain see Smith 1988; Smith 1993; for Germany, see Ronneberger 1994; for the Netherlands and Belgium, see Breebaart, Musterd and

Perceptions of deviance often have a distinct external slant to it and throughout history deviant sexuality has been constructed as coming from ‘outside’: promiscuity is often linked to mobility (Valier 2004; Burgess 1925/1967), to modernity and to foreign influence. Eastern European and North African boys, girls and young women engaging in street prostitution has led to concerns in Italy (Pavarini 1995), Sweden, Finland and Norway (Taylor 1998:26; Penttinen 2010). Homosexuality has long been seen as the ‘outsider’s sex’, a form of ‘deviance’ that is brought upon a society by foreigners lacking morality and propriety.<sup>43</sup> For instance, the Ugandan political debate to strengthen punitive responses to homosexuality and same-sex relations has become a rhetoric tool in a government anxious to establish itself as legitimate to its people. While Uganda has a relatively long and at times uneasy approach to same-sex relations (with tolerance and arrests occurring in waves), homosexuality is touted as an exclusively ‘Western’ occurrence that is ‘corrupting’ Ugandan youth. What is new is the ratcheting up of the construction of homosexuality as a *threat*. Government policy has posited this threat as affecting both families and ‘family values’, youth (as the bearers of the future) and as a threat to national identity itself. President Yowari K. Museveni has stated that ‘Homosexuality is un-Ugandan’, in a move to establish himself as the protector of Ugandan values and provider of security.<sup>44</sup>

The absolute Other in contemporary Australian political discourse is the child sex offender. They have offended against those groups traditionally under the care and protection of the patriarchy (its women and children) and therefore offended against male capability itself (the state and its men failed to protect). Punishing the paedophile restores the State’s power by conveying a message of condemnation: the State is legitimated not only in its *right* but in its *responsibility* to punish those who violate the sanctity of our children.

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Ostendorf 1997; for Sweden, see Vogel 1992), further exacerbate the links between life in the ghetto and crime. Many European states share a concern with the foreign ‘Other’: immigrants, labour migrants (Taylor 1998:25; Karydis 1998; for Germany see Sack 1998) with economic dimensions alongside perceptions of crime that portray the foreigner *the reasoning criminal* (see Sack 1998; Christie 1993; Cohen 1985; Garland 1990; Clarke and Cornish 1986).

<sup>43</sup> The word ‘sodomite’ itself refers to the alluded immorality in Sodom and Gomorra that, according to the Bible, led to its downfall and destruction.

<sup>44</sup> This idea becomes easier to understand, perhaps, if one views it as an extension of David Halperin’s (1986) analysis of homosexual relations in Greek antiquity, where the Athenian adult male exercised sexual acts with his social inferiors (boys, women, slaves and foreigners): sex thus became a signal of socio-political domination (Fuss 1989:45). If one views sexuality as domination, it is not so far-fetched to also associate it with neo-colonialism and cultural imperialism.

## **Situating criminalization: law, regulation and governance**

How one views a problem determines the solution; and ‘people's political opinions tend to be a *blend* of attitudes and arguments from *different* political ideologies’ (Lappalainen 2001:8, italics in original). Criminalization and decriminalization of particular behaviour is a formative legal process but above all it is a definitional one, relying on shared language and shared emotions to convey meaning. Legislation is written discourse and criminalization efforts therefore have ‘log books’ in the shape of legislative preparatory work and the written law. Legislating is a political process to be sure; and yet, somewhere along the way the end result of this political act acquires its status as ‘apolitical’ (Lernestedt 2003:19). Criminalization is a form of social control (Jenness 2004:149): law is social behaviour, forms part of the social behaviour, affects social behaviour, and is in turn affected by social behaviour. Law is a manifestation of values. Theorizing about the criminalization of sex therefore necessitates theorizing about society as well as about law.

Criminalization of particular behaviour is one of many potential regulatory responses initiated and legitimized by the state. Regulatory influences can take any number of forms, of which informal or social regulation can be as important as what the statute books say, and research deals with such issues as compliance, trust, voluntary participation and cooperation in what could be called non-legal regulation (see for example Braithwaite and Levi 1998). Regulatory options are intrinsically linked to the world view and values of those who choose them, and a functionalist perspective on the criminal justice system would seek to understand how changing identities and the role of institutions ‘fit’ into the traditional conceptions of criminal justice (Nobles and Schiff 2001:197). What has found common ground across political ideology in the field of child sexual offending in the past decade, however, is the tendency to equate ‘regulation’ with ‘criminalization’ of behaviour. Sexual offending in a wider sense, is now so deeply connected with its jurisprudential codification: one is ‘a convicted dangerous offender’ if one fulfils the criteria of the legislation. Sex offender and sex offending legislation is therefore a rich source of material to analyse in terms of the place of sex but also the place of law in society.

Steven Vago (1997) views the law as having three overriding functions: *social control*, *dispute settlement*, and *social change*. Criminalization of deviant or undesirable behaviour plays a role in the social control, and the social change. ‘The concept of law’, Raymond Wacks states, ‘lies at the heart of our social and political life’ (Wacks 2005:xv). Apart from anarchists who would argue that a lawful society could be possible through voluntary arrangements and mutual assistance and some Marxists whose Utopian ideas of communism would relieve society from the oppression of state power, the idea of a society without some form of law and order apparatus has never gained serious support in literature or political philosophy (Tännsjö 2001).

Law has had a prominent place in the history of philosophy from the time of Aristotle, whose political writings were inseparable from legal discourse. Plato’s *Republic* is dominated by the idea of the citizen as recipient of law, and of hegemonic state power. A good citizen is one that is under the control and guidance of the *bonus pater* – the state, and this close link between law, power and ideals still influences law and international relations some 2,000 years later. The legal system reflects each people’s consciousness and therefore varies over time and place. A Hegelian notion would hold that each nation has the legal system that is right for them for that time, and it is perfectly natural and inevitable that the legal system should be one of constant change, tension and development. The state becomes the ultimate reality manifestation of virtue, the combination of law and morality, and the state therefore symbolises the highest good (Strömberg 1989:47).

Law can be thought of as a messenger – constantly sending messages in all directions in society. Law can be one means for framing threats, by first creating them, then legitimising them by the enactment of protective legislation, and thereby also resolving (‘solving’) the threat. Legal ‘development’ is not linear but cyclical – there are ebbs and flows (for instance in the law and order debate) and recurring themes. The law tells a story (Lernestedt 2003), and this narrative is one that begins in committee chambers and working papers in Parliament and ends, ultimately, in High Court judgements (that are often told in a pedagogic storytelling manner, identifying perpetrator and victim and assigning blame where it is due).



Criminal law thus has both a moral basis and a ‘communicative function’ (Simester and Hirsch 2011:4). Its ‘moral voice’ is there to encourage deliberation and ‘express disapproval of the offender’s wrongful conduct’ (Ibid: 212).<sup>45</sup> But law, like poetry, needs interpretation to be understood (Strömholm 1989); understanding legislation is to both comprehend its ritualistic references (‘a person convicted of this offence may be sentenced to up to three months’ imprisonment’) and what this signifies (‘why did the legislator select imprisonment over monetary fines? Is imprisonment a more severe consequence?’).

Neil Gunningham (2009)<sup>46</sup> sees law as a defined part of a broader regulatory agenda, which in turn forms part of the concept of governance. Thus:

- Law is a narrow concept: acts, statutes and Codes form the basis for legislation
- Regulation is a broader concept that includes partnerships but government remains at the centre of the decision-making process
- Governance denotes a plurality of actors and social steering mechanisms that can but do not have to involve government; here, polycentric governance has multiple actors of equal influence.

Law reflects ideology and law influences ideology. It has a ‘socio-technological function’ (Hyden 1982) in addition to its immediate function in conflict resolution; Töllborg (1982) refers to these as the ‘manifest objective’ of law (the visible, easily understood objectives that can be drawn from the law itself) and its ‘latent objective’ (the underlying goal of preserving a particular form of societal structure). Law can be a means to describe reality, but legal constructs are social constructs, imagined mental abstracts that do not ‘exist’ in any real sense (Påhlsson 2005:20-21). Law is an

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<sup>45</sup> Lernestedt (2003:333) points out that the Swedish law that bans female genital mutilation (FGM) (*Lagen (1982:316) mot förbud mot omskärelse av kvinnor*) did not rectify a gap in the existing legal framework: genital mutilation could already be, and had at times been, prosecuted under common assault or aggravated assault laws. Rather, it was sending a message to the community that this particular practice was unacceptable, and serious enough to merit its own law: a message that was further reinforced when the name of the law was altered in 1998 from a ban on ‘circumcision of women’ to a ban on the ‘genital mutilation of women’ (*Lagen (1982:316) med förbud mot könsstympning av kvinnor*).

<sup>46</sup> Seminar ‘Environmental law, regulation and governance: Shifting Architectures’, ANU, Canberra 15/11/09.

ideology with a specific purpose: to organise life and make it understandable and manageable (Pahlsson 2005:20-21).<sup>47</sup>

Social control and power are intrinsically linked (Weber 1947; Flyghed 2002; Wahlgren 2008:17). State power, in regulatory terms, can be roughly divided into two dimensions: *to steer collective behaviour away from undesirable activities* and *to deal with the consequences of these actions* should they nevertheless occur (Flyghed 2002:25). Legislation is a manifestation of force that serves to reinforce authority and supremacy and in turn increase *expectations* of action (which in turn have a stabilizing effect on power; Berger and Zelditch 1998). Criminalization of sexual behaviour ticks these boxes. It symbolizes the state's authority to interfere in private spheres, it reinforces its power to punish deviance, and it creates a recurring expectation that it is, and remains, the vehicle to regulate societal behaviour. Its foundation of normative social control combines formal and informal sanctions of deviant behaviour to create compliant bodies. Disciplination of the sexual body enables the disciplination of the mind (Foucault 1977/1987; Foucault 1984a; Foucault 1984b). Criminalizing deviant sex becomes a means to routinize compliance and to shape the agenda of criminal politics by conveying messages of what is acceptable and not only to prospective offenders but to the public also.

To explain the historical dominance of formal law over other forms of social and regulatory norm systems, a first step is to look at the law as *norm-reflection* and *norm-generation*. Anna-Karin Bergman (2009) has pointed to the link between the norm-generating process and the subsequent 'need' for regulation (see also Svanberg 2008 about the overt and covert communication inherent in legal norms). Socio-legal studies have found legal norms to be referred to more frequently in formal settings (such as business transactions) and in larger cities where there is less personal interaction between individuals in the public sphere. On the other hand, smaller communities and rural societies rely less on formal normativity, where different cultural norms dictate human interactions. Informal traditional norms may lead to conflicts between neighbours, for instance, being settled differently in a community

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<sup>47</sup> Stridbeck (1982) prefers to speak of 'manifest' and 'latent' goals of law in the context of symbolic norm-generation, using the example of legislation to ban parental physical discipline of children as one area where the ideological function of law is expressed through the manifest but which also serves a latent, symbolic function.

where the inhabitants will continue to live and interact after the conflict has been settled (Svanberg 2008:82).

To trace the development of law in a society enables the trajectories to describe the past and determine what happened then to lead us to where we are today (see also Craven, Fitzmaurice and Vogiatzi 2007:9-10). The law is fluid system constantly in patterns of change<sup>48</sup>. The law cannot be static as technological, forensic, legal, developmental and societal advances create new legal dilemmas that require corresponding evaluation of its permissibility and harm, whether its regulatory tools are appropriate and politically accessible, and whether societal consciousness needs to be sensitized to these new advances. Sex offender legislation, as all legislation, needs to abide by key principles of legitimacy, proportionality and effectiveness to be warranted. These principles, that form the basis for all criminalization of behaviour, are at times made explicit in both Australian and Swedish sex offending legislation, while other times they remain implicit. What is, then, ‘good’ sex offender legislation?

There are a few ground rules according to Tala (2005). A piece of legislation (Act, Code or Statute) is ‘legitimate’ in a formal sense if it conforms to Tala’s (2005) five conditions:

1. It needs to be created by a competent decision-maker (e.g. Parliament) (the legality principle)
2. It needs to follow proper procedure in the relevant jurisdiction
3. It needs to be in written form
4. It needs to be legitimately publicised, and
5. It needs to be formally enacted as per the procedure in the relevant jurisdiction.

A different way to think about legitimacy in lawmaking is to assess the need for the particular behaviour to be regulated through legal means. The Swedish committal investigation into the prosecutorial system, *Åklagarutredningen -90* from 1992 (SOU 1992:61, ‘*Ett reformerat åklagarväsende*’) pointed to five factors that convey legitimacy to all proposed new criminalization:

1. An act can lead to demonstrable injury or danger;

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<sup>48</sup> This process has been referred to as the *autopoiesis*, or self-sustention, of law (Teubner 1988; Teubner 1992; Maturana and Varela 1975; Maturana and Varela 1980; Luhmann 2004; for an account of the bio-scientific roots of the concept of autopoiesis see Arnoldi 2006)

2. Alternative sanctions are unavailable, irrational or would require disproportionately high costs (the principle of *ultima ratio*, or last resort);
3. Penal sanction is needed due to the severity of the action;
4. Penal sanction is an effective means to counteract the undesirable act;
5. The judicial system has enough resources to handle the possible inflow of infringements that the criminalization may bring.<sup>49</sup>

Additional elements to consider in the criminalization process could be *interest* (in whose interest should we act to bring about a change in behaviour?), *harm* (to others, to society or to the legitimacy of the legal system itself; Feinberg 1987), and *effectiveness* (will criminalizing particular acts change the frequency by which they occur, and/or will it have other adverse consequences?) (Lernestedt 2003).<sup>50</sup> As concerns the latter, Jan Svanberg (2008:93) lists six factors that determine the degree of effectiveness in legal norms: 1) *stratification* (formal use of norms increase as societal stratification increases); 2) *social distance* – the higher the social status, the more likely a person is to make use of formal norms, and the greater the difference in status, the more likely; 3) *culture* (whether or not the family and community culture encourages formal use of norms influences a person's decision to use it); 4) *organisation*, whereby highly organised societies are more prone to use formal justice); 5) *substituting social influence* – the degree to which competing normative paradigms influence behaviour; and 6) *formal institutions*; a person acts differently in their role as parent, teacher, home owner and so forth.

There are costs associated with almost everything in life, so too criminalization. Claes Lernestedt (2003) splits these potential costs into three conceptual baskets: a) the cost (not in an exclusively economic sense) of certain undesirable behaviour occurring in society (and, conversely, the gains when this does not occur); b) the cost for society to implement the criminalization; and c) the cost for those who as a result of the criminalization are hindered from engaging in the now-criminal behaviour (2003:26).

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<sup>49</sup> These guidelines have been accepted in principle by the Swedish national parliament (Lernestedt 2003:21).

<sup>50</sup> Similarly, Peter Wahlgren (2008:56) speaks of four competing interests: the demands for legislation to display, in turn, *legal rationality*, *cultural (moral/religious) rationality*, *political rationality*, and *rationality in its implementation*. Moreover, legislation must have an element of 'internal rationality': it must not contradict itself, it must be coherent and consistent, and it must contain all the necessary ingredients - but not any unnecessary ones - to belong in the 'sphere of legitimacy' (Wahlgren 2008:53-55). Legislation void of internal rationality undermines the Rule of Law because of its inconsistent application.

By established custom the criminalization of an act should therefore be the last means and be used sparingly: actions that threaten individual freedoms, restricts human choice and opens up to a person being subject to punishment must be used with caution. In the last decade, the legislation restricting the freedom and agency of convicted sex offenders in the various Australian jurisdictions has at times struggled to find ample justification. Such legislation was first introduced in Victoria in 1990 through its *Community Prevention Act* which was tailor-made to enable violent prisoner Garry David in 'preventive detention' for up to twelve months at a time.<sup>51</sup> It is debatable whether legislation essentially targeting specific persons, on grounds of their predicted future dangerousness and potential threat to the public, would hold up to the standard set by *Åklagarutredningen-90*.

From a societal perspective, an over-criminalizing zealotry can result in a loss of legal obedience, or put pressure on a police force and the judicial system that is already in many jurisdictions stretched resulting in fewer severe crimes being appropriately handled and brought to justice. That each act of criminalizing behaviour therefore needs to be satisfactorily motivated (Hart 1963) is usually taken as fact. Importantly, as *Åklagarutredningen-90* noted, the judicial system must be prepared to deal with the new criminals created by the reform. Enacting legislation is cheap, but the consequences may be costly.

An obvious shortcoming of negative legitimization is that the act of criminalization must come first, and any effects can only be measured later. Predictions of reduced frequency and any real effect on conviction rates are only theoretical, and at best estimates of future behaviour (Lernestedt 2003). Reasons for reduced levels of wrongdoing centre around two assumed effects of criminalization of the behaviour: *general and specific deterrence*, and, closely linked to the idea of general deterrence, positive general prevention through *the formation of a new morality* (Lernestedt 2003). Put simply, the legislator assumes that, over time, new norms will become internalized and people will matter-of-factly desist from wrongdoing; it has a normative function. An increasingly common interpretation of negative legitimization could thus be that the state can, through the criminalization act, express a clear

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<sup>51</sup> New South Wales introduced similar legislation in 1994 in order to keep Gregory Wayne Kable, convicted of murdering his wife, in prison after serving his time. This legislation was later overturned by the High Court as being unconstitutional, though on grounds of constitutional law rather than principles of proportionality in sentencing or human rights.

opinion regarding certain acts (Lernestedt 2003:316). Indeed, this was made explicit in the introduction of the Swedish *Sex Purchase Law 1998* and the idea of normative change in behaviour is also evident in the ongoing debate around consent-based legislation in Sweden. These sites of contention become arenas where different narratives around normalcy and deviance, innocence and guilt and the continued role of morality play out.

### **Structural-functionalist perspectives on the regulation of deviance**

‘The sexual morals of the community will be found to consist of several layers. There are first the positive institutions embodied in law; such, for example, as monogamy in some countries and polygamy in others. Next there is a layer where law does not intervene but public opinion is emphatic. And lastly there is a layer which is left to individual discretion, if practice if not in theory. There is no country in the world and there has been no age in the world’s history where sexual ethics and sexual institutions have been determined by rational considerations...’

(Russell 1929/2009:2)

That a society’s view on sexuality is intrinsically part of the greater organisation of that society means that sexual offending – the deviant or criminal aspects of sexual thought or activity – can only be meaningfully understood within the greater socio-legal, cultural and religious contexts of that society. The law does not operate in a vacuum and sexual offending legislation cannot be understood without reference to how sexuality is constructed. Historically, the regulation of sexuality and sexual acts has been based on one of four possible grounds: *coercive sexual acts* (Leander 2007:204) and *particular sexual acts* (such as sodomy or oral sex) are situation-specific (criminalized irrespective of the actors involved), while *the criminalization of sexual relations between persons in blood-line* or dependency relationships with each other, and *sexual relations with those below the age of consent* – thus automatically considered too young to be able to make an informed consent to have sex – are person-specific (Leander 2007:204).

Law is only one disciplinary form of regulation of behaviour, and other sources of control may influence behaviour alongside law: there is a cultural limit, not least, to

law (Wennström 2001). The limits of law as the only form of what Mathiesen (1978) has dubbed the ‘covert disciplinatio’n means we must go beyond jurisprudence and legal philosophy in order to understand what drives individual and social behaviour, in particular when it comes to regulatory options for influencing behaviour. Regulation of undesirable sexual behaviour also occurs through social, informal regulatory practices such as alienation, stigmatization or shaming (Braithwaite 1989). Foucault (1977/1987) links formal and informal penal practices by referring to the normalising judgement – ‘the continuous comparison between good and bad citizens, between right and wrong’ (Clarke 2006:96) that infuses daily activities with corrective norms. Even the threat of sexual violence regulates, by restricting the ‘life room’ (Jeffner 1998:46) of women’s agency when women make choices out of fear (such as altering their behaviour to decrease the risk of victimisation). The threat of deviant sex offenders serves a purpose for those who wish to restrict women’s freedom.

Crime is informed, defined, inspired and sanctioned by those who perpetrate it, those affected, those who observe, those who punish and those who care from afar, the media and the ‘concerned public’. The Durkheimian tradition of viewing crime as an inevitable feature of social order, rests on the idea that a secularized society needs deviant offenders as the moral markers of boundaries between good and bad (something later expanded upon by Hans Boutellier (2000)). Society needs its Others – its sex offenders, vagrants, minorities – to sustain its moral order. Does the criminalization of (some) sexual deviance then serve particular political purposes?

### **What function does criminalization of sexual offending serve?**

‘...obeying the principle of overdetermination, a single cluster of causes may have a variety of effects’ (Gay 1985:50 fn.8)...Overdetermination is in fact nothing more than the sensible recognition that a variety of causes – a variety, not infinity – enters into the making of all historical events, and that each ingredient in historical experience can be counted on to have a variety – not infinity – of functions.’

(Gay 1985:187)

Traditionally, jurisdictions tend to legislate against particular acts or actions rather than personal characteristics (for instance, in India performing a male homosexual act

was illegal until 2009, though ‘being homosexual’ was not<sup>52</sup>). Criminalising someone’s personal thoughts, desires or fantasies would be ineffective, as convictions would be almost impossible to secure, and could challenge basic legal principles such as freedom of thought. However, the dichotomy between deviant behaviour and behaviour by a deviant person (Tittle and Paternoster 2000:22) has become muddled in recent Australian legislation. A sex offender may be viewed as *being* a deviant, as he has committed the *deviant crime* of sex offending. What is new is the tendency to increasingly regulate convicted *offenders* rather than *offences*. In Australia, this is evidenced, for instance, in the legislation entitled *Dangerous Prisoners (Sexual offenders) Act 2003* (Qld) (Act no. 40 of 2003) and the *Dangerous Sexual Offenders Act 2006* (WA). Both pieces of legislation share a common goal, which is to enable continued detention of convicted sex offenders upon completion of a prison sentence in cases where the offender is deemed to pose a continued risk of sexual re-offending (Edgely 2007).

Lindgren (1993) uses Gamson and Modigliani’s (1989) idea of ‘interpretive packages’ or ‘frames of interpretation’ to show two layers of discourse operating simultaneously. The first package or frame has a rational dimension, using arguments relating to harm, consequences and moral reasoning. The second frame is the symbolic dimension that structures arguments by the use of metaphors, historical examples, slogans, illustrative anecdotes and icons (Lindgren 1993:26). The two layers prop each other up in support of an overall argument that acquires an air of ‘fact’ and becomes a de-politicized social problem.<sup>53</sup> Legislation to detain dangerous sexual offenders indefinitely in prison after they have served their time relies on these different frames of interpretation: the risk that a convicted sex offender may recidivate is a fact (though the likelihood is a different matter) and so it becomes a symbolic act to find evidence

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<sup>52</sup> ‘Homosexual intercourse was a criminal offence until 2009 under Section 377 of the *Indian Penal Code 1860*. This made it an offence for a person to voluntarily have "carnal intercourse against the order of nature." This law was struck down by the 2009 Delhi High Court decision *Naz Foundation v. Govt. of NCT of Delhi*, which found Section 377 and other legal prohibitions against private, adult, consensual, and non-commercial same-sex conduct to be in direct violation of fundamental rights provided by the Indian Constitution.’ ([http://en.wikipedia.org/wiki/LGBT\\_rights\\_in\\_India](http://en.wikipedia.org/wiki/LGBT_rights_in_India), accessed 14 June 2013). However, in 2014, the Delhi High Court struck down the legislative change, leading to a recriminalization of homosexual acts.

<sup>53</sup> Best (1990) has analysed the ‘problem’ of missing children in the United States and the concern around these children. In particular, he sought to ‘identify the claims-maker’s *interests* in promoting a social problem’ (1990:11), noting that ‘We prefer to blame social problems on flawed, deviant individuals, while paying little attention to the complex workings of the social system...And defining threats to children in terms of child molesters, kidnappers, and other deviant adults made these fears more manageable...if society could just bring a few villains under control, the threats would disappear, and the future would be secured.’ (Best 1990:180)



to support moral arguments as to why these offenders should remain imprisoned indefinitely.

The result is a conflation of *possibility* with *likelihood*. Tellingly, offenders can be considered ‘high risk’, ‘medium risk’ or ‘low risk’ but not ‘no risk’ (philosophically speaking, can anyone over the age of, say, five?). In Queensland<sup>54</sup> and South Australia<sup>55</sup>, for instance, special provisions allow for the *indefinite* detention of convicted sex offenders who are deemed dangerous (by two medical practitioners, one of whom must be a psychiatrist). The stakes are high, then, for the individual being assessed, classified and locked away based on these professional’s knowledge. Can such predictions ever be truly accurate? Whose knowledge is to form such judgement on another human being’s thoughts, choices and motives? Can such knowledge even objectively exist?

### **The formulation of the sex offender as a social problem**

Knowledge is constructed, cumulated and applied and has a historical and cultural specificity (Geller and Vasquez 2004:2). For instance, our collective and individual ‘knowledge’ of what constitutes a sexual offence varies over time, is informed by a multitude of sources and relies on, among other things, on whether the behaviour in question is deemed ‘deviant’ or ‘normal’. Social problems exist, Spector states, ‘only through the enterprise of groups or individuals who create them’ (1976:171). Moreover, ‘knowledge is sustained by social processes’ and ‘knowledge and social action go together’ (Burr 2003:4-5).

Social problems tend to be defined along one of two main paradigms: the first is that they stem from objectively defined conditions such as poverty or unemployment, and are thus functions or symptoms of ‘real’ policies. The second theoretical framework holds that social problems are established through collective processes of definition (Lindgren 1993:34). The latter is a useful perspective in understanding constructed frameworks around sexual offending. Sexual offending exists, for sure: rapes and

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<sup>54</sup> Under the *Penalties and Sentences Act 1992*; see also the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*

<sup>55</sup> Section 23 of the *Criminal Law (Sentencing) Act 1988 (SA)*, later amended by the *Statutes Amendment (Sentencing of Sex Offenders Act) 2005 (SA)*.

sexual assaults take place every day, in every country on earth. If prostitution is ‘the world’s oldest occupation’, rape is perhaps the world’s oldest crime. But societal acceptance and understanding of rape and sexual violence changes along with waves of legislative and judicial reform that are both influenced by, and influence, our understanding of what sexual violence ‘is’. Describing the sexual violence itself therefore needs to be done alongside describing society’s approach to sexual violence, what meaning we ascribe to it and the thought-constructions that frame our understanding of its causes, responses, and effects.<sup>56</sup> Authors such as Susan Brownmiller (1975) in the United States and Ngaire Naffine (1990) in Australia were instrumental in placing sexual violence on the public agenda and initiate a social movement that directly impacted on rape law. More recently, grassroots movements such as the Megan’s Law initiative in New Jersey (which has had flow-on effects in other parts of the world) serve as reminders of the potential impact of lay perspectives in framing how threats are constructed.

Drawing on work by Edward E. Jones and Keith E. Davis (1965), Allen E. Liska alludes to constructions of sexuality as being constructed in particular time-space frameworks:

‘...in attributing intentions to others, people are sensitive to whether their acts seemed to be caused by external forces (social pressures and accidents). If external forces are not apparent, people tend to attribute acts to choice and to impart motives, dispositions, and intentions to the actor. For example, homosexual behavior in a constrained single-sex environment (a prison) may not

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<sup>56</sup> A case that illustrates this well is the culture of abuse on Pitcairn Island described by Sarah Coster (Coster 2004) in her doctoral research. Pitcairn Island, an inaccessible, barren island in the Pacific Ocean became the home of fugitives from the English ship *The Bounty* following a mutiny against its captain in 1767. The sailors, who had spent some time in Tahiti and formed relationships with local women returned to Tahiti after deposing Captain Bligh and sought refuge on Pitcairn Island where they lived undetected for more than fifty years. Today’s residents are all direct descendants from the sailors and their Pacific spouses and whilst officially a British protectorate, live according to local culture that has developed due to its extreme isolation from the rest of the world. In the mid-1990s it transpired that many of the island’s young women had been victims of widespread and horrifying sexual abuse from an early age. In 2003 a trial was held on Pitcairn Island. 13 men were charged with multiple counts of rape and other sexual abuse; 12 were convicted. What transpired in the Pitcairn Island trials was a narrative of a culture of violence, where male power was institutionalised and had assumed near-absolute hegemony. Rape had become normalised. It occurred so frequently against all of the women and girls on the island (often beginning when the girls were as young as 11 or 12) that it was seen, at least by the men, as ‘normal’ expressions of sexuality. For the victims, the frequency did not equate to normalcy, and many left the island as soon as they were old enough, never to return. In other words, the sexual assaults – that included men openly attacking and raping women in public and in their homes – were seen by some residents as ‘normal’ while others still deemed them ‘deviant’.

lead to being labeled a homosexual; rather the person may be defined as a heterosexual without choice.’

(Liska 1987:152)

Amitai Etzioni (1976) notes that social problems can be defined along a scale ranging from ‘personal’ to ‘collective’. A personal problem is the responsibility of the person or family in question to solve, irrespective of any help society may contribute with, while a ‘collective’ problem is one that one can legitimately expect society to handle, irrespective of any help individual members may offer (Lindgren 1993:39). For instance, drug abuse is an issue often deemed to be personal while natural disasters are considered collective problems. Sexual violence is explained variously as an expression of individual deviance and other times as a societal problem.<sup>57</sup>

Issues presented in a dramatic way have greater chance of successfully competing for space (Lindgren 1993:50); but a problem also requires a solution. The balancing act is delicate between sustaining the drama – more easily done by simplifying messages, using symbols and ritualistic scripts – and desensitizing the public with too much information that creates a loss of interest. Those who ‘own’ a problem are also perceived as speaking with authority on it as societal problems possess both a cognitive and a moral dimension (Gusfield 1981). The cognitive aspect is that which deals with facts regarding a problem: recidivism rates among paedophiles, theories to explain sexual offending, the links between socio-economic hardship and crime, and so forth. The moral dimension decides whether particular behaviour is to be considered shameful, immoral, undesirable or pitiful (Lindgren 1993:51). Claim-makers with a vested interest in funding, opportunity to speak on their own issues or getting re-elected will advance different ‘solutions’ to social problems.<sup>58</sup>

Society is ‘imagined’ (Mills 1959; Anderson 1991; Keel 2010). Crime is a social and legal construct, the result of a triangulation of law, public opinion and political

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<sup>57</sup> There is, however, a tendency (not only in recent years) to individualize and privatize social problems (Lindgren 1993; see also Mauss 1975 on social movements arising out of social problems). The converse is also true, when lobbying groups aim to redefine private problems as collective societal problems. Domestic violence has been redefined from a private matter to a societal problem in the past three decades, and ‘violence against women’ is now explained and addressed on a systemic scale and not merely by reference to the individual pathology of the ‘violent’ offender.

<sup>58</sup> Gusfield (1981) was one of the first authors to speak of social constructions of problems, using the example of drink-driving to illustrate the construction of the problem as highly individualized, as a personal failing or immorality rather than by way of pointing to systemic problems (Lindgren 1993).

response. Crime does not come out of nowhere, but flows from the ‘political spectacle’ (Edelman 1988) that orchestrates a continual ebb and flow of issues of concern. ‘Public concern about an issue in complex modern societies’, Kenneth Thompson points out, ‘seldom develops as a straightforward upsurge of indignation from the grass roots – there is a “politics of concern”’ (Thompson 1998:12).

Moreover, what is considered a societal problem is by no means a given or a mere reflection of fact but also illustrative of the symbolic order of moral and political responsibility typifying actors (as ‘criminals’, ‘alcoholics’ or ‘paedophiles’, to name a few). This typification is not without consequences: if sex offenders are ‘criminals’, it falls on the criminal justice system to handle them. If, on the other hand, they are ‘mentally insane’ it is the medical profession that bears responsibility.

### **Sex offender regulation as political discourse**

Problem ideologies depend on a series of steps, where *naming* or *defining* the problem is the first (‘defining’ the ‘Jewish problem’ enabled Nazi leaders of the Third Reich to articulate a ‘solution’; viewing juvenile delinquency as a ‘law and order problem’ sets the scene for constructing a law-and-order solution). The second step is to set up the problem as a *norm-deviating process*, where the solution indicates a *return to normal conditions*. Pre-determined norms dictate the higher goal from which the norm-breaking deviates: ‘divorce is a problem because the family is supposed to remain intact; crime and delinquency are problematic insofar as they depart from the accepted moral and legal standards of the community.’ (Ryan 1971: 13)

Legislation pertaining to ‘dangerous’ sex offenders – offenders convicted of sexual offences that are deemed to pose a continued threat to the ‘community’ after serving time in prison – such as that of Queensland, NSW, Victoria and WA only pertains to those offences characterised as ‘stranger’ offences. These are defined as assaults in public places, often but not necessarily accompanied by physical violence, by a person unknown to the victim. These are statistically rare compared to the much more prevalent forms of domestic sexual violence, intra-familial sexual abuse of children and sexual victimization as part of intra-relational adult interactions (Ronken and Johnston 2014). Put simply, abhorrent sexual crime perpetrated by strangers is

relatively rare in both Australia and Sweden. Why, then, does it receive so much attention?

Unusual incidents tend to receive more media attention than the commonplace, and high-profile criminal acts change the societal legal consciousness. Global news flows from multinational news corporations and social media heighten awareness of legal initiatives around the globe, to be debated and disseminated. Criminal justice initiatives in California, India or Uganda now form part of the legal consciousness of citizens of Australia, Norway and Russia. With this comes an altering of communities' approaches to law-and-justice issues. Janne Flyghed (2001; 2002) has termed this the 'normalization of the exceptional': measures that were once unthinkable become acceptable responses to horrific events of an exceptional nature. Over time these spill over into everyday debate, gradually expanding into greater and greater spheres of influence; when an outrageous idea (such as capital punishment for paedophiles) has been aired enough times it begins to make sense.<sup>59</sup>

### **The sex offender as a symbolic construct**

Symbols, icons and images are valuable tools for public consciousness. They are instantly recognizable, reassuring and placating. An iconic image, a catchphrase or a religious ritual does not need to be debated at every instance precisely because their meaning is so well known, invokes a shared sensibility and has a predictive emotive response. The purpose of ritual in mass, for example, is to quieten the mind, not to stimulate it: the well-known phrases, songs and chants ease the mind and the body into a meditative state. Symbols in advertising create, elicit or enhance common reactions. Media is a constant teacher in how to respond to narratives of horror by illustrating sex offender stories with images of unkempt, menacing older men or smiling, remorseless youth being led into a courtroom.

Symbols can have positive aspects. They increase and transfer legitimacy. Symbolism and ritual both need and reinforce the legitimacy of authority (Jenkins 1998:156).

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<sup>59</sup> A parallel development is the gradual expansion of perceived threats, so that there is a normalization of the illusion of threats (Flyghed 2002:23). These twin strands of consciousness feed into one another: as the awareness of perceived threats grows, so do the forceful responses, which in turn reinforce that there really must be a danger lurking out there.

They 'routinize' (create and define the boundaries of routines) and give a sense of similarity. Symbols increase familiarity, including in new settings. They placate, and steer events in particular directions. Symbolism 'obscures the institutional complexities and inequalities of power in modern polities' (Merelman 1992:7). Physical symbols, like national flags, words, phrases and even ideas can all be hijacked by groups who then transform their meaning and claim 'ownership'.<sup>60</sup>

Language is a system of signs aimed at conveying information. Words have meaning, commonly understood and agreed references. But language can also be vague and convey only imagined, or partly shared, understandings. Foucault was one of the first to theorize as to the power of the spoken: by naming an incident, one controls it and the symbolic control which comes from having the power to speak particular words (judgements, directives, labels, diagnoses) transforms into real control by the actions that follow the utterance (see Foucault 1977/1987; Foucault 1993). What exactly might 'Australian values' mean? Who is meant by 'a sex offender'? The legal, technical meaning may be quite different from the common-sense, intuitive or layperson's meaning; and so in order to simplify a message, symbolism can act as a bridge.

Symbols are a means of explaining the inexplicable (Bruce-Mitford 1996:6), to make sense of the mysteries surrounding human life.<sup>61</sup> The concept of *symbolic politics* has been advanced to explain phenomena in political science, law, economic and in environmental regulation (Matten 2003:215). Symbolic politics has been defined as 'a political process in which certain goods and measures are announced and enforced, which...either represent sheer rhetoric and thus only target a signalling effect, or are designed in such a way that these goals and measures should or could not be realized and implemented' (Hansjürgens 2000:147). Put simply, they are goals or measures

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<sup>60</sup> For example, Swedish right-wing nationalists began to display the Swedish flag as a symbol of their patriotism in the 1990s. Twenty years on, displaying a national flag is still seen with some suspicion and even schools and public offices have at times avoided using the Swedish flag in official circumstances so as to not be connected with right-wing extremism.

<sup>61</sup> Signs and symbols share similar functions but are yet different. A sign is a tool or idea that illustrates or refers to something else (such as a 'Gucci' label or a road sign); they are common in advertising but are also used to define and display our identity. Symbols on the other hand, whilst similar in function to signs, have a deeper meaning and are more timeless. The strongest appeal of a symbol or sign is its immediacy: a warning sign on the sign of the road must be immediately recognized by the driver who has only a moment to interpret it and follow its cue. Signs that are universally recognizable such as those signifying toilets, telephone or smoking bans improve the likelihood of foreigners also being able to obey the rules.

designed to have high visibility but little effect. When the Swedish prohibition on the purchase of sexual services (*lagen om förbud mot köp av sexuella tjänster*, SFS 1998:408) came into force in 1999 it had the explicit purpose of acting as a both general and specific deterrent for those considering purchasing sexual services or profiting from the sex trade. It also had a specific normative purpose: to send the message that prostitution is something that society should ‘combat’ as it causes ‘serious harm to both the individual and society’<sup>62</sup>.

Symbolic politics differ from ordinary processes of codification in regulation where there is a ‘gap’ between ‘the regulatory idea and effective implementation of this idea’, due to factors such as watering-down of ideals into workable and enforceable deliverables. Rather, the idea implies a calculated showcasing of the regulator’s willingness to achieve certain regulatory ideals, however unworkable they may be in practice. Alternatively, they can be utilised to codify already existing practices (Matten 2003), meaning that very little ‘reform’ actually takes place. The use of emotive language in legislation, such as in the title of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) is an example of where the symbolic coupling between dangerousness and sex offending cognitively and linguistically produce an idea of sex offenders as dangerous. Sex offenders can certainly be dangerous and there can be good cause for continued control, care, treatment or even detention of particular prisoners, as stated in section 3 of the Act. But the underlying narrative is one that taints all sex offenders as inherently dangerous, needing to be controlled, treated or detained in some manner or other.

Symbolic regulation can be thought of as a conceptual framework for understanding legislative, policy and, in a wider sense, regulatory changes that occur that are seemingly incongruent, have a limited effectiveness or appear superfluous as they essentially codify what is already standard practice. To be sure, symbolic regulation need not be inherently meaningless or a cynical attempt to stifle public debate without having to achieve substantial change: taking a stand against an unethical practice can have value *per se*, irrespective of any substantive achievements on the ground and bad practices can be outlawed simply because ‘it’s the right thing to do’. For instance, reassuring a fearful public by a higher visible police presence is now an accepted

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<sup>62</sup> See <http://www.regeringen.se/sb/d/2593/a/116601> (accessed 2015-01-01). Sixteen years after its inception, this formulation still remains on the Swedish government website.

objective of policing, and cannot be dismissed merely by reference to actual crime statistics indicating that crime ‘really’ occurs someplace else.<sup>63</sup> However, constructing symbolic regulation as materially significant is a play with smoke and mirrors, masking systemic problems by offering appealingly simple solutions and dismissing ethical or legal concerns by reference to emotive or ‘common-sense’ reasoning.<sup>64</sup>

Some characteristics of symbolic regulation include:

*Principled regulation* (‘taking a stand’: codifying relatively non-contentious issues as a ‘matter of right and wrong’, without adverse economic or fiscal effects)

*Ritualistic regulation* (‘sending a message to the community’: window-dressing, or lip-service)

*Reassurance regulation* (the main, or even sole, objective is to demonstrate to the community that ‘something is being done’)

*Moral regulation* (regulating predominantly moral/religious issues seen as threatening ‘society as we know it’ or in order to ‘protect the moral fabric of society’; often reference to threats to undermine ‘our way of life’ or ‘family values’ such as the age of consent for consensual sex or homosexuality)

*Scapegoating* (singling out small group/small issue and making it ‘indicative’ or ‘representative’ of a larger issue hidden beneath)

*Victim blaming* (changing law or policy to ‘enable’ or ‘facilitate’ for certain groups to ‘pull themselves up by the bootstraps’ or ‘self-help’)

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<sup>63</sup> Symbols are used in deliberate ways to influence and shape public opinion, but the message needs to be carefully balanced so as to not invoke the opposite reaction to what was intended (Garland 2005).

<sup>64</sup> The Sweden Democratic political party manifest for Stockholm (2010) advocated a ‘public register of convicted paedophiles’. But as paedophilia is a mental disorder, not a criminal offence it was unclear how the Sweden Democrats proposed this kind of information be collected – by mental health specialists, in breach of their medical confidence? What purpose would such a register have? Should it include those paedophiles – in a psychiatric sense – that have been convicted in a legal process, irrespective of the offence? Should it include paedophiles convicted of traffic offences? The party manifest did not advocate a public register of offenders convicted of sexual offences against children or clarify whether rapists who have offended against both children and adults appear on the register.



*'Inevitable progress fallacy'* (pointing to technological, economic or social factors 'outside our control' that government needs to 'respond' to for the safety of the nation)

*'Ticking bomb' arguments* (expediting measures by reference to an urgent threat/crisis/emergency, whereby normal rules do not apply (Cohen 2005))

*'Criminals outside the law' arguments* (particular groups of offenders are denied equal or fair treatment by reference to their criminality)

*'Community deserves to know' arguments* (whereby the concerns of the community weigh deeper than the rights of offenders, as if justice were a zero-sum game and where it is seen as acting responsibly by informing the public of offenders' whereabouts or personal details)

*'Mission creep'* (regulation starts small and becomes increasingly punitive, sometimes through 'administrative' changes such as reclassification of detainees as a matter of 'expedience')

*Self-reinforcing punitiveness* (the rules are set up so that breaches are almost inevitable and conformity is not rewarded; then the breach is punished on 'objective' grounds)

*Renaming* (rephrasing policy without substantially changing its content, such as when words like 'moderate physical pressure' replace 'torture'; 'collateral damage' are used over 'civilians' and 'illegal migrants' substitute 'war refugees')

*Centrality of victims' concerns* (the subjective emotions experienced by victims are given equal significance to their material or ethical rights, which are objectively determined)<sup>65</sup>

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<sup>65</sup> Whilst restoration of the material and emotional harm imposed on victims has at least in theory always been an objective of criminal justice policy, their (real or symbolic) suffering now firmly occupies a central place in the decision-making process, through measures such as victim impact statements in criminal trials, patients' rights groups in health reforms, and their increased status as 'expert witnesses' when legal reforms are debated (see, for instance, the many references to Megan Kanka's mother in the debates concerning sex offender notification in New Jersey and in the US more generally).

*Centrality of emotions*: it is enough that people ‘feel’ a certain way for an issue to be brought to the forefront: a public that ‘feels’ outraged, fearful or disgusted can succeed in altering public policy, regardless of facts or statistics.

*Blurring of emotional and moral reasoning*: the experiences of the public sensibility also has a direct link with the perceived morality of an issue; feeling angry or fearful of a convicted paedophile becomes a valid argument to support tougher measures

Governments may ‘govern through crime’ (Simon 2007) but more specifically they also govern through sex – by promoting ‘good sex’ (as defined by its cultural-political institutions) and denouncing ‘bad sex’ as deviant, harmful, immoral or criminal. Regulating through law – more particularly through criminal law – is one form of governance of a society, and a relatively small part of it at that.<sup>66</sup> Yet it is one that receives a great deal of media attention, and has come to represent what many people mean when they think about the state’s role in preventing and addressing sexual violence. Criminal law has become a representation of secular morality in pluralist and liberal societies (Garland 2001), and the ‘pastoral power’ which Foucault (2007) stated is given to police and judges, whereby they are given priest-like confessional trust and can give moral guidance, draws on the deference habitually given to religious authority.

Madness, dangerousness, crime and insanity have been conceptually linked for centuries in both popular discourse and state policy. Yet, there was a shift in the 19<sup>th</sup> century from the madman as a peripheral member of the community to the deviant person at risk of offending and who must be kept separate both for their own and others’ protection. Dangerousness formed the basis of two separate institutions: the prison and the asylum. This discourse has set the tone for much of regulatory practices concerning sex offenders for close to two centuries. In Australia, detention is used for

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<sup>66</sup>Eugen Ehrlich (1862-1922) was one of the founders of modern sociology of law and one of the first scholars to differentiate between ‘the living law’ (Ehrlich 1913/2001; Hertogh 2009) - how law actually mattered – and the law on statute books (Svanberg 2008; Pound 1922/2010).

criminal acts, mental illness, infectious diseases, immigration status, and dangerousness (the latter which includes sex offenders<sup>67</sup>).

Foucault, in *Madness and Civilization* (1964/1988), views the asylum primarily as a site for reason and control, subjecting madness to a ‘new morality’ (Rothman 1971:xvii) that would stamp out insanity through conformity. Rothman, in addressing but ultimately rejecting both the medical science explanation and the philosophical control/command theory advanced by Foucault, instead puts the creation of the asylum in a wider social framework. He does so by reference to the anxiety among ‘legislators, philanthropists, and local officials, as well as students of poverty, crime, and insanity’ (Rothman 1971:xviii) that began to see criminals, madmen and orphans not as inevitable features of social life but as *threats* that must be separated from vulnerable communities.

However, the entire terminology surrounding ‘dangerousness’ is not new, Pfohl argues:

‘Throughout history, societies, or at least those members in positions most threatened by disruptions of the established order, have produced means of identifying and controlling so-called dangerous people. Since the emergence of the state and the substitution of individual for collective responsibility, this practice has generally involved the diagnosis of and intervention against “dangerous” individuals... [in order] to identify and isolate those from whom the rest of us will be protected.’

(Pfohl 1980:129)

## **Conclusions: Creating criminalization imprints**

The criminalization of certain actions is a political decision. ‘Nature knows no criminals; society elects them’ Nils Jareborg (2001:45, personal translation) points out. Classic jurisprudence and criminological theory would state that the purpose of

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<sup>67</sup> One could debate the justifications for classifying a sex offender, but not a habitual drink-driver, as a ‘dangerous person’; and wonder why ‘dangerous persons’ legislation covers only personal/sexual injury and not, for instance, environmental or financial injury.

criminalising actions is to prevent crime (Jareborg 2001:47).<sup>68</sup> Jareborg points to the logical fallacy of this: the crime only occurs because of the criminalization. Had not the legislation stipulated a particular type of behaviour to be illegal, there would be no crime, in a technical sense, to prevent. Rather, criminalization serves a normative purpose: to encourage people to do the right thing (such as it has been determined by the state), and to discourage them from displaying undesirable behaviour. Punishment, on the other hand, serves a very different purpose (it could be specific or general deterrence, for instance). As means of discouraging undesirable behaviour range from regulatory disciplinary actions, via technological or contractual limitations, to the threat of legal sanction (Jareborg 2001:46)<sup>69</sup>, the criminalization of particular behaviour is the ultimate sanction in a long chain of informal and formal social control mechanisms.

The ‘morality-generating and habit-forming’ (Jareborg 2001:47) normative dimension to legislation situates itself between the formal and informal spaces of social control as norms are discussed, analysed and internalised so that over time, behaviour is automated (Jareborg 2001:47). This *symbolic function* of criminalization serves a purpose per se: by condemning behaviour as illegal, the expressive function of denunciation has been achieved (Jareborg 2001:48). The threat of punishment – punishment is always repressive, creating discomfort for the subject in one form or another – can act as a general deterrent.

There is tension between people’s beliefs in a ‘just world’ (Jost and Hunyady 2002) and everyday cynicism and disillusion regarding the justice deficit, politicians’ ‘real motives’ and loss of belief in ‘the system’. Despite this, the ‘hegemony of law’ (Silbey 2005) sustains its institutional power (but also cements structures of power and inequality). The development of government as a service provider to discerning customers demanding that their needs be met (Osborne and Gaebler 1992) including law reforms to their own taste. When government is more concerned with risk management than with leadership (Hood 1991), and the loss of institutional religion, class belonging and party ideology has led to fewer spaces for deliberate reflection on moral, ethical and societal matters, the law remains as the one moral beacon of

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<sup>68</sup> Lernestedt offers a simple definition of criminalization: ‘To criminalize a type of action is to by law sanction it with a punishment’ (2003:15, personal translation)

<sup>69</sup> Lernestedt (2003:23) refers to criminalization as a ‘toolbox’ – the same is true of course for regulatory options of different kinds also.

society. The law offers a *context*, a chance to view certain behaviour in light of larger social mores.

Legislation aims to do many things. These motives are sometimes contradictory, sometimes merely inadequate to redress the situation. Regulating and managing sexual offending and sex offenders is a complex and yet constant issue for lawmakers and politicians. Current approaches in Australia, Scandinavia, the European Union and the United States share many similar traits. Different societies have different foci, to be sure. Where one jurisdiction has opted to create Sex Offender Registers, another chooses electronic surveillance and monitoring of convicted sexual offenders, cognitive-behavioural or psychological treatment programs, imprisonment, and confinement in mental hospitals, mediation, or bio-psychiatric treatment options such as chemical castration. The particular formula of regulatory options in each jurisdiction is a result of political will, mass media influence, budgetary and technological constraints, historical developments of legislation, religious viewpoints, medical discourse, psychological research, parliamentary or lawmaking options, and cultural values to name but a few influences. These different factors form part of a state's sexual history discourse so that a particular regulatory proposal is considered unthinkable, suitable or even necessary depending on the precise combination of factors.

Legislation in a state occurs at the crossroads between often contradictory and conflicting discourses (Weeks 2000:146). A country's crime policy may be more a response to calls for punishment than to actual crime levels (Wilkins 1991; Ruggiero, South and Taylor 1998b:10). This 'penal grammar' that forms part of a country's cultural particularities or penal sensibilities (Tonry 2004) are national but are also influenced by global streams of information, collaboration and exchanges.

Internationally, legislation around sexual crimes and sex criminals tug and flow in different directions, between increased tolerance and greater repression, between criminalization and liberalization. Prostitution and trafficking for sexual slavery purposes are now topics on the global agenda; nationally, areas such as domestic sexual violence, paedophilic sexual assaults on children and child pornography are more likely to dominate the debate on sex crimes in national jurisdictions, with

‘ordinary’ rapes and gang rapes, sometime with ethnic or cultural overtones, not far behind.

Although individuals react differently to situations, we also ‘react collectively through legal institutions, including institutions of coercive behaviour control that we establish and apply as a society’ (Schopp 1998:184). Schopp refers to these institutions as the ‘conventional public morality’, consisting of ‘the widely accepted principles of political morality that provide the foundation for the legal institutions’ (Ibid.). While law is not the only means for changing or improving the world, it has nevertheless endured as the tool *par excellence* for social engineering and the conscious steering of societal action. Law as betterment relies on the notion of a societal collective memory (what Teubner (1988:325) refers to as the ‘memory of law’), possible because single events are coupled together to form part of a greater coherent mass of ideas.

Some societal ideas, however, seem more resilient to change than others. This includes certain aspects of criminal law, such as prohibitions of particular sexual behaviour. Sexual boundaries can be negotiated in some areas – the criminalization of fornication, homosexuality and adultery, for instance, certainly has softer boundaries that shift and change with the times. Other times, however, the boundaries remain firm irrespective of societal mores changing in other respects. There remains a deep fault line, for instance, between children, on the one hand, and sexuality on the other, and some of the complexities of criminalising sexual deviance involving children as agents or objects have been subject to regulatory interest for millennia. The next chapter offers a rationale for the methodology chosen to investigate these issues.

## CHAPTER 3: METHOD

‘What is defined as crime in France ceases to be such a few hundred miles away. There is no action universally considered as a crime over the whole face of the earth. Consequently nothing, at bottom, reasonably merits the name of crime. It is all just a matter of geography and opinion.’

(de Sade 1791/1996:120)

This thesis is concerned with two overarching and linked questions. Firstly, what are public perceptions of deviance and how it should be regulated, in the context of sexual offending? Secondly, how do these public perceptions of sexual offending influence regulation of sexual behaviour in Australia and Sweden?

This thesis uses a triangulation method. Its use of secondary data (in the form of Australian, Swedish and international criminological, sociological and legal literature) to assess the historical and contemporary underpinnings of the regulation of sexual offending is complemented by primary data consisting of a small number of individually conducted interviews with stakeholders in the legal and judicial sectors. Finally a content analysis of legislation, preparatory documents and other forms of official discourse depicts how the legislator opts to regulate sexuality and sexual offending. This third side of the triangle is a deeper and more detailed reading of some particular crimes of sexual offending and how these are regulated in Australia and Sweden. These crimes are sexual offences specifically related to children, as well as prostitution/sex work and child pornography crimes (the latter are sexual offences in Australia, but not in Sweden where they are considered crimes against public order). The data were used to inductively gain an understanding of conceptual generalizations (Sarantakos 1993). While case studies are bound by time and place, triangulation, or multiple methods, are appropriate means of ensuring validity of the data (Berg 2004) through critical analysis and overcoming ethnocentric tendencies in one’s own and other societies (Nelken 1994). Moreover, some newspaper clippings and social media content served as background information, to illustrate particular cases or community attitudes. These did not, however, constitute a form of data *per se* and were thus not assembled or coded systematically.

Legal judgements from Australian and Swedish courts are not used as data for study *per se* but used to illustrate or highlight particular points throughout the thesis. It should be noted that in both countries courts, in particular High Courts, serve to interpret legislation and assess the constitutional validity of particular legislation. As such these judgements provide precedents (which are not legally binding in either jurisdiction but rather act as guidelines) and complement the theory of lawmaking in how society can in effect handle offenders and protect victims. The constraints of space and clarity however necessitate that this thesis only includes court cases on an anecdotal basis. Moreover, three of the Australian States are common law jurisdictions (New South Wales, South Australia and Victoria), where the role of the court in creating law has a vital role and legal precedents frame legal development. However, in order to facilitate comparisons the thesis uses only codified material in the form of statutes and codes.

The interviews were explorative, a means for gaining insight as much as information and to validate thought alongside providing knowledge (see Kvale 1997) on the various types of qualitative interviews in research). While they were intended to number around 20, due to personal circumstances they were in the end limited to three: one with a Swedish professor emerita of criminal law, two held in Australia with the Director of the Bureau of Criminal Statistics of New South Wales, and a Judge in the District Court of New South Wales respectively. All three agreed to disclose their names and professions and thus waived their right to anonymity. They were contacted by email. Upon agreeing to meet and before the interview began, they were given an information sheet and signed a consent form. The interviews then used open-ended questions on their views on matters such as the advantages and disadvantages of their respective legal system, and how the law could be reformed in terms of sex offender management. The interviews lasted approximately one hour and were not taped; instead the researcher took notes. A summary of the interview was then emailed to each interviewee to offer an opportunity to comment and clarify any errors or misunderstandings. As the interviews were intended to provide background information and an opportunity for discussion rather than to be drawn on for data, there was no need to modify the research design as circumstances changed and did not allow for 20 interviews.



The texts were analysed using a qualitative text analysis method. Qualitative approaches and methodologies (the former used in a wider sense, the latter in a more narrow sense; see Vaismoradi, Turunen and Bondas 2013) differ in terms of epistemological and philosophical starting points, but have in common their understanding of knowledge as objectively defined but subjectively understood. Put differently, a qualitative text analysis of a particular piece of discourse aims to provide knowledge but also to offer ‘new insights’ (Elo and Kyngäs 2008) by disclosing the meaning behind the text and the possible interpretations that may stem from it. Its aim is to clarify by placing the spotlight on the subjectivity of human understanding as a complex, multifaceted yet logically coherent thought pattern. Whether to test a hypothesis or to build a theory from the ground up, qualitative research brings a richer understanding of data than quantitative methods to measure content could ever do in isolation. For instance, a mere count of the number of court convictions for rape and sexual assaults in a particular jurisdiction would be limited in usefulness if this was not complemented by qualitative interpretations of how the courts arrived at the verdict and by reference to which legal statute (such as when the Swedish *brottsbalken* was reformed in 2005 so that acts previously classified as sexual duress were now classified as rape, resulting in a drastic increase in rape convictions in the following year).

Qualitative content analysis can be inductive or deductive (Pfeil and Zaphiris 2010), depending on whether the aim is category development or category application<sup>70</sup>; this thesis has leaned towards the former, allowing for a framework of theory to emanate from the data itself. It builds theory from the ground up, through the extraction of information from the material used.

The chosen method of interpretation, a qualitative text analysis of the material, views sex offences as well as sex offenders as socially constructed and seeks to trace the origins of these constructions to wider social ideas around sexuality, gender and social relationships at large. Put differently, there are both material aspects to a sex crime – the requisites needed for a particular act to qualify as a sexual offence, such as intent – and symbolic constructions of how it is viewed, discussed, reported and explained. It is this latter part that can be meaningfully understood by viewing the data through a

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<sup>70</sup> Mayring, P. (2000): ‘Qualitative content analysis’. Published on the Qualitative Social Research Forum ([www.qualitative-research.net/fqs-texte/2-00/2-00mayring-e.htm](http://www.qualitative-research.net/fqs-texte/2-00/2-00mayring-e.htm), accessed 2015-01-01).

social constructionist lens, highlighting that sex offences and sex offenders are sometimes – but not always – cognitively and semantically linked. For instance, a popular soccer player can be convicted of a sex crime but still not be viewed as a ‘sex offender’ in the eyes of the public or media, who use different interpretative frames to construct the person as a victim of circumstances, a ‘naughty boy’ who committed ‘a mistake’ or even a wrongfully convicted victim of malicious slander.<sup>71</sup>

Through the lens of sexual offences and their legal regulation in the various jurisdictions of Australia as well as in Sweden (with reference to other jurisdictions as relevant), conclusions can be drawn as to the increasing similarities in the regulation of sexual offending across jurisdictions in the Western world. By taking a comparative approach, this thesis demonstrates how a similar crime problem has been culturally constructed, socially understood and legally regulated in different jurisdictions, primarily Sweden and the states and territories of Australia. By looking at the ‘end product’ – legislation pertaining to sexual offences – questions can be meaningfully asked as to the words used, the meaning they convey, and why the legislation was worded, or framed, in particular ways. This is accompanied by an analysis that ‘backtracks’ to discover the origin of the criminalization or criminalization reform: how it got there, or put differently, what happened that led to this ‘end product’.

Research methods are rooted in ‘specific assumptions and beliefs about the environment and provide a means of structuring the environment in such a way to allow it to be studied’ (Schreiber 1996:64; Denzin 1989; Blumer 1969). The research carried out in order for this thesis to be written begins with five assumptions: first, that *crime*, as a legal, political and social occurrence, is a construct rather than a fact; second, that ideas of normalcy, deviance, right and wrong affect – but do not directly determine – what is considered *criminal behaviour*; third, that the linguistic concept of *crime* is fused by a wide variety of meanings that sometimes diverge or even contradict one another; fourth, that crime has a unique and personal meaning for each person who reflects on it, based on individual circumstances, ethos, experiences, faith, and outlook on life, meaning that universal truths about crime are impossible; and

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<sup>71</sup> See, for instance, how convicted rapist Ched Evans, a popular football player with English Premier League club Sheffield United has been represented in both traditional and social media as a remorseful man who ‘committed an act of infidelity’ against his girlfriend and ‘made an incredibly foolish decision’ (<http://www.theguardian.com/society/2014/oct/22/ched-evans-act-of-infidelity-rape-conviction-video-statement>, accessed 2015-01-01) while the victim had to leave her home and change her identity twice after her name was revealed on the Internet by supporters of Evans.

fifth, that certain words that relate to crime or criminal behaviour are embedded with symbolic meanings that obscure, confuse and make irrelevant the more instrumental uses of the words. The word ‘paedophile’ is such a word: its meaning is a *toujours-déjà*, instinctively: the person using the word and the person who hears it may not quibble about its meaning, they believe it to mean what it means. Yet a psychiatrist and a journalist may use the word to signal two rather different things.<sup>72</sup> Their frames of interpretation, or discourse schemas, differ.

To compare two legal systems is to make a comparison of the similarities and differences, not only in the actual wording of particular legislation, or whether a certain issue is regulated through law in the first place. It rather encompasses the entire legal system, because each jurisdiction’s legal system is a unique combination of the particular historic, social, economic, cultural, ethnic and juridical circumstances that have coloured that particular entity. States form the legitimate basis for legislation in a post-Westphalian world, and legal jurisdiction is most often linked to state territory. A study in jurisdictional legislative particularities is also a study in the politics of those states under the looking glass. This thesis uses a crime politics perspective: the field of criminology where questions of legitimacy and social control converge.

Quantifying deviance is done through the use of statistics (such as police notifications, charges and court convictions) and definitions (legal – current and historic, from Australia, Sweden and elsewhere) in order to give precise definitions to a vague concept. For instance, a jurisdiction’s age of consent is one indicator of the perceived deviance level of ‘underage’ sex. Bilateral and international definitions through agreements (such as those from the European Court of Human Rights, UN, and the ICC), and legal statutes regarding specifics such as the age of consent/statutory rape definitions can also provide insight. Finally, diagrams and visual representations of deviance are useful illustrations.

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<sup>72</sup> The Daily Telegraph Online used the phrase ‘sex monster’ 319 times between 2005 and 2011 (the trend was increasing use over those years); ‘sex pervert’ 204 times. Words like ‘warped’, ‘crude’, ‘sick’ were used to a lesser degree (e.g. ‘police hunt for tramstop pervert’ – pervert is mostly used in connection to less serious offences like online chats, grooming, and priests, as in ‘sex priest a bully and a pervert’). ‘Perverts to share housing complex’ (DT 18 May 2010), ‘Ex-student tells of sex monster’ (DT 26 July 2011). All headings retrieved from [www.dailytelegraph.com.au](http://www.dailytelegraph.com.au) on January 12, 2012.

An oft-repeated truism in the global criminology discourse is that all criminology is comparative, or should, at the very least, ‘contain a comparative dimension’ (Hardie-Bick, Sheptycki and Wardak 2005:1); Durkheim’s assertion that ‘comparative sociology is...sociology itself’ (Durkheim 1938:39) has, Newman and Howard note dryly, come to be included in the opening statements of virtually all papers relating to comparative criminology (Newman and Howard 2001:1). Indeed, many forms of ‘regular’ criminology have a comparative component, whether statistical, genealogical, intra-cultural, legislative or juridical. Straight ‘side-by-side’ comparisons are however of limited value in explaining *why* there are differences. For this, the comparison needs to be complemented by social, legislative, criminal justice and cultural settings of each of the countries.

The process of reinterpretation is to see the past through the lens of the present and construct new truths in one’s ‘biographical *tableau*’ (Becker 1963:59). A comparative reading can both not only generate a deeper understanding of one’s own legal system, but also strengthens one’s belief in that system by finding fault in others’. Observing divergent structures can also be normatively useful: a sort of quiet acknowledgement that what ‘we’ are doing is in fact working better than ‘their’ alternative. For instance, reports of heinous and painful executions from the United States form part of the Scandinavian ideological basis for the humane treatment of prisoners; ‘we are not barbarian like them’. In short, ‘comparative’ law aims to both compare and contrast; careful selection of what is being compared (or rather, as it were, contrasted) and explicit definitions and delimitations are necessary to make the comparison meaningful (see Loeber 1961; but also Bogdan 2003).

By gaining a deep multi-perspective understanding of the nature of the inquiry, this can contribute to the development of criminological theory in the field of crime politics. The overarching ontology is hermeneutical and drawn from a critical realist perspective in the sense of being rooted in an understanding of the world as subjectively and socially constructed, not objectively given, bearing in mind that the epistemology of the project is monistic.

## The function as an object of study in cross-cultural research

A comparative study of law is above all a *functional* approach. It allows the researcher, and the reader, to ask questions of a more fundamental nature as to the function, importance, value, and shape of law itself. How does the ‘legal consciousness’ (Silbey 2005:323) manifest itself in different places? How do people view what law is, what it should accomplish, to what degree it should interfere with people’s privacy and freedom, and from where it derives its legitimacy?

Anthropological works such as Bronislaw Malinowski’s (1926) study of law, crime and social custom among one Melanesian people in the Trobriand Islands off New Guinea, have asserted that primitive societies have norms and rules that can usefully be thought of as legal systems, similar in function to our Western equivalents even when the processes and punishments imposed differ greatly (see also Russell 1929/2009). Such studies may divulge that there is, in fact, a ‘Rule of Law’ of sorts in these societies, embedded in greater social structures of mutual rights and obligations where taboos (for instance around certain sexual relationships) corresponding to Western criminal law helped maintain this ‘elaborate social machinery’ (Beirne 1983b:382) and supervised by some form of legitimate authority. Malinowski’s study focused on the *function* of what he labelled ‘law’ rather than its *form*.<sup>73</sup>

A different approach, based more on Wittgenstein’s (1953) idea of reality expressed through language, is offered by Peter Winch (1958). He argues that observational methods based in science are inappropriate for cross-cultural studies because mere observation of behaviour is inadequate to explain the reasons for this behaviour. It is the *meaning* and the *language* expressing this meaning behind the action that has explanatory, and thus predictive, power. Closely related to this is the social constructivist approach to interpret action in order to construct meaning. For example, a person photographing a young child may do so for many reasons. A proud parent’s motivation in taking a summer photo of naked children in a pool is different from an artist’s and a paedophile’s. It is the thought behind the imagery that determines whether it is harmless, artistic or child pornography. A researcher from a different

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<sup>73</sup> This drew criticism from researchers such as William Seagle (1937).

culture might interpret the action based on personal underlying assumptions, knowledge and stereotypes.

### **A note on Swedish-English translations: linguistic dilemmas and diversity**

There is one other methodological quirk that must be mentioned at the outset, namely the inter-language comparison that forms part of an inter-legal comparison. Swedish is a Germanic language and the Swedish legal system contains words in Swedish that do not translate well into English or other foreign languages (just as, conversely, common law expressions are not immediately possible to directly translate into other languages: expressions such as *affidavit*, *writ*, *damages*, *tort* and *common* all require fairly elaborate explanations to the non-Anglo reader). A few examples will suffice to illustrate.

A key word in Swedish legal discourse is *rätt*. The Esselte *English Law Dictionary* (1989) translates this word to ‘law [or] right’: in other words, the word can be defined narrowly as something ‘being right’ (in the sense of ‘it is right that criminals be punished’), which has both a legal and a non-legal meaning.<sup>74</sup> Something may be ‘right or wrong’ without having legal implications. However, *rätt* is also used to signify law, for instance in phrases like *folkrätt* (public) international law; the word *folk* denotes a people, nation or other collective), or *kontraktsrätt* (contractual law). The word appears in words such as *rättsmedicin* (forensic medicine), *rättssal* (courtroom), *rättshjälp* (legal aid), *rättvisa* (justice) and *rättslära* (jurisprudence). The Swedish word for a legal action or trial, *rättegång*, translates perhaps most directly as ‘the course/process of getting it right’ (an endearing way of viewing trials, to be sure). In jurisprudence *rätt* can find a comfortable equivalent in the German word *Recht* which is commonly known and understood also amongst non-Teutonic readers (e.g. *Rechtstheorie* as legal theory). Nevertheless, the differences are not only semantic but point also to fundamentally philosophical and pragmatically technical differences of a legal nature.

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<sup>74</sup> The English for ‘a right’, in the meaning of e.g. ‘a human right to...’ has a match in the Swedish word *rättighet* (derived, obviously, from the same root word).

As a member of the European Union and more generally of the postmodern global world, Sweden customarily publishes much of its legal and governmental material in English. Official governmental inquiries (*Statens Offentliga Utredning*, SOU) as a rule include an abstract in English. When available, the thesis uses documents originally written in English. Other times a translation has been necessary (and proofread by assistant professor Eva Johnsson, Uppsala University). When the researcher has made a translation from Swedish into English, this is noted as ‘personal translation’.

## **CHAPTER 4: PERSPECTIVES ON SEXUAL OFFENDING**

### **Introduction: Sexuality and sexual offending**

To understand what sexual offending 'is', it is useful to contextualise it in terms of what 'sexuality' is. Sexuality is a vital and pervasive feature of individual and collective culture as old as humanity itself. It is embedded in societal renewal – without it, society would not procreate and regenerate (Weeks 2000). Most people think about sex, have sex, seek intimacy, and self-define the boundaries of their own sexual autonomy: 'Sexuality is an intrinsic aspect of social relations, which can be studied in relation to all areas of life and the organisation of society... (Conference proposal for BSA Annual Conference in 1992, quoted in Weeks 1996b:3-4). Sexuality is an aspect both of the individual and the collective. Sociological understandings of sexuality seek to understand and integrate political, philosophical and cultural understandings of how sexuality is represented and illustrated as acceptable and deviant, and how those boundaries are drawn. Sexuality certainly also has a dark undercurrent, of sin, violence, danger and disease (Weeks 2000:163). Sexuality 'takes many forms, is patterned in a variety of different ways and, moreover, cannot be understood outside the context in which it is enacted, conceptualised and reacted to.[...] Sexualities today are lived in a variety of communities of identity, of interest and of politics. They express and delineate a plurality of values' (Weeks and Holland 1996b:1). In this chapter, some of these perspectives, values and identities are explored, in order to create a solid understanding of what sexuality 'is' and how it relates to sex offending.

Sexuality can be viewed in a multitude of ways, from the biologist or natural to the social or cultural. Sociologists who take a constructivist slant on sexuality tend to view it less as a 'drive' or instinct than as a political embodiment of social meaning, norms and negotiation (Seidman 2004:250; Weeks 1985; Weeks 1986; Weeks and Holland 1996a; Weeks and Holland 1996b). As human beings find their place in the world, they acquire knowledge as to the expectations on how they should act and the social conformity that determines norms. There is a transformative nature in this acquisition of conformity and internalising of boundaries that is reminiscent of Piaget's (1970) view on knowledge as the result of continuous construction (Rossi



1983:10). We develop models of understanding the world that enable us to understand it in particular ways (Piaget 1970; Levi-Strauss 1976; Rossi 1983). Moreover, Segal states, 'Our experiences do not simply mirror social meanings, though they are inevitably filtered through them' (Segal 1994:209). Society's sexual scripts (Gagnon and Simon 1975) act as these filters for constructing our own attitudes, beliefs and thoughts.

Sexuality is closely linked with identity, values, morality and societal organisation. The wide variety of attitudes and values around sexuality is nothing new: 'We can find in the history of the past two hundred years or so almost all the themes that preoccupy us now, and similar laments about the decline of morals and a confusion of values.' (Weeks 1989; Weeks 2000:164) If there has been a 'secularization of sex' (Weeks 2000:167) that has separated sexual values from religious ones, this is a new trajectory. Nevertheless, many societies continue to draw close links between sex, procreation and marriage, advocating that the two former should only occur inside the latter and that by extension only procreative sex should be considered 'normal' or 'acceptable' sex while non-procreative sex – with two participants of the same sex, or non-penetrative, oral or anal sex – thus is 'unnatural', in that it does not fulfil the purpose of conceiving children, and by extension 'deviant'.

Such views still hold sway in many cultures around the world, including modern Western societies such as Australia, the United States, Europe and Scandinavia. Remnants of the beliefs around 'non-procreative' sex as equalling 'deviant' can be traced in debates from same-sex marriages (where homosexual sex and marriage become linked, rather than love and marriage) to age of consent regulation.

## **Sexuality and identity**

Sexuality is an expression of the individual desire but its meaning is negotiated inside cultural and legal paradigms. It occupies a 'symbolic centrality' (Weeks 2000:144) in social discourse that directs and steers other social and political events. Moreover, the social, the liberal and the moral form a symbolic bond between individuals where transgressions are met not only with legal-penal consequences (Durkheim 1893/1933) but also societal judgement. Cultural codes in media and political debate reflect and

legitimate legal norms but also keep these norms in a fluid state of critical reflection (Seidman 2004) amid proposals to change. ‘Sexual storytelling is a political process’ (Weeks and Holland 1996b:7), a form of contested knowledge (Seidman 2004) as to what constitutes acceptable and deviant sexual practices. Homosexuality, for instance, as an individual sexual characteristic is a relatively recent phenomenon<sup>75</sup>; that a person’s sexual behaviour (such as male-on-male sex) should form the basis for their personal characteristics or even identity (as ‘a homosexual’) has not historically been common.<sup>76</sup>

That sexuality is more than a personal immediate act – what one ‘does’ – and that it is in fact deeply embedded in one’s personal identity – who one ‘is’ – has been discussed by writers such as William Simon and John H. Gagnon since the 1970s (Gagnon and Simon 1973; see also Gagnon and Simon 1974; Gagnon and Simon 1975), but it is Michel Foucault’s work on the matter that has received the most attention since its publication. Arguing that sexuality is constructed through political, social and cultural discourse – communicative texts that tell stories as to the truth of the world – Foucault’s work coincided with streams of academic debate conveying alternative truths that also took place from the 1960s onwards but in particular in the 1970s. Foucault elaborates upon in his three volumes on *The History of Sexuality* (*The Will to Knowledge* (1976), *The Use of Pleasure* (1984a) and *The Care of the Self* (Foucault 1984b)). While Foucault was not the first author to vocalise the idea of sexuality as a social construct, it is his idea of this construct as constituted *through discourse* that has received a great deal of attention. The Victorian era had created a normative division between ‘normal’ sexuality – that which had reproductive potential and occurred in the parental bedroom (Clarke 2006:101) and the ‘deviant’ forms that were relegated to brothels and asylums (Clarke 2006:101). The latter form was regulated and policed but in essence both forms were subject to formal and informal regulation through law and social normativity.<sup>77</sup>

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<sup>75</sup> Seidman (2004:244) states that ‘heterosexuality and homosexuality were not a basis for personal identity until the early twentieth century’, while Clarke (2006:101) dates this propensity somewhat earlier, to have occurred from the 1870s onwards.

<sup>76</sup> In certain cultures, such as in the Middle East, the rights of homo-, bi-, and transsexual (HBT) groups use instead language such as assigning sexual roles to the parties: an ‘active’ person is a man who penetrates (another man or a woman), a ‘passive’ party is the penetrated (woman or man).

<sup>77</sup> Foucault’s writings have been the subject of a great amount of critique; some of these perspectives are covered by Burchell, Gordon and Miller 1991, Clarke 2006, Dean 1999, Dreyfus and Rabinow 1982, Gutting 1994, Hoy 1986 and Kritzman 1988. The best known critic is perhaps Jürgen Habermas whose criticisms occurred on a number of levels. Habermas believed that Foucault deliberately

Foucault's Repressive Hypothesis that situates 'good' sexuality within the nuclear family whilst assigning psychiatric labels to 'bad' sexuality in turn led to the idea of bio-power.<sup>78</sup> There are four elements of Foucault's classification of bio-power as the situated body-specific expression of his power-knowledge nexus: '*the hysterisation of women's bodies..., a pedagogisation of children's sex...the socialisation of procreative behaviour...[and] a psychiatrisation of perverse pleasure*' (Clarke 2006:102-103, italics in original). All this leads not to a 'regulation' of sexuality, Foucault argues, but to 'the very production of sexuality itself' (Clarke 2006:103). Sexuality is thus 'invented' (Foucault 1976; Clarke 2006; Binnie 2004).

In Lisa Appignanesi's (2008:182) words,

'Sexuality is other than anatomical. It is not simply a matter of physical parts, but something mysterious and perhaps threatening, constantly in need of investigation, attention, or control... As the [20<sup>th</sup>] century turns, sexuality increasingly and openly becomes complicated in the way the Western world makes sense of health and happiness, identity and destiny. It becomes a key indicator of the kind of individual one is, normal or perverted, sane or mad. The focus on sexuality, as Foucault underlined, particularly problematized women and homosexuals, masturbation, and children.'

This new fixation with the sex offender focuses on the deviant *person*. Almost invariably in the discourse it is a male offender, who *is* his crime, who wears his offending as a fixed part of his identity that is both inescapable and morally a responsibility to escape. This chapter teases out how this new deviancy came to be. It begins with unmasking the sexuality discourse in order to set out the place of sexual offending in sexuality as a greater whole, before moving on to the place of criminalization in legislation – how it could be, how it once was thought of and how it

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overlooked penal law as well as advances in liberalism and human rights in his conceptual shift from sovereign power to administrative power (Clarke 2006:104) and filtered out law in constituting a protective as well as repressive regulator of sexual expression. Foucault's question of to which degree our own sexual identities are individual choices and how much of that choice is made for by others (Clarke 2006:107) and imposed on our passive bodies nevertheless remains an interesting one.

<sup>78</sup> Clarke (2006:108) points out that Foucault did not believe that the 18<sup>th</sup> and 19<sup>th</sup> century saw simply a repression *per se* of sexuality in society (that all sex was 'bad' and must be kept to a minimum), but rather a creation of a new discourse around sexuality that situated sexuality in the social and in fact separated from 'sex itself'.

has become today. In part at least, to regulate sex is to codify deviance, and so the idea of deviance follows in this.

## **The body-mind paradox of sex offending**

Almost a century ago, Bertrand Russell noted that the law is concerned with sex in two different ways: on the one hand to enforce whatever sexual ethic is adopted by the community in question, and on the other hand to protect the ordinary rights of individuals in the sphere of sex. The latter have two main departments: on the one hand the protection from assault and from harmful exploitation, on the other hand the prevention of venereal disease (Russell 1929/2009:5).

Sexual offending is dualistic. When a rape occurs, it is the body that is violated, in a way perhaps more intimate and profound than any other type of crime. At the same time, it is the mind that conceptualizes and constructs the action as a rape (and not, for instance, 'just sex'). It is the mind that determines the difference between 'good' and 'bad' sex – on a personal level, in the immediate act, and on a societal and communal level in the creation of regulatory limits to sex. To regulate sex is to apply the conceptual mind, cognitive thought and analytical normativity to a bodily experience. It is a paradox. The body is often situated in the domain of natural sciences; and sociology, if it touches upon the physical body at all, does so in the context of the necessary but basic typification of the collective, as embodiment of culture or as a vessel for the mind (Alkvist 2004).<sup>79</sup> Philosophical expressions of a believed dualism separating body from mind emerged from classical Greek and Roman writings but it took several centuries for the *homo duplex* image to emerge, the overt manifestation of which is the Cartesian catchphrase 'I think, therefore I am': thought, not body, makes the civilized human.<sup>80</sup> Alongside philosophy, Christianity stood for much of the emerging hostility towards the natural body and its basic needs, perhaps most of all sexuality that needed to be controlled, reigned into matrimony or avoided altogether (Alkvist 2004:29-30).

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<sup>79</sup> It is this focus on the body as situated in nature that is pushed forward in arguing for heterosexual reproductive sex as the only 'natural' form of sex: sex as expression of lust becomes deviant, although many heterosexual couples do have sex for purposes other than strictly in the hope of procreating.

<sup>80</sup> Although Alkvist (2004) argues that Descartes had a more complex understanding of the relationship between body and mind than this popular analysis of *cogito ergo sum* would convey: passions and emotional sensations are inscribed in our body through our experiences and it is the body, not the mind, that 'remembers' pleasurable as well as frightening experiences.

Sex becomes a crime when one of three things happen: when the act itself is criminalized, when the circumstances of the actors or the act so dictate, or when the mindset of either or both actors determine the sex to be unwanted or against their will. To criminalize sex is to seek to regulate those boundaries between good and bad, normal and deviant. It is to institutionalize sexual autonomy but at the same time it is to recognize that there are times when those involved cannot (be expected to) make rational decisions and exercise sexual agency.<sup>81</sup>

## **Feminist and queer understandings of sexual violence**

Sexual storytelling is one of selection: ‘Just as some voices from the past were not heard, some voices of today remain mute. Many of the silenced voices of the past – of women, of gays, of “the other” – have created some spaces, told some stories, brought about some change; but there are also stories that still we have not imagined’ (Weeks 1995; Weeks 1996:41).

Two important contributions that advanced understandings of sexuality and sexual violence<sup>82</sup> were feminism and queer studies (emerging from 1970s gay and lesbian movements). These two movements pointed to generic understandings of sexuality in the 1970s as heavily preoccupied with an institutional heteronormativity that equated ‘sexuality’ with ‘men’s experiences of heterosexual sex’ (with issues such as sexual violence, marital rape, homosexual – including lesbian – rape, female sexual autonomy and intra-familial sexual abuse of children almost wholly absent in accounts of ‘normal’ versus ‘problematic’ sex).

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<sup>81</sup> Such as when jurisdictional norms determine the age of consent whereby every sexual act involving a minor below that age becomes ‘statutory rape’.

<sup>82</sup> Alternatively, the term ‘sexualized violence’ can be used both as a descriptive and an analytical tool to denote a spectrum of actions directly assigned to gender (Jeffner 1998). This includes rape, sexual violence against children, prostitution, violent pornography, and domestic violence perpetrated by men against women (Jeffner 1998:36). The overall similarity between these different forms of violence, according to this theory, is that they are overwhelmingly a result of male dominance over women – generally and specifically, and thus form a continuum of hegemonic masculinity and oppression (of women, but also of children, including boys) (Connell 1987). The phrase denotes that the violence may be sexual per se, but it can also form part of physical and other forms of violence: the violence is ‘sexualized’ even when it is not strictly ‘sexual’ in any given moment, because of the gender structures in the relationship between offender and victim. That this violence occurs for different reasons than, for instance, bar fights or football hooliganism is a cornerstone of its philosophical underpinnings. Jeffner emphasizes that sexualized violence must also be understood, interpreted and problematized in relation to other forms of interactions between males and females. It is, as she points out, a difference of *degrees* of interaction, not of *forms* of interaction (Jeffner 1998:46).

While there is no single feminist theory but rather liberal, radical, Marxist, socialist, postmodern, and other forms of feminist thought, they do share a common perspective on gender issues that is not generally captured by mainstream criminological theories (Akers and Sellers 2009:267). It is therefore useful to highlight the development of feminist approaches to legislation concerning sexual violence.

A fundamental notion in feminist theories is the significance of the patriarchy in social organisation. A patriarchal society systematically favours male rights and privileges over female, though exceptions on an individual level naturally occur. While patriarchy is neither universal nor inevitable, the vast majority of societies throughout history and around the world can be said to be patriarchal (Akers and Sellers 2009:268).

Gender plays a crucial role in the sex offender discourse. Constructing sexuality is, in essence, to construct heterosexuality (Jeffner 1998:29) as the predominant normative paradigm. Romantic heterosexuality becomes the 'normal' illustration of sex, with paradigms challenging this order expressing 'deviance' or 'extreme' forms of sexuality.<sup>83</sup> The so-called 'natural behaviour' argument – that reproductive sex is 'natural' and all forms of non-reproductive sex is by extension 'unnatural' has a deeply cultural base in Western Christianity (Ruth 1987; Pagels 1999) and religious moralizing over 'sinful' sex (John 1995). Western or occidental sexual mores are founded upon 'categorical dichotomies' (Travis 2003b:10) where difference is highlighted over similarity. They see gender differences as fixed and place great emphasis on the differentiation between 'men' and 'women' as both embodiments of 'male' and 'female' characteristics and the basis for values assigned to each sex (Travis 2003b:10-11).

'Natural' forms of (hetero)sexuality are often linked in sex and biology discourse to normalcy and 'biological' expressions of sex, indicating that dominant expressions of heterosexuality are assigned a hegemonic role as the 'given, predetermined and

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<sup>83</sup> The trials and convictions of the founders behind *Oz* magazine, first in Sydney in 1964 and later in London in 1971 shows how terms such as 'deviant' or 'obscene' can change rather quickly. *Oz*, a magazine founded by Richard Neville, Richard Walsh and Martin Sharp in 1963, led to several trials for obscenity charges. Its content included references to homosexuality, lesbianism, pornography and issues such as abortion (a criminal offence in NSW at the time). The conviction in 1971 led to the three co-editors being imprisoned for a time before the conviction was overturned on appeal.

natural' (Jeffner 1998:29) form of sexuality. MacKinnon has taken this a step further, viewing sexuality as a social construction based on men's power, defined by and for men and enforced onto women (MacKinnon 1989:128; Jeffner 1998:30). Power differentials by race, class, age and gender all influence criminal justice decisions, for instance. Feminists view gender as a fundamental factor in determining treatment of offenders as well as victims, assigning a wish to maintain male dominance to decisions made by the criminal justice system. Some feminist theories 'explain criminal justice decisions as reflecting this male dominance and functioning to support patriarchy by discriminating against women and reinforcing traditional female sex and family roles' (Akers and Sellers 2009:268). MacKinnon's definition of masculinity intrinsically links an eroticisation of dominance to a corresponding eroticisation of female subordination she argues is pervasive in society and which is evident not only in pornography but in 'ordinary' expressions of romantic love (MacKinnon 1989:130).<sup>84</sup>

One of the key thinkers in the sexuality discourse, Michel Foucault was an anti-essentialist and, despite his illumination of the constructed frameworks that frame our thinking about sex as well as our actions, he was guilty of overlooking gender, and the feminist inroads into an understanding of sexed sexuality. For Foucault, 'sexuality is not understood as gendered, as having a male form and a female form, but is taken to be one and the same for all – and consequently male' (De Lauretis 1987:14; see Foucault and Gordon 1980). His complete and utter silence on lesbianism as an expression of homosexual sex or as sex at all situates his idea of sex, 'real sex', still as *what man does* (to other men, or to women).

It is generally men's active sexuality that is the focus of prohibitions, whereas women are generally seen as passive victims. For women, passiveness and modesty have been the expected sexual behaviour. Abstaining from sex, lust, desire and will – *not* having sex – is what makes a decent woman: 'For much of human history, [virginity] has been held in high esteem for young women approaching marriage: virginity has been an essential quality for determining their market value. Once virginity was lost, a nubile woman's worth was greatly diminished.' (MacLachlan 2007:3) Myth and

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<sup>84</sup> Moreover, female genital mutilation (FGM) has been criminalised under both Australian and Swedish law. Though not a sexual offence, it can be conceptualised as sexualised violence aimed at subordinating women to male sexuality.

religious legend from ancient Greece to Christianity has placed the passive female at the height of adoration: Hera, the wife of Zeus was said to restore her virginity regularly, an accomplishment she shared with Athena, Aphrodite and Artemis (MacLachlan 2007:4) and the Virgin Mary has remained a supreme icon of innocence and maternal – but never romantic or sexual – love for Christians. Though this has changed to some degree in the 20<sup>th</sup> and 21<sup>st</sup> century, Abbott (1999) describes the ‘BAVAM’ (Born Again Virgins of America) who exemplify the contemporary abstention wave in the United States and who draw links between sexual abstinence and morality.

Sexual behaviour has always been infused with morality and it has often been the female body that has acted as the embodiment of virtue. It is the site of responsibility for sexual action, constructed as the recipient, not the agent, of sex. It is penetrated, impregnated, sullied, and destroyed. It must be protected, be kept intact and remain the exclusive site of one chosen man’s sexual desire. Ideas around female virtue and men’s honour remain in many cultures today: a common Arabic saying is that ‘A man's honour lies between the legs of a woman’<sup>85</sup> and so-called ‘honour killings’ of girls, women, boys and young men seen to be violating cultural codes of modesty occur regularly not only in the Middle East but also in Australia, Scandinavia and elsewhere.<sup>86</sup> Notions of masculinity as well as femininity creates expectations on individual behaviour (Seidman 2004:226; Connell 1995:37).<sup>87</sup>

The one exception to the expectation of the sexually passive female body has always been prostitution, where the female body lures and tempts men into sin. In the Victorian era, the sexual icon of active female sexuality was the prostitute, whose sexual activity needed to be reigned in, rescued or regulated. To understand these women as sexually active, they must be constructed as essentially different from other women, the ordinary, ‘normal’ women whose passivity and abstention formed natural

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<sup>85</sup> See [http://www.huffingtonpost.ca/tarek-fatah/honour-killing\\_b\\_1133349.html](http://www.huffingtonpost.ca/tarek-fatah/honour-killing_b_1133349.html) (accessed 23 June 2014)

<sup>86</sup> So-called ‘infidelity checks’, whereby men digitally penetrate their female partners to ascertain whether she has been unfaithful, have recently been the subject of several court cases in Sweden. The High Court of Sweden found, in June 2013, that such behaviour constituted rape as the behaviour, despite not being intended to satisfy the men’s sexual urges, had a sexualised aspect to it.

<sup>87</sup> A 2005 paper by Raewyn Connell and James W. Messerschmidt nuanced and developed the concepts first advanced in Connell’s 1995 book, including responses to criticism that masculinity need not be as one-dimensional as put forth in the book. See Connell and Messerschmidt 2005.



expressions of their embodied sexual nature.<sup>88</sup> 19<sup>th</sup>-century and early 20<sup>th</sup>-century feminists who fought for a recognition of women's right to consensual sex and protection from undesirable sex viewed the prostitute with ambivalence. They wrestled with commonly anchored ideas of women as asexual and advanced the idea that women in general could in fact enjoy sex. But this right was limited to married, heterosexual women who indeed were quickly redefined, in the burgeoning sexology discourse, as responsible for not only their own enjoyment but their husbands' as well (Bland 1996:78-79).<sup>89</sup> The polarity between the 'respectable' married woman and the prostitute was given a new dimension when 'the *sexualised* married woman and the *sexless* spinster' (Bland 1996:93) became symbolic opposites in the sexual landscape that was still dominated by the idea of male involvement as crucial to sex.

### **Psychoanalytical perspectives on sexual offending**

Freudian psychoanalysis takes as its starting point that much of psychic disorder stems from conflicts around sexuality, both in the child and later in life. A normal trajectory of sexual development would follow particular steps that would lead the child towards an adult life of moderation and restraint. 19<sup>th</sup>-century psychoanalysts increasingly saw the mother-child relationship as the key determinant of a person's ability to grow into a healthy person; consequently, in deviants and sexual criminals it was also assumed to be the mother's inadequacies or shortcomings that led to unhealthy expressions of sex – a belief that still influences psychoanalysis today (Appignanesi 2008:272-300).

It is well known today that rape and sexual violence can cause trauma and psychiatric illness. It is therefore surprising that this link was almost wholly absent from the mental illness work up to the 1980s (Appignanesi 2008:406).<sup>90</sup> Research by psychoanalyst Alice Miller into child physical and sexual abuse seems to confirm the close link between childhood victimisation and later offending behaviour: this cycle of abuse places sexual violence, then, in the psycho-social fold of explanations for sexual

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<sup>88</sup> In prostitution, it is the woman who is predator and the man lured into lewdness: a turnaround of the otherwise socially conforming sexual roles that stem from gender relations in a wider sense.

<sup>89</sup> Indeed, a married woman who did *not* 'respond' sexually to her partner was labelled 'frigid' (Bland 1996:78-79) and in need of therapy. The right for women to have sex earned in the 19<sup>th</sup> century became a duty in the 20<sup>th</sup> century: a duty to her country, to her husband and to herself.

<sup>90</sup> William D. Mosher gathered data from English-language psychoanalytic journals from 1920 to 1986 and found only 19 articles dealing with the topic of sexual abuse or incest in all that time (Appignanesi 2008:406).

offending. That physical and sexual violence perpetrated against children is often linked and committed by parents or caregivers whom themselves are victims of such violence has arisen to collective consciousness in the past two decades.

Recent research has cast doubt on Freud's assumption that all individuals are naturally sexually attracted to children but that they evolve, through social conditioning and repression, into favouring adults as sexual objects (La Fontaine 1990:99). It is argued that sexual offending of children stem from largely non-sexual motives such as issues of domination and control, a lack of self-esteem on the part of the offender, a fear of women, or antagonism against the child or their mother and a desire to punish either, or both (La Fontaine 1990:100).

## **Psychological perspectives on sexual offending**

The American psychiatric diagnostic manual DSM-IV-TR classifies particular sexual behaviour as deviant according to rather precise parameters; for instance diagnosing a paedophile as a person who has had recurring intensive sexual fantasies, impulses or actions involving sexual contact with children for a period of at least six months. In addition these impulses, drives or fantasies need to have caused negative consequences or problems with relationships with other people. Moreover, a criterion for being a paedophile is that the person is at least sixteen years of age and at least five years older than the child or children they are attracted to (Bäsén and Långström 2006:181).<sup>91</sup> The World Health Organisation uses a somewhat simpler definition in their manual for illness and health ICD-10, defining paedophilia as a 'sexual preference for children, boys, girls or both, usually prepubescent or in early pubescence' (Matravers 2008).<sup>92</sup>

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<sup>91</sup> While child sexual offenders are overwhelmingly portrayed in media as men, female sex offenders also exist. See Matravers (2008) who found that women offenders tended to have experienced sexual victimisation themselves, have poor and abusive relationships with men and family members and come from lower socio-economic backgrounds. While the sample of 22 convicted women offenders in Matravers' study is too small to generalise from, McCarty (1986) studied 26 women convicted of incestuous child sexual offending and came to similar conclusions. McCarty also found that women offenders more often tended to be co-offenders or accomplices to child sexual assault with male offenders than single-actor offenders

<sup>92</sup> The terms infantophilia or nepiophilia are used to denote a sexual preference to very young children, under the age of three. Hebephilia is a term for sexual attraction towards pubescent children (also the term efebophilia is used for the same phenomenon). Pederasty is an older term denoting all male homosexual paedophilia irrespective of the child's age (see Bäsén and Långström 2006:179).

Treatment of paedophilia and child sex offenders needs to take into account the great diversity of sexual behaviour, thoughts, fantasies and motivations in this group. Remorse is assumed to have a transformative effect and is a key ingredient in many treatment programmes. There is a belief in a particular kind of rationality that shapes how people act, including and perhaps especially deviant or criminal acts: offenders offend because they have not ‘seen the light’ (Lacey 2008).<sup>93</sup> While treatment does reduce rates of recidivism (Bäsén and Långström 2006:208), research consensus is now that true paedophilia cannot be ‘cured’ and that treatment programs therefore should use a combination of chemical castration (in the form of drugs that lower the client’s sex drive) and therapy that enables the offender to manage their symptoms and to avoid situations that might lead to offending behaviour (Lösel and Schmucker 2005).<sup>94</sup>

Importantly, many would-be child sexual offenders such as paedophiles choose not to ever offend and act out their fantasies as they are well aware of the severe consequences of such behaviour (Bäsén and Långström 2006:180). Others who sexually offend against children are not paedophiles in the strict sense, but sometimes what has been labelled non-exclusive or regressed paedophiles (that also can form sexual attractions towards adults). Intrafamilial child sexual offenders tend to display more ‘normal’ patterns of sexual attraction and be non-exclusive offenders; in these cases sexual contact with a child may in part be a form of substitution and be due to the ‘availability’ of a sexual ‘partner’. Conversely, exclusive or fixated paedophiles more commonly offend against stranger children, though research in this area has found mixed results (with some pointing to intrafamilial child sex offenders often also having paedophilic sexual interests; Bäsén and Långström 2006:191). ‘True’ paedophilic offenders recidivate to a higher degree than non-exclusive child sex offenders (Bäsén and Långström 2006:191).

Being sexually victimised as a child can have severe and long-lasting consequences:

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<sup>93</sup> However, this fails to explain when crime *is* the most rational choice, such as the lucrative businesses of human trafficking and prostitution.

<sup>94</sup> In June 2014 a Swedish clinical trial was announced that will assess the effectiveness of *Degarelix*, a testosterone-lowering substance that is hoped to combine a reduced sex drive with increased self-regulation and empathy. The trial will include 60 participants, all diagnosed as paedophiles, and be conducted through Karolinska University Hospital in Huddinge.

‘While some child abuse victims have no short-term symptoms, a majority show some difficulties including sexualised behaviours, anxiety, fear, depression, suicidal ideation, somatic complaints, aggressive behaviours and substance abuse. “Complex PTSD” is often used to describe a constellation of symptoms that may not meet the formal criteria for diagnosis of PTSD in DSM-IV-TR, but includes difficulties with affect regulation, hyperarousal, volatility, poor attention and relationship problems. Victims of child sexual abuse have been found to be at increased risk, longer term, for a variety of DSM-IV-TR diagnoses. These include depression, conduct disorder, PTSD and eating disorders...Child victims of sexual abuse, the majority of whom live in domestic situations where the abuse is occurring, are frequently victims of other offences, such as violence.’

(Howard and Westmore 2010:23)

## **The aetiology of sexual offending**

Keith Burgess-Jackson (1996) speaks of three theories of rape: the conservative (rape as a violation of property; Carter 1985); the liberal (rape as unwanted violation of integrity) and the radical (rape as a class-based oppression and humiliation). Over time, the conservative view of rape as a violation of male sexual exclusivity and property and the radical view of rape as the violent outcome of unjust class societies have both waned in favour of the liberal view on rape in the Western world. Swedish as well as Australian legislation has steadily shifted focus away from rape as unwanted sex, taken by force, towards a view that a rape is, above all, a violation of a person’s sexual integrity and bodily autonomy. Put differently, the modern definitions place less importance on the actions of offender and victim and more on the state of mind they were both in. It is evident in the regular changes of the Swedish legal rape definition that the use of force is no longer a requisite but that a rape can be achieved when an offender exploits a person’s vulnerable condition (whether this condition is due to sleep, intoxication, or other circumstances such as being alone in a car with the offender in an unknown place without means of getting back to safety).

Taking a different starting point, psychotherapists Elisabeth Kwarnmark and Inga Tidefors Andersson (1999) speak of three types of rape: *anger rape* (often unplanned, using excessive violence); *power rape* (the most common type, driven by a need to dominate and exercising control over another human being); and *sadistic rape* (which

links anger, power and sexuality, where the rapist is aroused by aggression and the victim's helplessness and often planned) (see also Nilsson and Wallqvist 2007:165). Others divide rapes into categories based on the circumstances: an *attack rape* is an assault by a stranger, usually occurs outdoors by a person unknown to the victim. A so-called *betrayal rape* is one where the rapist has first won the victim's trust and where both parties know one another. A *group rape* is one where two or more perpetrators attack a single victim (Nilsson and Wallqvist 2007:164-165; Hedlund and Göthberg 2002).<sup>95</sup> An interesting alternative to these definitions comes from Karen Leander who states that rape can, in fact, at times be supported by hegemonic societal mores:

‘Definitions have often categorized rape into non-normative rape defined as both a violation of the woman and of social norms and normative rapes defined as sexual contacts not chosen by the victim but that are in some way supported by social norms. Normative rapes are broken down into acquaintance rape including date and marital rapes, punitive rapes, rapes as weapons of war, so-called exchange, survival, ritual and status rapes, and, finally, rapes of persons in custody.’

(Leander 2007:204; see also Koss 1997:224-227)

It would seem from the above that rape has relatively little to do with sexual gratification, and this is indeed the point that Leander is making: ‘Interviews with convicted rapists have led to a categorization of underlying non-sexual motivations for rape such as anger, power and sadism.’ (Leander 2007:204; Groth and Birnbaum 1979). Non-sexual motives for rape, then, nuance understandings of both who rapes, and for what purpose. For instance, Eldridge Cleaver wrote in 1968 that the forbidden alliances in the United States at the time between white women and black men led to Cleaver becoming a serial rapist. His mixed feelings of simultaneously desiring and hating the ‘white woman’ led to raping that which society said he could not have. He describes the rape as ‘an insurrectionary act... defying and trampling on the white man’s law, upon his system of values, and...defiling his women’ (1970:26).

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<sup>95</sup> This latter definition is less satisfactory in that a group rape can of course also be an attack rape or a betrayal rape, as these focus on the *modus operandi* rather than on the number of participants involved. Group rapes are complex to define in terms of the emotions and justifications that the perpetrators hold, which can of course differ between participants and over time.

Stina Jeffner's research based on interviews with 15-year-old Swedish boys and girls entitled 'Kind of like rape' (*Liksom våldtäkt, typ...*), illuminates the complex 'negotiating space' (Jeffner 1998:223) that surrounds what constitutes 'rape' - a space that is greatly wider than its judicial definitions. The interviewees negotiate a complex landscape of understandings around what constitutes rape and sexual assault. Using a feminist research perspective as her basis, Jeffner researches sexualized violence in the context of heteronormativity, and asks the question whether sexual violence is at the end of a continuum between 'normal' and 'extreme' sex (Jeffner 1998:17) – whether, put simply, rape is another form of 'sex gone wrong'. Gender norms prescribe acceptable behaviour for boys and girls as well as for men and women and send messages about how different sexes can behave. Sidestepping these rules, for instance when girls get too drunk or dress inappropriately, is assigned importance based on two normative aspects: what 'others' do, and what one 'should' do (see Lundgren 1993).

## Rape myths

Whilst much research, driven in part by feminist theories, has advanced societal understanding of sexual violence, the 'silence surrounding rapes' (Nilsson and Wallqvist 2007) has not been entirely replaced by understanding and knowledge. In addition, many myths around how victims of sexual violence 'should' behave before, during and – importantly – after the violation, add to the stigma and feelings of guilt and shame (Nilsson and Wallqvist 2007:8). Recent discourse that offers victims' narratives of sexual violence can assist others in feeling a sense of recognition and understanding.<sup>96</sup>

Jeffner's interviewees (1998) define rape in three ways. The first definition has a clear objective element of what the offender does ('a person who has sex with someone against their will'). The second definition places more emphasis on the offender's

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<sup>96</sup> For literature in Swedish, Lotta Nilsson and Annette Wallqvist's (2007) book *Vägen vidare efter våldtäkt. Att bryta tystnaden* (The road ahead after rape. Breaking the silence) includes the stories of seven women who are victims of rape (despite their attempts they could not find men or boys willing to participate). Caroline Engwall's (Engwall 2008), (Engwall 2012) books *14 år till salu* ('14-year-old for sale') and *Skamfläck* ('Mark of shame') depict the true stories of underage children who, following sexual abuse, sell sex. See also 'Paulina's blog (<http://mitthopp.blogspot.com/>), a woman who tells her story of sexual violence, and Novahuset, a not-for-profit organisation assisting 'guys and girls' who have experienced any form of sexual violence 'online or offline' (<http://www.novahuset.com/>).

personal characteristics ('it's something that psychopaths do'). The third definition is understood in terms of the consequences for the victim ('it's the most cruel thing that can happen to someone'). Throughout the study, what stands out is the male hegemonic code of interpretation: male opinions around what constitutes rape, offending and victimization are given supremacy also in the minds of girls. Interviewees of both sexes view being under the influence of alcohol, previous sexual experiences of the victim and the victim's character (dress, flirtatious behaviour and alcohol consumption) as mitigating circumstances making any resulting rape less serious and blame-worthy (Jeffner 1998:170-226). The whore mythology is prevalent in the young interviewees' minds, and it does not take much to be labelled a 'whore' by either sex. In other words, there is a responsabilization of the victim, but also of girls and women as a whole: they are responsible for their own virtue, protection and safety. If they violate the 'rules' (by 'going after others' boyfriends, flirting, dressing 'a particular way [or] wear[ing] too much makeup' (Jeffner 1998:202)) they violate the 'virtuous-unvirtuous dichotomy' (Clark 1987). They become, in Jeffner's words, 'unrapeable' and have only themselves to blame for any punishment to the violation. This double bind – of constructing rape as a legitimate punishment for the victim's transgressions of what is expected of her – serves to uphold and continue the rape myth (Clark 1987:1) that understands rape primarily as a violation of women's virtue, not their bodies (Jeffner 1998:205).

Using both actual and fictional cases as the basis for these interviews, some prevalent rape myths in Jeffner's research include:

- 'Good boys' don't rape
- Girls who get drunk, flirt and dress provocatively have only themselves to blame
- Whores cannot be raped (and a man who did would rarely be prosecuted under Swedish law until the early 20<sup>th</sup> century, as the rape legislation was aimed at protecting 'honourable' women only)

The 'real rape' myth – that a 'real rape' is committed by a complete stranger, outdoors, is paired with physical violence or threats of violence, by a person carrying a weapon or being physically superior in size and strength – affects media reporting and has consequences for how society, victims, perpetrators and individuals view sexual violence. Both victims and perpetrators in scenarios different to this 'ideal

case' sometimes minimize what occurred: an equally common myth is that sexual offending occurring inside the home, within a committed relationship, is not as serious or traumatic as stranger attacks. A woman interviewed by Nilsson & Wallqvist (2007:128) feels uneasy describing the acts perpetrated by her ex-boyfriend as rape: 'rape sounds so awful. It must be worse for those who are raped out in town. But I didn't want to and I screamed and really said no. So I guess that's rape too' she explains, representing the cultural code that dictates that only some rape victims should be entitled to call themselves so.<sup>97</sup>

### **What is 'natural' about rape?**

The 'natural rape' theory advanced by Thornhill and Palmer (2000) in *A Natural History of Rape: Biological Bases of Sexual Coercion* is in essence a linking together of rape and reproduction, stating that men rape (women) in order to maximize their chances of offspring. Reproduction, in this view of 'biology as natural', is all about male choices and decisions, with female sexuality meek and responsive (Drea and Wallen 2003:29-30). Countless anecdotal evidentiary examples are typically collected from the animal world to show that among particular species, the male acts in particular ways in order to secure females to mate with to the detriment of other males. This theory is then applied to human males as a single-function pattern of behaviour ('men rape to reproduce'), ignoring or disregarding all other possible explanations for rape (as punishment, revenge, power, anger, domination, sadism or male bonding, to name but a few) and thus disregarding the diverse aetiology behind decisions to rape (Drea and Wallen 2003:29-32; Cohen, Garofalo, Boucher and Seghorn 1971; Brownmiller 1975; Groth, Burgess and Holmstrom 1977; Rada 1978; Groth and Birnbaum 1979; Berlin 1988).

The publication was fiercely critiqued in, among others, a 2003 anthology edited by Cheryl Brown Travis' (2003a). This collection of essays is largely a set of responses

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<sup>97</sup> Claes Borgström (interviewed by Nilsson and Wallqvist 2007:65) notes that guilt and shame, though often discussed interchangeably, are in fact two quite different feelings. Guilt stems from accusing oneself, for instance for having reacted in a 'wrong' way (such as not having resisted the rape or having opened the door and let the assailant in). Guilt can also stem from the reactions of those around the victim, such as parents, partners or friends questioning one's behaviour leading up to or during the assault. Shame, on the other hand, is a feeling of being dirty, physically and mentally, such as the shame of 'being a rape victim' (Ibid.). It is shame, together with fears of not being believed or being seen as partly responsible, that can lead to a victim's decision not to report the sexual victimisation to police, for instance (see also SOU 2001:14).



and counter-arguments to Thornhill and Palmer's thesis that there are biological, even 'natural' reasons why men rape (women). Instead, the anthology's authors conclude, based on alternative studies, that gender and sexuality have as much a social as a biological base, and that evolutionary theory alone cannot explain 'why men rape'. The so-called 'natural behaviour' argument – that reproductive sex is 'natural' and all forms of non-reproductive sex is by extension 'unnatural' – blends pseudo-biological and social interpretations of animal and human behaviour in order to make a point and to be given a status of neutrality. However, the 'natural behaviour' argument has a deeply cultural base in Western Christianity (Ruth 1987; Pagels 1999) and religious moralizing over 'sinful' sex (John 1995) which disregard the social settings in which sexuality and sexual violence occur.

Drea and Wallen (2003:52) note that even as a mating strategy, rape is a high-risk activity with limited success; not to mention the social and legal repercussions of such behaviour. Nor does the theory explain gang rapes (which would lead to uncertainties in relation to paternity), homosexual rape, or non-vaginal penetrative rape. Moreover, rape of prepubescent children cannot be explained by the 'rape as a natural expression of male sexuality' theory, unless one begins to speculate as to these non-procreative forms of sexual intercourse as being somehow useful for the rapist in other ways. Cultural stereotypes around why men rape and why women are raped are certainly manifold, and have layers of political, gender, social and sociological understandings to them.

Nature can be held responsible for much human action, and the argument that reproductive control rests with the female can swing the argument in the opposite direction. Thus, US politician Todd Akin in August, 2012 speculated that in cases of 'legitimate rape', women in true distress would 'have ways' of hindering pregnancy to ensue as a result of rape; the implication, of course, being that women who fall pregnant in a rape situation were not 'really' raped (also Willke 1999).<sup>98</sup> The

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<sup>98</sup> Melisa Holmes, M.D., rebutted the notion that conception is in any way connected to whether the two persons involved were aggressive or affectionate and pointed to research finding a 5 %-rate of rape-related pregnancy (resulting in some 32,000 pregnancies per year in the United States in women aged 12-45; see Holmes, Resnick, Kilpatrick and Best 1996). 12% of the pregnancies that were a result of rape ended in miscarriage (Ibid.)

statement drew strong criticism in many quarters but shows how prevalent ideas of biology as the deciding factor in how rape is conceptualised.<sup>99</sup>

Some scholars have pointed to power asymmetries and differential status as a key ingredient in sexual aggression (Travis 2003b:3; Brownmiller 1975; Holmstrom and Burgess 1980; Baron and Strauss 1989) and that rape is thus committed by men from a much wider social variety than the ‘lone deviant psychopath’ myth would hold (also Burt 1980; Malamuth, Haber and Feshbach 1980). Understanding its pervasive nature – the scale of the problem and its social diversity – has had implications for legal reform and shifts in the criminalization of sexual deviance (also Koss, Gidycz and Wisniewski 1987).

Travis’ edited collection also questions two other pervasive myths: one, that rape is primarily about sex, that is, sexual desire; and two, that this desire stems from an ‘overwhelming biological’ urge that only with great difficulty can be controlled or reigned in (Travis 2003b:21). The collection of papers also highlights the differences within each gender (why do not all men rape, even when the circumstances would allow it, if it were purely a natural urge?) and on the social and cultural settings in which rapes occur (Martin 2003; Sanday 2003). For instance, Peggy Sanday’s research on gang rapes in American college settings found that the perpetrators acted more because of male bonding and group pride than in securing sexual gratification (Sanday 2003).

## **Rape as a rational act of behaviour**

One problem with Thornhill and Palmer’s hypothesis of rape-as-procreation is that it fails to explain the multiple factors behind the decision to rape as well as the effects of rape. It applies a *post-facto* perspective – if the rape results in pregnancy, it was a

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<sup>99</sup> Willke (1999) believes that ‘To get and stay pregnant a woman's body must produce a very sophisticated mix of hormones. Hormone production is controlled by a part of the brain that is easily influenced by emotions. There's no greater emotional trauma that can be experienced by a woman than an assault rape. This can radically upset her possibility of ovulation, fertilization, implantation and even nurturing of a pregnancy.’ See <http://www.christianliferesources.com/?library/view.php&articleid=461> (accessed 2011-10-24). Counter-arguments to this would include that not all rapes are ‘assault rapes’, that there may indeed be reasons for even greater emotional trauma than to be the victim of rape, and that the implication that since ‘real rapes’ do not according to this theory result in pregnancy, then cases where the victim does fall pregnant would not be ‘real’ rapes – a deeply inaccurate and insulting contention.

‘success’ for the rapist – with the motivations for the rape in the first place. The most obvious example is sexual violence that occurs in war or conflict situations. Its pervasiveness has recently been brought to light in the Democratic Republic of Congo (DRC), Rwanda and Uganda to name a few places. Congolese estimations of the prevalence of sexual violence in direct relation to the ongoing war in parts of the country are harrowing: around 33% of women and girls in rural DRC have been victims of rape (Wahldén 2010:152), with victims aged from three to 80. It has become a means for humiliation, to destabilize families and communities and forms part of a system of ethnic cleansing (Wahldén 2010:152). It is often paired with torture and in view of family members and other villagers as part of the humiliation process (Wahldén 2010:152). In patriarchal societies, sexual violence degrades not only the victim but his or her family members, and the burden of shame is exacerbated if the rape results in pregnancy.<sup>100</sup>

Girls, boys, women and men were sexually victimised during the civil war in former Yugoslavia (in what is today known as Bosnia-Herzegovina, Croatia, and Serbia/Former Republic of Yugoslavia) for a number of reasons. These included rapes in the context of ethnic cleansing – accompanied by torture and murder – , police who raped girls and women in conjunction with arbitrary arrests or house searches, soldiers who raped women as revenge for their husbands or fathers mobilizing against them and joining the war on the opposing side, and sexual victimisation as retaliation for wrongs committed before the war began, by the victim or their husband or other member of the family (Nikolić-Ristanović 1998:465; Nikolić-Ristanović, Mrvić-Petrović, Konstantinović-Vilić and Stevanović 1995:53-55).

### **Male sexual victimization**

As noted above, sexual violence also affects men in not insignificant numbers. A report on sexual violence in DRC published in the Journal of the American Medical

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<sup>100</sup> Moreover, there is an ‘economy of violence’ framework in which sexual violence needs to be understood. For instance, in northern Uganda natural resources such as oil could not be exploited while villages in the vicinity used the land for agricultural purposes. Rebel guerrillas and government troops alike therefore conducted massive attacks on these villagers, raping women and children in order to scare the villagers into leaving. As soon as the land was abandoned, the oil could then be expropriated. This type of pervasive sexual violence exemplifies the non-sexual but highly gendered nature of rape: the motivations for the mass rapes were economic, with the sexual act a tool for achieving a particular goal (True 2012).

Association in 2010 estimates that 24% of men (and 40% of women) interviewed reported having been sexually assaulted in relation to the armed conflict (Johnson, Scott, Rughita, Kisielewski, Asher, Ong and Lawry 2010). The International Criminal Tribunal for Former Yugoslavia (ICTY) has heard testimonies and sentenced perpetrators of horrific sexual violence perpetrated against boys and men, placing the issue on the international law map for the first time. ICTY defined, in the *Tadić* case, sexual violence as both a form of torture and a crime against humanity (see Sivakumaran 2007 for the nexus between male sexual victimisation and conflict).

In Sri Lanka, sexual violence perpetrated against both women and men was pervasive during the longstanding domestic conflict between government forces and Tamil combatants, but seemed to escalate as the conflict came to a head in 2009 (Peel, Mahtani, Hinshelwood and Forrest 2000). Since then sexual violence against the Tamil population has remained at high levels and is reported to be endemic against Tamil persons unlawfully detained (Sooka 2014). More recently, the 2011 uprisings in Libya, Syria and Egypt have seen prisoners and demonstrators testifying to experiencing and witnessing horrific sexual violence conducted against both male and female prisoners.

Though still severely under-researched, male-on-male rape has thus emerged as a new factor to be included in the sexual violence discourse.<sup>101</sup> Nationally, the realisation that male victims of sexual violence do not always receive the understanding and appropriate treatment they deserve has led to initiatives in both Australia and Sweden to set up special care units that specialise in male sexual victimization. One such facility was set up in 2014 at *Södersjukhuset* hospital in central Stockholm in response to politicians raising the issue of a systemic lack of understanding in the healthcare systems of the particular needs of male sexual victims.<sup>102</sup> On a societal level, rape myths and stereotypes around sex offending and victimhood impact on community understandings of male sexual victimisation and can have detrimental effects on the support given to the victim as well as the culpability of the offender. In the Sri Lankan conflict, testimonies from male victims of rape highlight the unease the community

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<sup>101</sup> See, for instance, Abdullah-Khan's (2008) monograph entitled 'Male Rape. The Emergence of a Social and Legal Issue' which, among other things, includes a discussion on rape myths and masculinity.

<sup>102</sup> In 2012, 133 cases of alleged rapes of men were reported to Swedish police, the majority (80%) of which were reported to have occurred indoors (<http://www.kvinnojouren.se/statistik-om-anmalda-brott-fran-bra>, accessed 2015-01-01).

can feel around the issue, with victims speaking of being shunned by their families and ridiculed by the police and legal system (Sooka 2014).

The next chapter examines the regulatory frameworks for sexual offending in Australia and Sweden, and sets out to compare and contrast how the two countries regulate acts of sexual crime and deviance. It portrays how rape myths and cultural stereotypes remain entrenched in the criminal law system in both countries, though particularities differ.

## **CHAPTER 5: THE REGULATORY FRAMEWORK FOR SEXUAL OFFENDING IN AUSTRALIA AND SWEDEN**

‘The 1990s has been the decade of the predatory sex offender, at least in terms of constructing a demon. Across the world a range of legislation has been put in place which seeks to single out this group of offenders for greater punishment, fewer rights and potential exclusion from society.’

(Nash 1999:6)

### **Introduction: A comparison of the regulatory framework for sexual offending in Australia and Sweden**

Sexual offending regulatory frameworks in Sweden and in the federation of Australian states and territories share many similarities but also differ in key aspects. Current penal sanctions across the states and territories’ jurisdictions in Australia are increasingly homogeneous and criminalization initiatives in one place regularly have flow-on effects into others. Moreover, international cooperative agreements and obligations stemming from internationally recognized instruments such as the International Criminal Court’s membership charter and the United Nations *Convention on the Rights of the Child* create a reformatory imperative in Australia as well as in Sweden.

That there is a great deal of homogeneity in the legislation between these two countries does not mean that the debates prior to and following the introduction of new legislation are always similar. What prompts different countries to take different approaches to regulating crime in their society? Why does a state choose one regulatory option over another? Some factors include the historical developments of the law; societal tradition; the current legal system (including whether the legal system forms part of the Anglophone Common Law or the French Civil Law)<sup>103</sup>; the particulars of the political system; societal values, religious values and gender issues, the role feminism has played in advancing the rights of women; the role of women and girls in society in a wider sense; and the ownership and organization of mass

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<sup>103</sup> The Swedish legal system is loosely based in the civil law tradition but differs from the French/Continental system in important respects, primarily in the field of procedural law.

media. Many of these mesh and overlap: societal values and religious values, for instance, developed closely together in Sweden for centuries.<sup>104</sup>

## **Children and sexuality**

Regulating sexuality is difficult, and criminalizing sexual offending calls for judgements passed on the degree to which human activity is acceptable and unacceptable, normal and deviant, harmful and harmless, voluntarily entered into and non-consensual, and which freedoms are at stake at any given time. These considerations are particularly poignant when children are involved as agents in the sexual act, as either subject or object.

A child is both a subject and a non-subject; a citizen and a non-citizen; an agent and an object under criminal law, and the legislator needs to negotiate an array of assumptions both as to a child's presumed innocence (of mind, body and sexual awareness) and their ability to separate right from wrong, to act in their own best interest, to delay gratification, to enter into agreements and sign contracts, to make decisions as to their own health, safety and security, and to negotiate relationships with others. Parents and legal guardians are given responsibility to act in the child's interest in many of these fields, such as the right to proceed with (or terminate) medical care, to enrol the child in (and withdraw from) education and schooling, to purchase (and sell) goods and services on behalf of the child, to represent the child in financial and inheritance matters, and many other things.

At the same time, parents' and guardians' rights to decide over the child's body are not absolute, and the power over the child's mind is not total. Children have many of the same human rights and basic freedoms that all other human beings enjoy, in many respects the same rights as other citizens of their country, and have the right to expect the same level of security and safety as adults. They can testify in court, receive crime victims' compensation, demonstrate and partake in democratic deliberation, and be a claimant in a criminal or civil case.

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<sup>104</sup> A Catholic country from the 12<sup>th</sup> century and from 1527 onwards as a Lutheran state, the King was head over the Church of Sweden (a development not unlike that in Tudor England, albeit for different political reasons) from that time until the year 2000 when church and state were officially separated by law.

It is easy, then, to invoke the protection and safeguarding of children as an argument for tougher approaches to sexual offending and for suppressing certain liberties and freedoms otherwise sacrosanct. Children are deemed to be particular in both international and national law: they hold many, but not all, rights that adults do, they have obligations (such as the duty, by Swedish law, to attend school) adults do not, and in most legal matters they are under the guardianship of their parents or other adult custodians. In Australia, Sweden and all other Western jurisdictions there is a legal age of criminal responsibility, under which children below a certain age are assumed to have less self-control and therefore cannot be subject to penal sanctions under the law, and there is also a sexual age of consent (15 in Sweden, 16 in most of Australia) that serves both as a normative guide – young children are not supposed to engage in sexual activity – and a means by which to punish those who engage in sex with children.

Legislation pertaining to child pornography, sexual grooming and online offending involving children moreover establishes special protective measures to protect children from sexual exploitation online and in real life; in Sweden as in Australia a person is deemed to be a ‘child’ depicted in ‘child pornography’ if they are under the age of 18. This irregularity – that persons aged 15 to 17 can legally consent to have sex but not depict it, have it depicted, post or live stream it on the Internet or in any other way profit from distributed images of the activity – is the result of an assumption of vulnerability on the young person particular to sexual matters. Moreover, it rests on the assumption that adults and older teenagers can exert inappropriate influence to induce teenagers to make sexual decisions that prove to be harmful.

### **Child sexual abuse**

Few criminal acts are subject to such community outrage as child sexual abuse, in particular in cases of abductions and violent rapes of children by strangers. These cases, rare as they are, statistically, compared to intrafamilial child sexual abuse, have led to a spate of new legislation in Australia, the UK, the US and many other Western jurisdictions since the early 1990s. In Australia, responses include the creation of a nationwide sex offender register (ANCOR), legislation to permit continued detention



in prison for offenders deemed to still pose a danger to the public after serving their sentence, Working with Children checks to hinder convicted sex offenders from working in areas where they may encounter children (including, but not limited to, schools, childcare nurseries, swimming pools and sports clubs, youth associations and libraries), and legislation that bans convicted sexual offenders from residing near schools, nurseries or parks.

Under Swedish law there is no requisite stipulating the use of force or threat for a rape of a child to be defined as such, if they are below the age of consent. Acts of a sexual nature that, due to their degrading nature or other circumstances can be equated to sexual intercourse are also considered rape under the same legal paragraph. Rape of a child as a distinct crime was entered into force as a separate crime on April 1, 2005, and replaced earlier legislation that had been ambiguous both in its language (the crime used to be called ‘seduction of [a] youth’ which sends quite different signals as to the severity of the act) and its application in cases where the sexual act did not *per se* constitute a vaginal intercourse.<sup>105</sup> The 2005 reform of *brottsbalken* saw an introduction of several new penal provisions aimed at protecting children (SOU 2010:71:28), and an increase in the severity of penalties pertaining to the crime of rapes of children (*våldtäkt mot barn*).

Similarly, in Australia sexual intercourse with a child below the age of consent (which ranges from 14 to 18 between jurisdictions, with the state of Queensland retaining a higher age of consent for anal intercourse, irrespective of the sex of the parties involved) there is no requisite of force, as a child is deemed incapable of sexually consenting.

Although a majority of child sexual abuse occurs in the home, by a parent, sibling, stepparent or family friend (Ronken and Johnston 2014), it is usually not this type of offending that has caused media and community attention in the past decade. Rather it’s the ‘loner paedophile’ who ‘preys’ on children unknown to him, that has become the iconic sex offender and much of the new legislation in this field is aimed squarely

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<sup>105</sup> In the Swedish High Court case known as NJA 1961 s. 461, a man had systematically committed sexual assaults against a girl by masturbating against her body. Although they had both worn underwear and trousers, the Court determined the acts to have been of such a distinct sexual nature and constituted a grave breach of the victim’s sexual integrity that the offence was deemed to be equal to sexual intercourse (Holmqvist, Leijonhufvud, Träskman and Wennberg 2007:6:19).

with this type of offender in mind. While this type of offending is horrific for sure, it has been noted that such an exclusive focus on the ‘stranger danger’ risks obscuring the fact that the ‘typical’ child sex abuser does not fit this stereotype, and that by focusing resources on a relatively small number of offenders – the ‘stranger’ – resources are directed away from the quiet epidemic that is child sexual abuse occurring in the home.

### **Incestuous sexual abuse**

Not all child sexual abuse that happens in the home is perpetrated by a parent or sibling and therefore the phrase ‘incestuous abuse’ is incorrect in these situations. Rather, the incest label has come to signify situations where the persons involved have consented to the sexual relationship and the ‘wrongness’ of the sex, rather, stems from the fact that they are closely related. In some jurisdictions the word is done away with altogether, such as in Sweden where the law now speaks of rape, sexual assault and sexual duress of a child on the one hand (where the act is criminalized irrespective of the relationship of the perpetrator and the victim), and intercourse with a descendant (*samlag med avkomling*) and intercourse with a biological sibling (*samlag med syskon*) respectively.

Sexual relationships are traditionally closely linked with the conception of children and it has been this aspect that has been the focus of much legislative focus. A prohibition of marriage by relatives, however defined is thus a triangulation of distinct but interlocking issues: extramarital sex (banned and punished by religious institutions such as the Christian church; La Fontaine 1990:28), biological impediments to procreation by blood relatives, and societal taboos stemming from alterations of relationships between family members. The phrase ‘incest’ has been used in several different ways, to explain intrafamilial child sexual abuse (such as when a father or stepfather sexually abuses children) and sibling sexual abuse, but it is also a collective name for consensual and voluntarily entered into sexual relationships by blood relatives and even at times step-siblings or stepparents and their stepchildren. The terms ‘child sexual abuse’ and ‘incest’ are sometimes used interchangeably, although they mean different things both semantically and legally; traditional common law definitions of incest take a great deal of care in defining both the act and the actors

involved, both of which are necessary elements to elicit criminal culpa.<sup>106</sup> There are thus several interpretations of the word *incest*, ranging from dictionary definitions to criminal law definitions and layperson or community interpretations (La Fontaine 1990:24).

The incest taboo is one of the most enduring social taboos (Tittle and Paternoster 2000:21), but the cultural taboos on incest are explained in many different ways. Functionalist approaches to the incest taboo would see it as a threat to society in that it disrupts the natural fabric of society and is therefore dysfunctional; another theory holds that the danger of a father-daughter sexual relationship is that it reduces his natural authority over her: by reducing himself to her power, he elevates her influence over him (La Fontaine 1990:35) resulting in disobedience and disruption of normal family structures (Tittle and Paternoster 2000:6-7). Other reasons for the taboo would hold that by entering into a sexual relationship prematurely, the child's natural sexual development – including their sexual integrity – is disrupted which, in turn, negatively impacts on the child's ability to grow up into a sexually autonomous person.

Freud's early work on the incest taboo, in a related vein, concentrated on the disruption of the power relationship between fathers and sons, where sexual competition would prove damaging to the father's status and supremacy. Swaying between believing his patients' assertions of sexual trauma at the hands of family members and labelling them fantasies brought on by hysteria or paranoia, Freud abandoned his idea of incest as prevalent in middle-class families when it was met with disbelief (La Fontaine 1990:37).

While there are many different definitions of incest, the most commonly occurring statistically is one where a father has a sexual relationship with his biological daughter (Arens 1986; Herman 1981). Alternatively, a person having a sexual relationship with

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<sup>106</sup> British and Scottish definitions refer to heterosexual intercourse rather than other forms of sexual relationships and place emphasis on the existing relationships between the parties involved, irrespective of their age (La Fontaine 1990:23-24). In Scotland prohibitions on incest date back to 1567 and include a wider range of relatives than its British counterpart, the 1908 Punishment of Incest Act that regulates the crime in England, Wales and Northern England. In Britain, as in Sweden, incest was long considered a religious offence and was dealt with in ecclesiastical courts in Britain until 1857 (the exception being a period between 1650 and 1666 when English law passed by the Commonwealth government made incest punishable by death; La Fontaine 1990:25). In the period between 1857, when the crime was taken out of the hands of the ecclesiastical courts until the passing of the 1908 Act, there was no penalty for incest as it was not subject to any law.

a step-daughter is also commonly referred to as ‘incest’ although there is no biological kinship.

Different jurisdictions define the crime of incest differently, and in some parts of the world it is altogether missing (though it does not follow that either the incidences on the ground nor societal taboos are correspondingly absent). As noted above, the ‘wrongness of incest’ in Swedish law stems from the blood relationship between the parties involved (who are assumed to consent) and the current regulatory framework deems it to be conceptually different from child sexual abuse. *Brottsbalken* regulates two separate scenarios: intercourse with a descendant and intercourse with a sibling. In the former, it is assumed that it is the older person in the relationship who is primarily at fault and can be sentenced to up to two years whereas the ‘descendant’ (including both first and second generation descendants, i.e. children and grandchildren) is not subject to punishment. Full siblings can both be sentenced to prison for up to one year for the crime of intercourse with a sibling, if the sexual act was consensual; if one of the persons is under 15 or does not consent to the act, the perpetrator would be sentenced for rape or rape of a child as per any other form of sexual attack against another person.<sup>107</sup>

If low intelligence, poverty and crime have historically been ideologically coupled, it is particularly apparent in the case of incestuous child sexual abuse (La Fontaine 1990:26). Its manifestation is regularly assumed to be a result of lower status slums, poverty, culturally different migrants or other people of low status in society. The idea that ‘normal’ people do not form sexual relationships with kin is closely connected to the process of Othering, where ‘others’ are represented by ‘inferior’. In the Cleveland case, La Fontaine (1990:27) notes that courts found it more difficult to accept the idea of ‘respectable’ and affluent parents committing child sexual abuse than their poorer neighbours.

Recognition of child sexual abuse as a societal problem follows the path of increases in the focus on children’s rights generally. Moreover, international conventions such as the CRC have also assisted in a greater focus on the wellbeing of children (Shannon and Törnqvist 2011:7), but the move from social welfare responses to criminal justice

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<sup>107</sup> Half-siblings do not fall under this regulation.

sanctions of sexual transgressions against children in Australia and Sweden follows global trends of regulating child sex offenders through juridical means.

## **Regulatory responses to child sexual abuse**

If the 1970s was the decade when rape was ‘discovered’ as a crime problem, the following decade was the era of the child abuse discourse. Until the 1980s, moral panics concerning children’s sexual wellbeing had been rare. As a topic, child sexual abuse had attracted little attention either by specialists such as therapists and social workers or by the public (La Fontaine 1990:2) in the Western world. The 1980s saw several moral panics break out over child sexual abuse in the US, the UK and elsewhere. In Britain in 1986, when the BBC program *That’s Life* presented its *ChildWatch* survey which estimated that large numbers of Britons had been subjected to sexual abuse, it was not only a recognition of the existence of the problem but also of the scale of the problem. Similar developments then occurred in Australia, the United States, and Scandinavia. In Britain a year later, the so-called ‘Cleveland affair’ saw 125 children from 57 families being taken into care on the suspicion that they had been sexually abused by their fathers or stepfathers, with mothers either passively standing by or actively participating in the abuse (La Fontaine 1990:1-3).

More recently, widespread sexual abuse of at least 1,400 victims, some as young as 11, in the English city of Rotherham came to light in 2013. While five men had been convicted of rape and sex trafficking in 2010, it was discovered that the sexual abuse had begun in 1997 and continued for years, with police and social workers ignoring or even facilitating the abuse. In the city of Rochdale, a similar sex trafficking gang was discovered in 2012 but the police had received reports of adult men, mostly of British Pakistani origin, systematically grooming and exploiting pubescent and teenage girls for sex for several years prior to the arrests. The perpetrators targeted White English girls from lower socio-economic areas, and both rape myths and class stereotypes played into the police inaction, with police and social workers referring to the girls as ‘slappers’ and ‘sluts’ who only had themselves to blame.<sup>108</sup>

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<sup>108</sup> See *Review of Multi-agency Responses to the Sexual Exploitation of Children (Rochdale)* and *CSE Serious Case Reviews Published 20/12/2013* (<https://www.rbscb.org/news/news-archive.aspx?ID=23>, accessed 2015-01-01)

A reading of the discourse arising from the Cleveland affair reveals several important frameworks of meaning that tell a great deal about the social and political circumstances of child sexual abuse at the time. Firstly, La Fontaine (1990:8) points out that the issue quickly became one where there was a battle of authority between ‘the state’ and ‘the family’ – represented as ‘husband and wife’ but failing to take into account the divergent views that at times came forward between fathers and mothers. What was seen as ‘parental authority’ was in fact ‘fathers’ rights’, including some cases where mothers expressed fears that there was actual sexual abuse occurring. The second battle took place between ‘freedom’ from involvement by the state into ‘the family’s’ affairs, and protection of children, where those who believed most strongly in individual freedom and parental authority minimized the likelihood of child sexual abuse completely (La Fontaine 1990:8). Thirdly, the children are clearly posited in the discourse as passive objects of protection, with adults providing both protection and frames for interpretation of the events that occurred.

Fourthly, the gender distribution of the actors involved in the event reflected traditional roles of masculinities and femininities, where media portrayals of the story often posited men against women (La Fontaine 1990:11). Those who denied the existence of child sexual abuse entirely provided a discourse of the events as women either as professionals that threatened to undermine the traditional family (with a female paediatrician and a female child abuse consultant to the social services receiving far more media attention than male colleagues (La Fontaine 1990:10-11) or wives ‘brainwashed’ (La Fontaine 1990:10) into believing their husbands had committed the offences. ‘The family’ thus became posited as ideologically at odds with ‘social services’, the feminized representative of the state. Similarly, there was a positioning between the police, which represented force, authority and protection, and social services, that revealed difficulties in understanding each other’s objectives and the language spoken by the different agencies (La Fontaine 1990:12).

### **Regulatory responses to child pornography**

Few areas of criminal law evoke as varying and different arguments as the criminalization of pornography, and the boundaries between ‘child pornography’ and ‘ordinary’ pornography are particularly fraught with emotion and assumptions. While

pornography has been the subject of much intense debate from different quarters of the feminist thinkers, anti-feminist thinkers and other intellectuals alike, discourses clash. When radical feminist authors such as Catharine MacKinnon (1987; 1989; 1993; 1995), Andrea Dworkin (1980; 1981), Berkeley Katie (1995) and Margaret Baldwin (1984) describe pornography as violence against all women, invariably others disagree.<sup>109</sup> These issues are wholly absent in the discourse around child pornography, on the other hand, where the strong universal condemnation by politicians and media is often paired with a belief in the good of stronger criminalization responses to stamp out the crimes connected with the production, distribution and consumption of child pornographic material.

Alongside calls for more punitive responses to the behaviours involved in the child pornography industry, there are also initiatives to relabel pornography involving minors as Child Exploitation Material (CEM). The term shifts focus from the classification of the material as being similar to other pornography – with the exception of the person in the image being underage – towards the exploitative aspect of producing or obtaining such material. While research has found that children and young people abused in the process of creating such material can have adverse and sometimes long-term detrimental effects (Prichard, Spiranovic, Watters and Lueg 2013: 993), there needs to also be some level of distinction between material produced under duress and imagery initiated by curious young people as part of their personal sexual exploration. For the purposes of this thesis, the term child pornography is used over the term CEM which has not yet become part of the public consciousness as an instantly recognisable aspect of criminal behaviour.

Moreover, an analysis carried out by Samarah Symons and David Plater (2013) into the sentencing practices by judges in CEM cases found stark discrepancies in how the judges interpreted the sentencing guidelines, including conflating the severity of the pornographic imagery with the defendant's risk of reoffending.

When it comes to banning sexually provocative material there has always been a fine line between art and pornography, between material aimed to instigate reflection and

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<sup>109</sup> Alan Soble refers to MacKinnon's conclusions as 'silly generalizations' (Soble 2002:17), 'misleading and incomplete' (Ibid.:16) and expressions of 'dismal, even paranoid view[s] of the sexuality of men' (Ibid.:17).

meaningless provocation. The uneasy balancing act between ‘photography’ and ‘pornography’ is illustrated in the Australian case concerning photographer Bill Henson, who was charged with creating and distributing child pornography after opening an exhibition featuring prepubescent and pubescent youth in Sydney in 2008. Henson was acquitted in court where his photographic work was deemed to be ‘not without artistic merit’ and much was made of the fact that the venue – an art gallery – was one traditionally associated with cultural endeavours and not with distribution of pornography. In other words, it was not the depiction of the child itself – a 13-year-old girl pictured naked in a full-frontal shot – but the intention of the photographer and the venue in which it was shown that gave it a safe status of art over child porn. Had Henson instead downloaded the image onto an Internet website or sold it to a magazine, it is unclear how the court would have reasoned.

As human existence becomes increasingly image-centric as well as easily disseminated by a larger public (through the uses of Instagram, Facebook and blogs, to name but a few venues), every person becomes a potential artist but also a potential provocateur or pornography creator. The globalisation of imagery is at sharp odds with traditional ideas of ‘private’ photographs of family and kin on the other hand, and ‘public’ material to be purposively spread. A ‘private’ sex tape or nude picture can spread across the globe in a matter of minutes. With this comes, slowly, the realisation that child pornography is not only – though it is overwhelmingly – something that occurs ‘somewhere else’ (such as East Asia) for commercial purposes but that it can also be the result of innocent jesting between friends or silly dares gone wrong. It is therefore crucial to assess the legal, moral, philosophical and psychological ramifications of the regulation of child pornographic material.

The Australian federal governments of the past decade have universally condemned the creation, distribution and consumption of child pornography through increasingly extensive and invasive legislation. Following a 2007 election promise, the Australian Labor Party vowed to regulate the availability of child pornography on the Internet<sup>110</sup> in order to protect children from coming into contact with such material through the responsabilization of Internet Service Providers (ISP) (McLelland 2011). Moreover, a semantic shift has occurred in policy language, where this type of material is now

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<sup>110</sup> The proposed limitations were never enforced, however.



referred to as ‘child abuse material’ and covers not only depictions of actual children but also drawings and fictional work showing a child that ‘appears to be’ under the age of 18. The *Criminal Code Act 1995* [Commonwealth] (s.473.1) thus defines ‘child pornography materials’ as

(a) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who: (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity; and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.

The New South Wales *Crimes Act 1900 Section 91FA* goes even further, stating that ‘material’ may include films, printed matter, electronic images or ‘any other thing of any kind’. The case *McEwen v. Simmons & Anor* confirmed that this could include computer-generated cartoon images. In the case, where the defendant was in possession of satirical images of the children from TV series *The Simpsons* engaged in sexual activities, Justice Michael Adams concluded that, in his view, ‘the word ‘person’ included fictional or imaginary characters and the mere fact that the figure depicted departed from a realistic representation in some respects of a human being did not mean that such a figure was not a ‘person’ (*McEwen v Simmons & Anor* [2008] NSWSC1292, para 41).

The Swedish legislation pertaining to child pornography is placed in Chapter 16 of *brottsbalken*, as a crime against public order. The current scale of penalties is imprisonment for a period of up to two years, or, for a minor crime, fines or imprisonment for up to six months. Aggravated child pornography crimes are punishable by imprisonment ranging from six months to six years (SOU 2007:54:40). Aggravated pornography crimes are ascertained by evaluating the circumstances under which it was committed, such as whether the act was ‘committed in the course of business or otherwise for profit, was a part of criminal activity that was systematically practiced or practiced on a large scale, or concerned a particularly large

number of pictures or pictures in which children are exposed to especially ruthless treatment' (*brottsbalken* Chapter 16:10) (the list is not conclusive).<sup>111</sup>

Under Swedish law, child pornography crimes are crimes against public order rather than sexual offences due to the grounds for harm being different from other sexualised crimes:

'The subjects of protection in child pornography crimes are both children in general and the depicted child. In the Inquiry's opinion, a child pornography crime, regardless in principle of the type of act concerned can be deemed to have been committed against the child depicted in the pornographic picture. In any case the child may be deemed to have been offended by the crime. The depicted child is therefore normally to be regarded as an injured party in a crime of child pornography. The issue of whether the child has the status of an injured party must, however, be determined in each individual case.'

(SOU 2007:54:41)

Crimes relating to the production, distribution and purchase of child pornography fall under chapter 16 of *brottsbalken* which criminalizes the creation, distribution, possession and (intentional) viewing of child pornographic images as crimes against public order. However, the crimes of sexual posing (or 'exploitation of a child for sexual posing'; *brottsbalken* Chapter 6:8) and grooming ('contact with a child for sexual purposes'; Chapter 6:10a) are considered sexual offences. Depending on what is depicted in the pornographic material, persons involved in its production could also be convicted of rape of a child (if the child is under the age of 15; *brottsbalken* 6:4) or, if the child is a descendant relative, under the guardianship of or has a similar relationship to the perpetrator, if the child is under the age of 18 (*brottsbalken* 6:4).

Children who are depicted in pornography – voluntarily or involuntarily – may be entitled to damages under Swedish law (SOU 2007:54:43) and also to criminal injuries compensation, though 'it is doubtful whether damages can be paid in child

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<sup>111</sup> Courts were found to differ greatly in how they arrived at their judgement regarding the number of pictures found in a suspect's possession as well as what constituted 'especially ruthless treatment'. The 2005 inquiry (*2005 års barnpornografiutredning*) therefore proposed a clarification of the law by including the criterion 'pictures showing children that are particularly young, who are exposed to violence or coercion or who are otherwise exploited in a ruthless manner' (SOU 2007:54, p.41) in the pictures in question, for the crime to be considered gross.

pornography crimes that consist of [only] possession of pornographic pictures of the child' (SOU 2007:54:43). There has not to date been a court case where this has been put to the test.

### **Perspectives on the deviance of child pornography**

In what sense is child pornography deviant? Many who would not consider the consumption, distribution or production of adult pornography deviant and would defend its use would nevertheless see the use of children in pornographic material as wrong. Therefore the 'wrongness' of child pornography cannot readily be answered without attempting to describe the 'wrongness' of regular, adult pornography and the similarities and differences between the two – in principle and in reality. A person's views on 'regular' pornography might link in with their moral, philosophical, religious, and sociological views. It might be linked with one's sex, or gender, or one's political standpoints.

Feminist philosopher Eva Kittay draws on the Kantian moral principle to elaborate as to why (adult) pornography is condemnable:

'Regardless of how we draw the line between a legitimate and illegitimate sexuality, it appears that there are non-sexual grounds, purely moral considerations which apply to human actions and intentions, that render some sexual acts illegitimate – illegitimate by virtue of the moral impermissibility of harming another person and particularly for the purpose of obtaining pleasure or other benefit from the harm another incurs. Such a moral injunction is but a particular statement of the Kantian imperative not to treat persons as means only. Therefore, I maintain that sexual activity involving the violation of such moral imperatives is necessarily illegitimate... [This]...illegitimacy...derives not from any particular sex/gender system, but from a universal moral imperative.'

(Kittay 1984:150-51)

Harm can be thought of in a number of ways.<sup>112</sup> The production and distribution can physically and materially harm its participants, especially if they did not consent to take part. Moreover, it can harm the public interest by causing offense to viewers and

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<sup>112</sup> For a comprehensive overview of the various types of harm regulated in criminal law, see Feinberg (1987).

thereby affect their quality of life (Feinberg 1987: 222-223). A more contentious idea is that of moral harm (leading the person to become ‘a worse person’ in Feinberg’s (1987:27) words). Overwhelming evidence of a causal link between pornography and rape – that is, that men who consume porn are more likely to rape – could constitute a sufficient reason to condemn the porn industry altogether, something attempted by Diana Russell (1988) among others. Others, however, doubt the link and some evidence even points to the opposite: that indulging in viewing sexual fantasies in the home actually decreases the likelihood of persons going out to enact them onto others (see Murrin and Laws 1990). Others have asserted that the harm in porn consists of the objectifying *per se* and should not be read strictly as physical or emotional harm; it is harmful in itself to be considered not a person but a sexual object (Hill 1998; Russell 1980; 1988; 1993; Langton 1995; Stoltenberg 1989) – though if the person is not aware that they are being objectified, it becomes harder to justify harm in that respect.

Suzanne Ost (2009) poses the question as to whether it is harmful to merely possess and/or consume child pornography, assuming no involvement in the production or distribution (whose ‘wrongness’ are more easily argued). And if so, on what grounds? She turns to Devlin (1968) to formulate an answer: his thesis that immoral behaviour threatens the very fabric of society and thereby society itself – even when that behaviour occurs in private – could be valid still, if its foundations in natural law’s reliance on *mala in se* is extended to the harm principle (Ost 2009:108). If so, this might be because the images corrupt the viewer’s sexuality by making it possible to fantasise about children and that in itself would be wrong and harmful to societal taboos (what Ian Hacking 2003 has aptly labelled ‘pollution fear’). However, for pseudo-images such as cartoon or *manga* images, that cause no harm to an actual child, it would be a bigger stretch to advocate the corruption of the mind into hitherto unknown sexual territory (Ost 2009:120). That is not to say that ‘photoshopped’ or other modified pictures can be viewed as unproblematic: they do ‘become’ images of sexually abused children (Ost 2009).<sup>113</sup>

The 2007 SOU stipulates the difference between the criminalization of pornography and other sexual offending:

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<sup>113</sup> See Ost (2009: Chapter 3) for more on the debate on harm and exploitation of children in child pornography.

‘With regard to crimes against the general public, an individual person may not place himself [sic] above this public interest. Since the purpose of criminalising child pornography is not only to protect the depicted child from being violated but also children in general, the Criminal Code’s provision on consent as a general ground for freedom from liability cannot be applied in these cases.’

(SOU 2007:54:24)

Senn researched *women’s* altered mood states when watching porn and found that they became ‘more tense and anxious, more angry and hostile, and more confused...[and that watching violent pornography] increased women’s level of depression’ (1993:188-189). These effects are interpreted by Senn as ‘harm’ in its own right, and provides sufficient justification to her that porn is harmful and therefore indefensible (Senn 1993; see also Soble 2002:150-151). However, as with any other type of consumption of imagery, the person voluntarily electing to watch it may have a range of responses and the fact that something may cause distress to some of its viewers is not generally enough reason to ban it.<sup>114</sup>

Phyllis Chesler (1978-79) in a related vein believes the existence of porn to be harmful because it gives men something to fantasise about whilst having sex with their partners and thus become emotionally withdrawn from their primary relationship. This harms those women who are older than and not as attractive as the models and actresses viewed by their men. The same argument could be made for child pornography, to be sure. That child pornography should be banned because of it is a stretch for regulatory legitimacy however.

Different discourses are framed and discussed differently: ‘a theoretical analysis of the way in which the law “thinks” about and constructs the dangers represented by these phenomena’ (Ost 2009:82) sees the harm as constructed quite differently in different cases. While the child pornography discourse is discussed through an indecency framework, grooming on the Internet has a ‘harm’ discourse framework (Ost 2009:82). The SOU 2007:54 (*Barnet i fokus*) speaks of a general increase of the ‘sexualisation of society’, illustrated by the increasing availability and ease of access

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<sup>114</sup> Watching a liberal party leader win an election may well cause distress to a voter not of the same inclination, but it is generally not thought of as harmful. Others may be distressed by violent movies but the general solution to this is to merely turn the TV off.

of online pornography, the link between porn consumption and engaging in the kinds of sexual activities viewed in porn, and an increased ‘sexualisation’ of the daily lives of children (SOU 2007:54:24):

‘Sexuality has taken an increasingly prominent place in Swedish society. The consumption of pornographic material – which, as a result of technical development has become more and more easily accessible – has increased, also among young people. Several studies have shown that there is a strong connection between having viewed pornography and having tested certain sexual acts. It is likely that greater sexualisation has led to the attitude of many of today’s children with regard to, for example, sexuality and nakedness not being the same as it was a few years ago. It has become increasingly common, for example, for children to publish “sexy” pictures of themselves on the Internet. It also happens that children depict their own sexual behaviour. How such and similar practises are to be assessed using current legislation on child pornography crimes is not entirely clear.’

(SOU 2007:54:38)

When children are exposed to sexual grooming, it normalizes deviant sexual behaviour which could affect their future sexual lives (Ost 2009:135-136). This ‘corruption of innocence’ (Ost 2009) is not dissimilar to the ‘corruption’ that occurs in contact child sexual abuse and other deviant forms of sexuality. On the other hand, this ‘fixation with childhood innocence’ (Ost 2009:245) assumes that children who are exposed to deviant sex have no prior exposure to sex, that they are a *carte blanche*.

ECPAT (End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes) has raised important questions as to what the phrase *child pornography* actually implies in terms of consent (Quayle, Loof and Palmer 2008:9; Taylor and Quayle 2003). A better term may be ‘*sexually abusive images*’ which is increasingly used by child advocates (Quayle *et al.* 2008:9; Jones and Skogrand 2005); however, legislation in many jurisdictions uses the term ‘child pornography’ (Quayle *et al.* 2008:9; Akdeniz 2008)). Moreover, since child pornography images range in severity from less to more explicit sexual content, it is not straightforward to call all images ‘abusive’ (Lanning 2008).

On the other hand, the ‘voluntary consent’ fault line may be difficult to pin down, for instance when teenagers post nude or explicit pictures of themselves on the Internet or engage in other forms of ‘sexting’ (see Lee, Crofts, Salter, Milivojevic and McGovern 2013). Lee and colleagues believe that the legal and semantic conflation of child pornography with voluntary sexting has led to over-criminalisation and a loss of nuanced understandings of risk, harm and consent. Moreover, while it is not a crime for a child to send an explicitly sexual image of themselves, it may be a crime for the receiver to view it, download it or distribute it. The crime of *grooming*, whereby an adult sexually grooms a child (over the Internet or in real life, something now punishable under both Australian and Swedish law) is a ‘new’ crime that ties in closely with child pornography crimes and with child sexual abuse. However, the paternalistic over-simplification of rendering all forms of sexting criminal diminishes female sexual agency, under the guise of protection. Moreover, relatively harmless forms of exchanges of explicit images could lead to a young person being convicted of a sexual offence with severe consequences (including, in Australia, the risk of ending up on the Sex Offender Register; Lee *et al.* 2013). In addition, it is worth considering the adverse effects of painting all sexual offences with the same brush; in a quest to depict all sexual acts involving children as equally wrong, the legislator risks obscuring the truly serious crimes. There *are* degrees of hell, and so there should be in sexual offending regulation.

Motivations for committing child pornography crimes range from the most intimate of sexual preference to detached financial reasons. The commoditisation of children and the sense of entitlement displayed by some sex offenders to justify their abuse (Pemberton and Wakeling 2009) has been used to understand intra-familial sexual abuse but it also lends a chilling theoretical framework of market economy to explain human trafficking in women (who also become commodities in patriarchal societies) and children. If a parent owns a child, they can also sell it<sup>115</sup>, temporarily or permanently.<sup>116</sup> When a perpetrator can order, and pay for, an act of abuse to take place at a time and in ways of his choosing whilst watching it in the comfort of his

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<sup>115</sup> Children have been called the ‘ultimate commodity’ (Posner 1998) in a world that recognizes them primarily as objects (of affection, but also due to their inability to exercise any real agency in legal, social and political matters).

<sup>116</sup> See Truong 1990 on the role of patriarchy in the sex tourism and prostitution discourses in South-East Asia, and Montgomery’s (2001) account of child prostitution in Thailand for an account of how familial obligations and perceived ownership over children’s autonomy feeds into the narratives that force children into sexual slavery.

home, and when there are willing sellers to conduct the abuse in the directed manner, it exemplifies the most harrowing commercialisation of sex and of children imaginable.<sup>117</sup>

Despite occasional raids resulting in large numbers of identified consumers of child porn (so-called ‘paedophile rings’), technical difficulties in securing data from hard drives and lack of resources means few are charged and even fewer users are ever convicted.<sup>118</sup>

In practice, charges relating to child pornography have become a ‘tag-on’ to other charges going to trial: In 2004, 45% of persons accused of crimes relating to child pornography were also charged with other crimes (38% of these other crimes related to sexual offences; Diesen and Diesen 2009:190). Child pornography crimes have, in other words, become ‘hidden crimes’ that are rarely prosecuted on their own, influencing the perception of them as somehow less serious than ‘real’ sexual crimes committed against children. Perhaps this is what the 2007:54 SOU alludes to when it states that ‘Child pornography crimes are not the most common of crimes. Only seldom do officials in the legal system have to deal with these crimes.’ (SOU 2007:54:43).<sup>119</sup>

The SOU 2007:54 inquiry conducted an in-depth reading of 303 convictions in cases involving child pornography, primarily of lower court convictions between 2001 and 2005. In just over half of the cases the suspect was also charged with other crimes in addition to the child pornography crimes. More than half (59%) were convicted of ‘ordinary’ child porn crime, 29% of ‘lesser’ child porn and 12% of ‘gross’ child porn

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<sup>117</sup> Bengt Kristoffersson was convicted in 2013 of procuring 11 cases of child rape in the Philippines. Kristoffersson instigated, directed and viewed the abuse in real-time from his home. He paid female relatives of the victims, who were aged between five and eight years, to rape and sexually abuse the girls. The Skåne and Blekinge Court of Appeal reduced the initial sentence of eight years imprisonment to 4.5 years in prison, partly based on the argument that the women who carried out the rapes did not act out of lust, but for monetary gain, and therefore were able to control themselves and minimise the harm to the victims.

<sup>118</sup> Diesen and Diesen (2009) illustrate this by recounting the Europol-initiated *Operation Sleipner* against of child porn distributors and consumers in 2005. 118 Swedes were arrested and their computers seized in the raid. However, three years later only a handful had been charged with crimes relating to these seizures, some 30 investigations were ongoing, whilst the remainders had been closed down without any charges. The main issue in Operation Sleipner’s Swedish part was going through the hard drives, an action requiring technical expertise in short supply that in many cases didn’t happen in the two years following the raid – leading to the crime being prescribed before anyone could be charged.

<sup>119</sup> Perhaps an alternative phrase could have been ‘child pornography crimes are not the most commonly prosecuted crimes’.



crimes (SOU 2007:54:404). The ‘lesser’ crimes overwhelmingly consisted of possession of child pornography (89% of the convictions), and the vast majority of possession crimes (n=86) were cases where the total number of pictures were 1-100 (in 69% of the cases). 12% had 101-200 pictures, 12% more than 201 pictures and in 7% of convictions the number of pictures in the suspect’s possession was not mentioned in the sentencing. Those who were also convicted of other crimes alongside possession were mainly convicted of distribution or production of child porn. Only one case reviewed by the Inquiry involved what could have been grooming of a child with the use of child pornographic pictures. The cases only led to fines, and not imprisonment (SOU 2007:54:404-406).

For ‘ordinary’ child porn possession convictions, the majority (60%) of cases involved 25 or fewer filmed sequences, though in one case the person had 11,239 images and 285 films (p.413). The single largest case of possession of images involved a person who had some 140,000 pictures (RH 2003:69). What is considered ‘ordinary’, in other words, varies greatly: some courts would consider a collection of around one hundred pictures to fall under this description, while at other times thousands of pictures would still be deemed to fall under this category as long as the charge ‘only’ (SOU 2007:54:415) related to possession and not distribution or production.<sup>120</sup>

### **Sexual crimes against children in a different jurisdiction**

A cornerstone of criminal law is that a crime shall be prosecuted and tried in the jurisdiction where it takes place, if at all possible (*Swedish Code of Criminal Procedures* (hereinafter *rättegångsbalken*) Chapter 2:1; for Australia see *Crimes*

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<sup>120</sup> ‘Gross’ crimes were at times merely possession crimes (30%, n=11), but where the images included particularly ruthless treatment of a child; other times it also included charges of distribution and/or possession. Courts illustrated in their sentences to a higher degree what was meant by ‘especially ruthless treatment’ by referring to images of children being very young, being penetrated in different manners, being tied or otherwise physically restrained, or that the child had been subject to gross violence or ‘sexual assault’ (SOU 2007:54, p. 421). In 16 of the 37 cases reviewed (64%), the punishment was imprisonment, most commonly of six months; one person was sentenced to 10 months in prison for having systematically, for some eight years, collected more than 44,000 images and 1,800 films, many of these having been further distributed to others and some of these depicting particularly cruel sexual abuse of children. Of the 303 reviewed cases, 71% of offenders were also convicted of sexual crimes against children, 3% of sexual crimes against an adult and 26% of other, non-sexual crimes (including violent and narcotic offences). In a third of cases in the category ‘sexual crimes against children’, the victimised child was the same one depicted in the child pornography. The numbers remained relatively steady over the reviewed time period (2001-2005).

(*Overseas*) Act 1964; see also Diesen and Diesen 2009:201).<sup>121</sup> This is not always something that can be done, and at times it is easier or more logical to investigate and prosecute a crime in a different jurisdiction.<sup>122</sup> An added dimension of extra-territorial proceedings is symbolic: it is a signal that wrongdoings can and will be punished irrespective of geography, and that wrongdoers have no safe haven from prosecution from their crimes.

In Australia, the *Crimes (Child Sex Tourism) Amendment Act 1994* was the first Commonwealth legislation to regulate sexual offences, specifically so-called sex tourists who commit offences against children in other jurisdictions. This was complemented in 2010 with the insertion of Division 272, entitled ‘Child sex offences outside Australia’ into the *Criminal Code Act 1995 (Commonwealth)*. Division 272 forms part of the Australian government’s undertaking to honour its obligations as a signatory to the CRC and its *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (Optional Protocol). It is essentially an expansion of the types of sexual offences committed in an overseas jurisdiction that are punishable under Australian law (Ireland-Piper 2010).

Moreover, the 1996 *First World Congress against the Commercial Sexual Exploitation of Children* (‘the Stockholm Congress’) was attended by countries, including Australia, which undertook obligations to combat the exploitation of children for sexual purposes. A second World Congress on the same theme took place in 2001 in Yokohama (‘the Yokohama Congress’). The significance of these Congresses lies primarily in the countries agreeing to conduct a stock take of their own respective legislation to ensure that it was compatible with international standards for prosecution of crimes relating to trafficking of children for sexual purposes.

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<sup>121</sup> A crime is considered to have occurred in Sweden if any part of the crime occurred in Sweden (Chapter 2:4) or has an (adverse) effect in Sweden (Chapter 2:4).

<sup>122</sup> *Rättegångsbalken* Chapter 2:2. An example would be a case where a Swedish person, whilst on holiday in Australia, commits an act of physical abuse on their partner. Upon return the victim notifies the police who launch a criminal investigation that leads to the prosecution taking the matter to trial. Since both parties are Swedish citizens, it is more expedient, cost-efficient and comfortable for all involved to handle the matter through the Swedish court system than to expect both the alleged perpetrator and victim to return to Australia to attend a trial. Similarly, the *Crimes (Overseas) Act 1964*, Section 4a)-c) states that ‘If a person...does...an act in a country outside Australia...and...the...act would have been an offence [in the Australian Capital Territory]...that person is guilty of an offence...and is punishable by the same penalty’.

On a regional level, the European Union has been active in regulating the issue of child pornography under the banner of ‘child exploitation’. The Council of Europe’s *Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography* (which entered into force in January 2004) is one such measure. Another significant instrument is the same Council’s convention that allows for its signatory states to conduct criminal proceedings in the offender’s jurisdiction (*European Convention on the Transfer of Proceedings in Criminal Matters; Strasbourg, 15.V.1972*).<sup>123</sup> This Convention has seen its signatories agree to conduct a criminal trial where, taking all relevant circumstances into consideration, it is most expedient and efficient.

Swedish regulations pertaining to the charging of crimes that have occurred outside Sweden are found in Chapter 2 of *brottsbalken*.<sup>124</sup> As a rule, the criminal offence must be illegal in the jurisdiction where it occurred also, and a Swedish court cannot impose a more severe punishment than the local court where it occurred could have (an exception to this rule, as per legislation dating back to 2005, is sexual offences committed against children under the age of 18: *brottsbalken* 2:1). A person already tried and acquitted elsewhere cannot be tried again in Sweden, *unless* the lowest punishment in Swedish law for the particular offence is a minimum of four years in prison, such as aggravated rape (*brottsbalken* Chapter 2; see also (Diesen and Diesen 2009:203).

### **Children, sexuality and the inflamed signification spiral**

The sexual abuse of children elicits strong responses and provokes culturally held beliefs in children as innocent, and questions societal assumptions about sexuality, parenthood, and about children themselves (La Fontaine 1990:20). Community sentiments towards homosexuality, sexual promiscuity and other sexual features differ greatly within societies, but sexual assault of children draws near-universal

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<sup>123</sup> In Sweden, this is known as *lagföringskonventionen 1972* (see SÖ 1976:21, prop.1975/76:3)

<sup>124</sup> It is not a crime for a Swedish citizen to purchase sexual services outside Sweden, though such a prohibition exists in Norwegian legislation. The Swedish government proposed a universal decriminalization of the purchase of sexual services irrespective of the legislation in the particular jurisdiction but the proposal found little bipartisan support and was not further advanced.

condemnation and contempt (La Fontaine 1990:21).<sup>125</sup> As a particularly vulnerable group of victims, children who are sexually violated can suffer more profound and longer-lasting consequences (Andersson and Eriksson 2011; Shannon and Törnqvist 2011). A child is developing not only physically but also emotionally – learning trust, integrity, intimacy and their own views on sexuality and their own bodies – and this process is vulnerable to disruption in different ways from adult victims (Shannon and Törnqvist 2011:7). Nevertheless, child sexual abuse by family members remains the most frequent form of abuse, with victimisation by strangers a far rarer phenomenon.

There are at least four distinct and separate discourses operating in the debates on child pornography, child sexual abuse and the sexual exploitation of children for commercial purposes. Some of these overlap, others are contradictory:

- The protection discourse
- The autonomy-liberty discourse
- The responsibility discourse
- The harm discourse

Child sexual abuse and child pornography fall under *the protection discourse* but grooming and ‘voluntary’ engagement by children in sexual activities could also be argued to be an expression of their *sexual autonomy and freedom*. For convicted offenders, *the responsibility discourse* sees increasingly punitive-minded forms of surveillance impact on their liberties. But victims of sexual violence can also be held responsible for their victimization if they are found to be less than ideal victims (such as in the debate whether ‘legitimate’ rapes can lead to pregnancies and whether thus there is such a thing as an ‘illegitimate’ rape). *The harm discourse* flows through all the case studies, though the harm experienced in each case is different. For a child depicted in pornographic material, in addition to any immediate sexual victimization at the time of the creation of the material it is possible to argue, as some have, that each new sale of the material would ‘harm’ the child, irrespective of whether they

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<sup>125</sup> To prove this point, authors often refer to prison hierarchies where other prisoners’ threats and violence aimed at child molesters is taken as proof of their sub-human status even amongst criminals (for instance, Börje Svensson’s (Svensson 2012) book researching paedophiles and sex offenders entitled ‘The Most Hated’ (*De mest hatade*, which sweepingly refers to this supposed pecking order of sorts).

would be aware of the purchase or not, as it would violate their sexual integrity and bodily autonomy that strangers would watch them in sexual imagery.

Moreover, child pornography as a case study also illustrates *the global discourse*. Child sexual abuse illustrates *the increasing convergence* between jurisdictions of legislative regulation of sexual offending. Incest, however, is *regulated differently* between Australian jurisdictions – although there is overlap in principle, if not in wording – and *conceptually framed* differently in Sweden. Situations of sexual abuse sit inside the sexual offending framework (irrespective of familial links between perpetrator and victim) while situations of voluntary incestuous relationships stand alone as a separate moral-biological issue.

The sexual boundaries in a fluid society are difficult to negotiate, codify and uphold solely with the help of the law. This is particularly so in the complex boundaries that regulate children (the right to experience and express sexuality, and the right to be protected from unwanted sexual contact), codified in terms such as child pornography, child sexual abuse and intrafamilial, or incestuous, sexual abuse. Children and sexuality is a field filled with contested meanings, signification spirals and many assumptions as to who, and what, the sexual offender in this case ‘is’. A person cannot ‘be’ a sex offender unless there ‘is’ a victim, and although child pornography is a crime against public order and the convicted offender thus is not a ‘sex offender’ in Sweden, the same crime would make the person a sexual offender in Australia. As such, it generates particularly interesting questions as to whether the definitions and labels society applies to offenders in this area are in fact socially constructed and open to redefinition.

Nina Persak (2007) has noted the vast and dangerous power that a state holds in rendering behaviour criminal, with all the consequences this brings for the individual concerned. That the propensity to regulate through criminalization, and the enthusiasm with which it is done, has found a spiritual home in the nexus between children and sexuality is clear. The inflamed signification spiral and the tendency to widen the net to include more and more crimes in the regulation of deviance and the moral discourse that accompanies this grow.

## **The prevalence and distribution of sexual offending and sexual victimisation in Australia and Sweden**

When victim survey data on sexual assault is compared to rates of sexual assault reported to police and resulting in conviction, there is a stark discrepancy. Cases of sexual assault are notoriously under-reported to the police, rarely go to court compared to other types of violent crimes, and result in low conviction rates (Brottsförebyggande Rådet 2015; Richards 2011). This is more so when children are involved, due to a wide range of reasons. The attrition rate between police notification, trial and conviction is up to 95% in both Sweden and Australia (as well as in most other Western countries) in cases of sexual assault, making it one of the highest attrition rates for any serious or violent crime (Diesen and Diesen 2009; Gelb 2007). This selection process, or ‘weeding out’ of cases in the process between police notification, via the prosecutorial decisions whether to bring charges, through to the court system makes a *de facto* sexual assault unlikely to lead ultimately to conviction.<sup>126</sup>

### **Reading the Australian data: some perspectives**

Statistics on the prevalence and distribution of sexual assault are difficult to interpret, and comparisons between jurisdictions face additional difficulties. There are several caveats that need to be kept in mind. Firstly, there may be cross-jurisdictional variations in the inclination of victims to report the offence to police (due to cultural sensitivities or differential expectations of treatment by police and by other agencies in the criminal justice system). Secondly, there may be cross-jurisdictional variations in the inclination of police to deem an offence to have been committed. Alternatively, they may deem a lesser offence to have been committed (indecent assault, rather than rape). Thirdly, jurisdictions may vary in what they classify as rape (for instance, whether definitions include male sexual victimisation). Lastly, definitions change over time (such as when the Swedish *brottsbalken* was reformed in 2005, leading to an increase in offences classified as rape but a corresponding decrease in other forms of

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<sup>126</sup> Normative expectations on the characteristics of the victim also play a part in the guilt attributed to perpetrators by police and others involved in the criminal justice system irrespective of what legal definitions of the crime stated. Put differently, there is a discrepancy between what the law said and how it was interpreted by those deciding whether to proceed with a complaint. See Kerstetter (1990).

sexual assault). As such, the statistics below should be read with caution and serve as an indication of the scale of the problem rather than be taken at face value.<sup>127</sup>

The time series for the Australian states and territories are taken from two publications from the Australian Bureau of Statistics (ABS), where the 2009 report was used for the period 2000-2009 and the 2013 report was used for the period 2010-2013.<sup>128</sup> One significant change between the two publications was that the 2009 and 2013 reports used population estimates based on the 2006 and 2011 Censuses of Population and Housing, respectively. As noted in the Australian reports, there are appreciable differences in the reporting of the victimisation statistics, both between states and over time. Moreover, the margin of error is high in all places but especially when it comes to sexual violence in remote parts of Australia such as rural Northern Territory, South Australia and Tasmania.

The numbers only include adults aged over 18, excluding the thousands of estimated cases of child sexual abuse throughout Australia. In Australia in 2004, 7,502 cases of sexual assault perpetrated against a child aged 0-14 were brought to the attention of police (Gelb 2007:8). These numbers have remained stable over the years. 61.6% of these cases involved a perpetrator known to the child: a parent (30%), sibling (3.5%), other family member (8%) or a person known to the child or their family (20%). Only 6.3% of offenders were strangers to the child (with 7% for girl victims and 5% of boy victims) (Gelb 2007:8). The least likely scenario is sexual victimisation by a mother/stepmother (0.8%) or other female relative (0.9%) (Gelb 2007). The statistics are not uniform in their reporting of the gender of the victim which makes it difficult to theorize as to the prevalence or distribution of sexual violence directed at boys and males or to conduct a historical or comparative analysis.

The following table shows the number of sexual assaults reported to police in all the Australian states and territories as well as in Sweden, from the year 2000 to 2013

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<sup>127</sup> In 1977, a cross-jurisdictional study of the levels of rape in Boston and Los Angeles found that different definitions of what constitutes a sexual crime can in part explain differences in police reporting. However, the study also hypothesized that more sexually permissive societies – exemplified in the study by California – had higher levels of reported rape due to a number of factors. See Chappell, Geis and Geis 1977.

<sup>128</sup> <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4510.0Main+Features12009?OpenDocument> and <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4510.0Main+Features12013?OpenDocument> (accessed 1 August 2014)

(rates per 100,000). The Australian data are collected from the ABS *Recorded Crime - Victims, Australia, 2009 and 2013* while the Swedish data are collected from *Brottsförebyggande Rådet* which collects data of police reports annually. Again, the data are descriptive of broad patterns only, and because of definitional differences across jurisdictions, should be interpreted with caution.

**Table 1: Rate of sexual victimisation reported to police for victims, all ages and both sexes, by jurisdiction, 2000-2013 (rate per 100,000)**

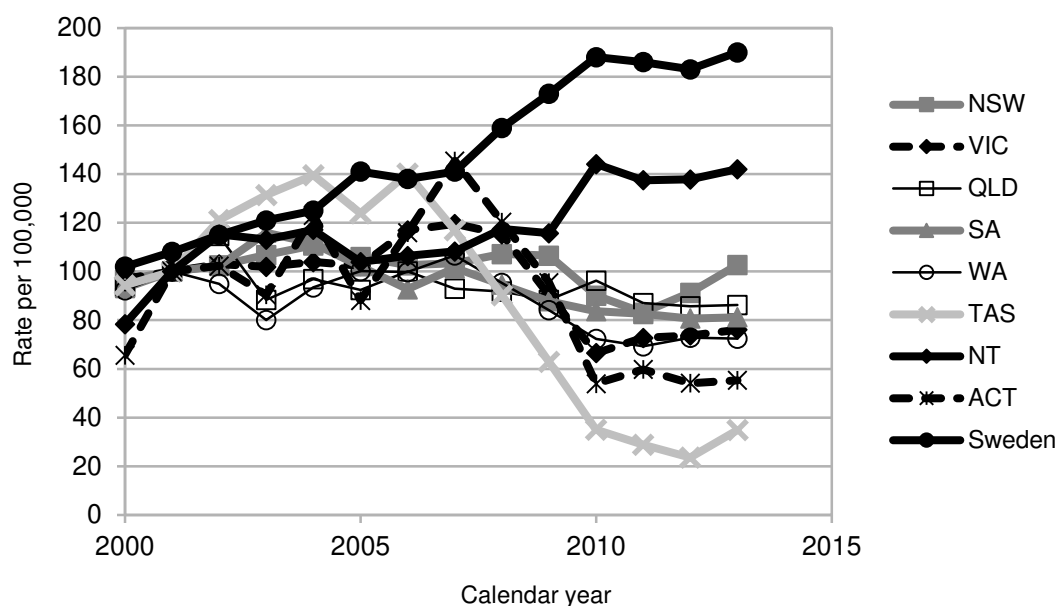
<i>Year</i>	<i>NSW</i>	<i>VIC</i>	<i>QLD</i>	<i>SA</i>	<i>WA</i>	<i>TAS</i>	<i>NT</i>	<i>ACT</i>	<i>Sweden</i>
2000	96.6	97.1	93.6	93.2	92.3	94.3	78.4	65.6	102
2001	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	108
2002	102.5	103.0	114.7	102.3	94.9	121.1	115.2	102.3	115
2003	106.8	101.9	88.4	115.9	80.0	131.4	113.1	90.4	121
2004	110.7	103.9	96.9	111.5	93.5	139.5	117.1	123.1	125
2005	106.0	102.3	92.4	102.1	100.2	123.9	103.9	88.1	141
2006	102.6	116.9	100.0	92.7	99.8	140.2	106.4	115.9	138
2007	103.4	119.5	93.0	101.4	106.6	117.0	108.2	145.4	141
2008	107.2	115.3	91.8	94.6	95.3	90.2	117.4	120.3	159
2009	106.5	90.2	88.4	87.8	84.1	62.9	115.7	95.5	173
2010	90.1	66.5	96.2	83.7	72.3	35.0	144.1	53.9	188
2011	83.1	72.7	87.0	82.6	69.3	28.9	137.5	59.8	186
2012	91.3	73.7	85.7	80.7	72.8	23.6	137.8	54.1	183
2013	102.7	76.1	86.2	81.2	72.5	34.9	142.0	55.3	190

(Source: Australian Bureau of Statistics 2000-2013 downloaded from [www.abs.gov.au](http://www.abs.gov.au) and Brottsförebyggande Rådet 2000-2013 downloaded from [www.bra.se](http://www.bra.se))

A visual presentation of the data is found below.



**Figure 1: Rate of sexual assault reported to police for victims, all ages and both sexes, by jurisdiction, 2000-2013<sup>129</sup>**



(Source: Australian Bureau of Statistics 2000-2013, downloaded from [www.abs.gov.au](http://www.abs.gov.au) and Brottsförebyggande Rådet data collected 2000-2013, downloaded from [www.bra.se](http://www.bra.se))

It is also noteworthy that the Australian Crime Victimization Survey indicated that a significantly higher number of persons were sexually victimised in their 12-month period of interviewing (2013-2014), putting the figure at 300 per 100,000 Australians (all State and Territory jurisdictions). There is thus a stark discrepancy between self-reported sexual victimisation and that reported to the police. Of those who responded that they had been sexually victimised in 2013-2014, 38% reported the most recent incident to police (which is consistent with the numbers below). Moreover, the Survey only includes Australians aged 18 and above, excluding child sexual victimisation.<sup>130</sup> Taking these victims into account, the discrepancy could be even greater.

<sup>129</sup> The change in Census of Population and Housing may explain the jump in the estimates for the Northern Territory between 2000-2009 and 2010-2013.

<sup>130</sup> All these data is extracted from the Australian Bureau of Statistics website: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4530.0~2013-14~Main%20Features~Victims%20of%20personal%20crime~4> (accessed 2015-07-01)

## Reading the Swedish data: some perspectives

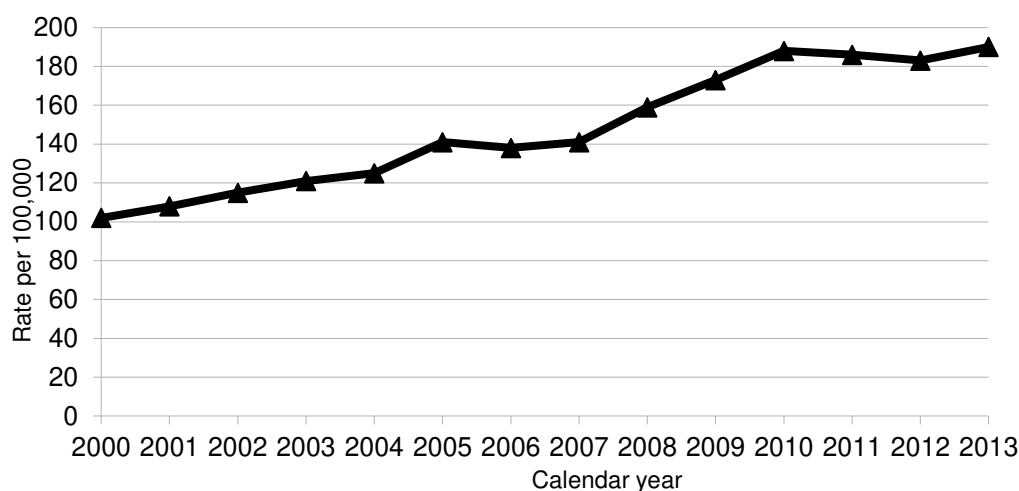
The Swedish data were collected from *Brottsförebyggande Rådet (Brå)*, and consists of data of sexual assaults notified to the police.<sup>131</sup> The Swedish statistics include the four types of sexual crimes: *sexual molestation* (of a child, or of an adult – this includes contact and non-contact offences such as flashing and inducing a child to partake in a sexual act), *sexual coercion*, *sexual exploitation of a minor* and *rape*. Sexual molestation offences form around half, and rape and attempted rape form around 35%, of all sexual offences reported to police (Brå 2013).<sup>132</sup> According to the Swedish Crime Survey NTU 2014 (Brottsförebyggande Rådet 2015) in which some 12,000 interviewees self-reported their victimisation, the rates of sexual victimisation have however remained steady over the last decade. Even so, NTU 2014 (Brottsförebyggande Rådet 2014) estimates that only 10% of all forms of sexual assaults are reported to the police, with rapes committed by a stranger in a public place the most likely form of sexual crime to be reported; this is consistent with international research on sexual violence (see for instance Walby and Myhill 2001). Again, the numbers can therefore not be said to be anything other than an indication of reporting trends as the majority of sexual assaults are never reported to the police.

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<sup>131</sup> <http://statistik.bra.se/solwebb/action/index> (data collected and collated in the 'Gör din egen tabell över anmälda brott' section on 1 July 2014).

<sup>132</sup> <http://www.bra.se/bra/brott-och-statistik/valdtakt-och-sexualbrott.html> (accessed 2015-01-01)

**Figure 2: Rates of sexual assault reported to the police from 2000 to 2013, per 100,000**



(Source: Brottsförebyggande Rådet 2000-2013 downloaded from [www.bra.se](http://www.bra.se))

From 2005 onwards there has been a steep rise in the number of rapes reported in Sweden from 2,631 in 2004 to 3,787 in 2005, to 4,208 in 2006 and up to 5,960 in 2010 (von Hofer 2011:60). This is most likely due to the changes to *brottsbalken* (2005) that now includes a greater amount of scenarios under the rape label than before. Put differently, behaviours that pre-2005 would have been reported as sexual assault are now reported as rape. The total number of sexual assaults – all categories – remains relatively stable pre- and post-2005, as does the number of convicted offenders, from 153 persons convicted of rape in 2004 to 204 in 2005 and 188 persons in 2010 (von Hofer 2011:70).<sup>133</sup> In 2006 18% of the rapes reported to police went to prosecution (Nilsson and Wallqvist 2007:34). The statistics for solved crimes – when the victimisation of a person results in the conviction of an offender – has remained between 34% (in 1997 and 2001) and 50% (in 1976, and 2010).<sup>134</sup> Stranger assaults form about 12% of the reported rapes.

Put differently, despite the tenfold increase in police notifications of rape over the past 40 years (Diesen and Diesen 2009:14) there has not been a corresponding increase in convictions – this number has hovered between 100 and 200 per year throughout the

<sup>133</sup> Of those 204 persons convicted of rape in 2010, the vast majority – 188 persons – were sentenced to incarceration in either prison, prison with forensic treatment, youth protective institution, institutional forensic care or a combination of protective surveillance and prison, all in accordance with *brottsbalken* Chapter 34, paragraph 1. See von Hofer (2011:70).

<sup>134</sup> The year 2009 saw 59% of cases brought to the attention of the police result in a finding of guilt, somewhat of an aberration as the numbers have otherwise averaged 40-50%.

whole period between 1965 and 2004. Following the legislative changes to the definitions of sexual crimes in *brottsbalken* in 2005 there were 216 convictions (all of whom male offenders) and in 2006, 227 men were convicted of rape in Swedish courts (and no women) (Diesen and Diesen 2009:21-22; Nilsson and Wallqvist 2007:34) – a remarkably small change considering the ostensibly widened definition that hoped to see more cases of sexual assault prosecuted as rapes.

Of all types of sexual victimisation, the largest age cohort in 2013 was women aged 20-24 (closely followed by the age group 16-19-year-old women) where 3.8% of respondents were victims of an act of sexual violence in 2013 (Brå 2015:47-48).<sup>135</sup>

The data show that the rates of *reported* sexual violence in Australia have not risen sharply over the last decade, and in some jurisdictions have in fact declined. By contrast, the number of reported offences has risen steadily in Sweden which now has the highest number of reported acts of sexual violence in Europe.<sup>136</sup> There are a number of plausible explanations for this.

Child sexual abuse is still an underreported crime in Sweden, though the legal response alongside increasing societal awareness has led to higher levels of reporting. Changes in the Swedish regulation of sexual crimes have led to a greater number of types of acts to be classified as child rape. Until the mid-1990s, for a sexual act to be considered rape, two requisites had to be fulfilled: firstly, that the perpetrator committed sexual intercourse or ‘thus equivalent sexual relations’, meaning in general oral or anal intercourse; and secondly, that the act occurred during duress in the shape of threats or violence, or that the perpetrator had brought the victim to a state of incapacitation, for instance by drugging or wilfully intoxicating them. In 1998 and 2005, Chapter 6 of *brottsbalken* was reformed in three important aspects that also impacted on the possibility of prosecuting perpetrators of child rape:

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<sup>135</sup> Men across all age cohorts reported a 0.1-0.5% sexual victimisation rate in 2013, and this holds steady over time.

<sup>136</sup> According to *Slagen Dam* (SOU 2001:14), around one third of adult Swedish women have been the victim of some form of sexual violence at least once after their 15<sup>th</sup> birthday. 90-95% of these acts are never reported to police.

- A widening of the definitions of sexual acts that could lead to penal responsibility for rape (including certain types of penetration, for example digital rape) that had previously been labelled ‘sexual duress’ (*sexuellt tvång*)
- Introducing the new charge ‘child rape’ (*våldtäkt av barn*) to apply to all situations of intercourse or equivalent acts against a child under the age of 15, or under the age of 18 in the case of the perpetrator being a parent or guardian of the child (the requisite of violence or duress does not apply to child rapes).
- The requisite of ‘causing’ a state of powerless condition (*vanmakt*) (where the perpetrator had to actively place the victim in a state of helplessness, for instance by drugging or intoxicating them) was replaced by the perpetrator’s culpability in ‘exploiting’ a state of helplessness (i.e., that the perpetrator wilfully exploits the victim’s state of vulnerability, irrespective of the circumstances in which they occurred, such as the victim being asleep, intoxicated, physically unwell or under the influence of mental illness).<sup>137</sup>

A reasonable conclusion from the material collected by Brå (Shannon and Törnqvist 2011) is that the changes in the labelling of criminal acts that occurred as a result of the criminalization reform in 2005 have made a difference in terms of police investigatory practices. In cases of uncertainty as to what form of sexual violation took place (for instance where very young children are victimized) there is a greater tendency to label the acts as rape rather than a less serious charge. There are other potential interpretations that could be drawn from the material. One would be that there has been a community impact in terms of widening the scope for understanding sexual acts committed against children as child rape, or an increase in the propensity to notify the police in cases of suspected sexual molestation of children. A third possible interpretation could be that there has been a *de facto* increase of serious sexual assaults against children in Sweden since 1995 (Shannon and Törnqvist 2011:11-12). This could be explained by what Susan Brownmiller (1975) has termed *the backlash effect*, where men seek to regain the power and control they perceive to be threatened by the women’s rights agenda by reasserting their hegemonic status by resorting to violence. Katrine Kielos (2008) alludes to a similar theme when she states

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<sup>137</sup> In the cases of child rape, this is relevant only for the age cohort 15-17-year-old victims, as any sexual intercourse with a child under the age of 15 is considered rape irrespective of the circumstances.

that the rapist wants to ‘own...punish...reinstate his honour...degrade...[and] exert power’ (2008:31, personal translation).

## **AUSTRALIA**

With a population of some 23.1 million<sup>138</sup>, Australia is a federation of States and Territories, each with a capital city. There are six States: New South Wales (NSW), Queensland (Qld), South Australia (SA), Tasmania (Tas), Victoria (Vic) and Western Australia (WA). The two Territories are the Australian Capital Territory (ACT) and Northern Territory (NT). The vast majority of the population lives along the coastline, with around a fifth of the population each in the greater Sydney and greater Melbourne areas, respectively. In all, almost 15 million people live in the capital cities with some 8 million residents spread over the rest of the continent.<sup>139</sup>

### **The legislative processes in Australia**

The federation of Australian states and territories has one national federal Parliament, but most crime and justice matters are dealt with on a state level. Heavily influenced by English law, common law continues to flow through the legal systems of New South Wales, South Australia and Victoria ‘where many (but not all) of the general rules are set out in cases, rather than statutes’ (Gans 2012:7; see also Roulston, Oxley-Oxland, White, and Woods 1980; Woods 2002). Queensland’s, Tasmania’s and Western Australia’s Criminal Codes date back a century.

Each Australian jurisdiction has its own particular legislative process, including the Commonwealth’s own Parliamentary process.<sup>140</sup> The relative independence in lawmaking that Australian States and Territories enjoy springs out of several historic and geographical conditions. At the time of the founding of the Australian federation, States fought fervently for their rights to decide in matters deemed to be of importance

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<sup>138</sup> As of 30 June 2013. See [www.abs.gov.au](http://www.abs.gov.au) (accessed 2013-04-29)

<sup>139</sup> <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/3218.0Main%20Features32012-13?opendocument&tabname=Summary&prodno=3218.0&issue=2012-13&num=&view=#PARALINK0> (accessed 2015-01-01)

<sup>140</sup> For a comprehensive account of the various legislative processes of Australia, see for instance Parkinson 2013)

to their local electorates, such as education, healthcare, political assembly and infrastructure. As such, the Constitution of Australia reflects a compromise between federal powers and state/territory self-government. Each State has a Parliament of elected Members of Parliament,<sup>141</sup> a Premier to lead government, and regular elections (while the Territories have Legislative Assemblies functioning similarly to the State Legislative Councils or Assemblies). As a rule, State Parliaments create the majority of legislation pertaining to criminal justice, police and court powers, and criminal behaviour. The federal government retains some power to override legislation emanating from State Parliaments and Territory Legislative Assemblies in certain circumstances, although this is uncommon.

### **The regulatory framework for sexual offending in Australia**

All Australian states and territories have enacted legislation that criminalizes particular forms of sexual conduct. In many cases the original statute or code is more than a century old: the *Queensland Criminal Code Act* dates back to 1899, while the *New South Wales Crimes Act (1900)* was enacted a year later and was amended in 1910 to enable it to be used in the Australian Capital Territory also (it was then in place until 1988 when the *Australian Capital Territory (Self-Government) Act* was enacted and thereby converted the *Crimes Act (1900)*).

Western Australia's *Criminal Code Act (1913)* followed more than a decade later, while Tasmania's *Criminal Code Act (1924)* and the South Australian *Criminal Law Consolidation Act (1935)* were both enacted in the inter-war era. Victoria's *Crimes Act (1958)* and the Northern Territory's *Criminal Code Act (1983)* are the most recent criminal code reforms. All the acts have been, and continue to be, regularly updated with both linguistic definitions and more substantive changes occurring, such as the legislation expanding to include more forms of behaviour.

Victoria's, South Australia's and Queensland's legislation use the word 'rape' to describe unlawful sexual assault, though in Victoria this is defined as 'sexual penetration', in SA 'sexual intercourse' and in Qld 'carnal knowledge' (*s1*) or, alternatively, in *s2*, as penetration of the vulva, vagina or anus or penetration of the

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<sup>141</sup> Most of these, including the NSW Parliament, are bicameral, with an upper house called the Legislative Council and the lower house the Legislative Assembly.

mouth (s3). Queensland separates ‘rape’ (where the maximum penalty life imprisonment) from ‘sexual assault’, meaning ‘unlawful and indecent assault’ or procurement situations which carry a maximum sentence of 10 years imprisonment.<sup>142</sup>

Most jurisdictions also have the additional offence of ‘aggravated sexual assault’ in some form, with higher maximum penalties; in SA for instance, the maximum penalty for aggravated sexual assault is 20 years compared to 14 years for ‘ordinary’ sexual crimes. By comparison, however, rape can be punishable by life imprisonment in both Queensland and South Australia, showing a wide range of regulatory responses to sexual violence.

Aggravated sexual assault, or sexual assault ‘in company’ (such as gang rape) carries a penalty of life imprisonment in NSW and QLD, 20 years imprisonment in NT and WA, 15 years in prison in SA and 14 years in ACT. In NSW the law differentiates between aggravated sexual assault (s.61J(2)) and aggravated sexual assault in company (s.61JA(1)). The latter carries the penalty of life imprisonment, the former 20 years in prison.<sup>143</sup>

Queensland statutes still retain the words ‘unnatural intercourse’ in relation to sodomy (where the age limit is 18 years for both parties irrespective of sex). Former Tasmanian legislation criminalized intercourse ‘against the order of nature’; this was removed following the *Human Rights (Sexual Conduct) Act 1994 (Cwlth)* based on the International Covenant on Civil and Political Rights.

For a particular behaviour to be defined, under the law, as a sexual assault or a sexual crime, certain elements need to be present. Chief among these are the *actus reus*, or physical act that took place, and the *mens rea*, or mental state of the defendant. These two factors are essential for an act to be considered a crime. A sexual assault needs to have a sexual element to it (defined in most jurisdictions as ‘sexual intercourse’ or

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<sup>142</sup> Should the indecent assault lead to the genitalia or anus of a person to come into contact with the mouth of another person, the maximum penalty is however increased to 14 years imprisonment.

<sup>143</sup> In 2002 Finnane J, in the case of *X* (Unreported 15/08/2002, NSWDC) handed down a 55-year sentence with a non-parole period of 40 years to Bilal Skaf who had participated in a series of gang rapes at the age of 20. The sentence was later reduced to 31 years. Skaf is eligible for parole in 2033. At the time of the original sentencing, NSW Premier Bob Carr celebrated the long prison sentence and claimed that it would ‘act as a deterrent for other criminals’ (<http://www.wsws.org/en/articles/2002/09/rape-s06.html> accessed 2015-01-01)



‘sexual penetration’, or ‘unlawful *and* indecent assault’ (*Qld Criminal Code Act 1899*, italics added), separating it from other forms of unlawful assault or bodily harm (and meaning that medical procedures, for instance, while conducted on sex organs but which are not sexual by nature, are exempt). Moreover, the mental state of the perpetrator is paramount: all Australian jurisdictions now have consent-based sexual assault legislation, meaning that a person who has intercourse with another without that person’s consent (or is reckless as to whether there is consent) is guilty of rape/sexual assault. For instance, the NSW *Crimes Act 1900* (section 54 read with section 50, pertaining to the ACT) reads:

‘A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

A person who, acting in company with any other person, engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 14 years.<sup>144</sup>

For this section, proof of knowledge or recklessness is sufficient to establish the element of recklessness.’

In Queensland, this also includes bystanders or other ‘procurers’ who may not actively take part in the sexual act but who encourage someone else to do so:

‘Any person who: a) unlawfully and indecently assaults another person; or b) procures another person, without the person’s consent i) to commit an act of gross indecency; or ii) to witness an act of gross indecency by the person or any other person; is guilty of a crime. Maximum penalty: 10 years imprisonment.

(*Qld Criminal Code Act 1899*, s352)<sup>145</sup>

To summarise, in most Australian jurisdictions the offender’s intent and understanding of the act as unlawful are paramount in establishing guilt: the act cannot be, for instance, the result of involuntary movement on the part of the alleged

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<sup>144</sup> This pertains to so-called ‘gang rapes’. Swedish law similarly views rapes where more than one perpetrator has assaulted the victim or ‘otherwise participated in the assault’ (*brottsbalken* Chapter 6:1, para.4, personal translation) as ‘aggravated rape’, punishable by imprisonment for up to 10 years.

<sup>145</sup> Swedish law has a similar clause on participatory offences in *brottsbalken* Chapter 23:4.

perpetrator (such as a muscle spasm) or while the perpetrator is asleep. They also need to be aware that the victim is not consenting, or reckless as to whether the other party is consenting to the act.

Consent is invalidated if it is gained by force, threats (of violence, public humiliation, physical or mental harassment of the victim or someone else, intimidation, fraud or deceit, unlawful detention (all jurisdictions except Qld and WA), or by abusing a situation of authority or trust (ACT, NSW, Qld, and Tas.). Moreover, an inability to understand ‘the nature of the sexual act’ negates any consent given in all jurisdictions except Western Australia. Children below the age of consent are also deemed incapable of comprehending the consequences of engaging in sexual behaviour; in cases of sexual intercourse with children, therefore, no evidence of force, threats or other forms of persuasion are needed for the act to be classified as a sexual assault. The age of consent is now 16 for most but not all States and Territories (see Table below).

While there is a great deal of overlap between States and Territories in their definitions of sexual offences and the regulatory consequences for convicted sexual offenders, there is also a not insignificant amount of variety. Queensland, NSW and Victoria have preventive detention. The definition of rape varies chiefly between WA on the one hand and ACT and NT on the other, where the former specifies that rape must include ‘penetration’ whereas the latter speak of ‘intercourse’. Queensland decriminalized anal intercourse for consenting adults in 1990 but retained a higher age of consent for anal intercourse (18 for both parties) than for vaginal intercourse (set at 16).

Table 2 is a summary of the differences in legislative definitions of what constitutes a sexual offence, and how it is punished, in the various states and territories of Australia.<sup>146</sup>

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<sup>146</sup> For a detailed comparison of the sexual offending legislation of the various states and territories, see Bronitt and McSherry (2010).

**Table 2: A comparison of the legislative definitions of sexual offences between Australian States and Territories**

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Common law/ Code jurisdiction	Common law	Common law	Code	Code	Common law	Code	Common law	Code
Main statute regulating sexual offences	<i>Crimes Act 1900</i> (NSW, with special provisions for ACT)	<i>Crimes Act 1900</i> (NSW)	<i>Criminal Code</i> (NT)	<i>Criminal Code</i> (Qld)	<i>Criminal Law Consolidation Act 1935</i> (SA)	<i>Criminal Code</i> (Tas)	<i>Crimes Act 1958</i> (Vic)	<i>Criminal Code</i> (WA)
Maximum sentence for a sexual offence (imprisonment)	14 years	Life	17 years	Life	Life	21 years	25 years	20 years
Sex Offender Register	√	√	√	√	√	√	√	√
Year of Sex Offender Registration Act enactment	2005	2001	2004	2004	2006	2005	2004	2004
Age of sexual consent <sup>147</sup>	16	16	16	16 (carnal knowledge) 18 (sodomy)	17	17	16	16

<sup>147</sup> Information from <http://www.aifs.gov.au/cfca/pubs/factsheets/a142090/> (accessed 2013-04-29)

As mentioned previously, rape prohibitions are historical and universal, and some form of prohibition, however defined, has formed part of the regulatory landscapes of Australia since its formation as a federation. A different way of measuring whether Australia is moving towards greater convergence in its regulatory approaches to sexual offending is therefore to study newer forms of legislation. In particular, the focus on the sex offender, through measures such as continued or preventive detention and the mandatory registration of convicted offenders onto sex offender registers can point towards greater harmonization in this field.

Here, it becomes evident that the increased similarities are more than a coincidence. Following the New South Wales initiative to create legislation to enable police to track convicted offenders post-release through obligatory registrations of certain offenders in 2001, the other state and territory governments soon brought their own initiatives to the legislature. Typically, these Acts carry names that insinuate that convicted sex offenders primarily pose a threat to children, through the inclusion of words such as ‘child protection’ in their names (though the registrants are not exclusively those who have been convicted of child sex offences).

**Table 3: Legislation pertaining to Sex Offender Registration, by State/Territory and year**

<b>Jurisdiction</b>	<b>Legislation</b>
ACT	<i>Crimes (Child Sex Offenders) Act 2005</i>
NSW	<i>Child Protection (Offenders Registration) Act 2001</i>
NT	<i>Child Protection (Offender Reporting and Registration) Act 2004</i>
QLD	<i>Child Protection (Offender Reporting) Act 2004</i>
SA	<i>Child Sex Offenders Registration Act 2006</i>
TAS	<i>Community Protection (Offender Reporting) Act 2005</i>
VIC	<i>Sex Offenders Registration Act 2004</i>
WA	<i>Community Protection (Offender Reporting) Act 2004</i>

Western Australia has also created a website where the public can conduct searches for convicted sex offenders in their area, and the Northern Territory government in late 2014 announced plans to create a publicly accessible website that would provide the names and locations of convicted sex offenders.

## **The development of Australian sexual offending legislation**

Indigenous Australians of Aboriginal and Torres Strait Islander descent have inhabited the continent now known as Australia for somewhere between 40,000 and 100,000 years and for millennia, each Indigenous nation has had sophisticated and elaborate systems of law in place to regulate human behaviour, settle disputes, regulate marriage and sexual relations and to ensure the continuation of stable societal mores.<sup>148</sup> Comprising more than 200 groups each with its own distinct language, customs and regulatory codes of conduct, Indigenous Australia relied on tribal law to settle disputes and dispense justice. Sexual mores were regulated through intricate systems of permissible and forbidden relations as to who could marry whom, and through the regulation of marriage (based on elaborate kinship systems) sexual conduct was also regulated (Turner 1980).

Indigenous collectivities pre-1788 tended to be flat in their hierarchical structures. Elders, of both sexes, were in a position of trust and offered advice as to what the law stated. Religion and law were seen to be stemming from the same source, and breaches of appropriate conduct thus offended on several levels. Returning society to equilibrium by punishment of the wrongdoer therefore was important from both a spiritual and a social order perspective (Turner 1980).

Ritual and regulation of behaviour played an important part of daily life in Indigenous society, and the law was a combination of religious, spiritual and social collective norms to guide and steer behaviour from deviance to normalcy. In these harsh landscapes, the group, family and clan were essential components to ensure survival, and justice was largely restorative: wrongdoings were punished and the offender was reintroduced into society. Exile seems to have been uncommon, reserved for the most

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<sup>148</sup> The following section is a simplification and the reader should bear in mind that each group had its own legal system, approaches to kinship and clan regulation of sexuality.

heinous offences (coincidentally, sexual violence was not included among these) against society and the spirits.

Sexual relations, and its sinister sibling sexual violence, played an important role in Aboriginal life pre-colonisation. Hughes writes of the Iora tribe, the original Sydneysiders, that Iora women:

‘had no rights at all and could choose nothing. A girl was usually given away as soon as she was born. She was the absolute property of her kin until marriage, whereupon she became the equally helpless possession of her husband. The purpose of betrothal was...to strengthen existing kinship bonds by means of reciprocal favors. It did not change a woman’s status much...’

(Hughes 1987:16)

Wives could be lent to visitors as a sign of hospitality or swapped as expression of brotherhood (Hughes 1987), or used as a peace offering to other tribes in times of conflict. Any reluctance shown towards the arrangements was valid reason for a husband to beat or even kill her. The rearing of children in a nomadic setting required a harsh weeding out of ill, deformed or otherwise unwanted children, with abortion and infanticide apparently practiced (Hughes 1987:16-17). It is difficult to know the extent to which this kind of generalising is true, but it is clear that women’s status in Aboriginal communities centred upon their sex, their fertility and their working abilities.

### **The colonial era: Sexual offending legislation from 1788 to 1901**

Human trafficking is not a new crime but an old crime by a new name. At times it has been known as slavery, other times punishment, colonialism, or even settlement. As a nation was founded by convicts, trafficked there to work or to provide sexual services to those who worked, Australia’s history is one of domination and slavery, of power and control, of white male supremacy and brutal oppression of the rest. It is a history of haves and have-nots. And it has usually been white men, who have ‘had’, and women, children and Indigenous Australians that have been the Others.

More than 160,000 convicts made the journey in century following the landing of the First Fleet on January 26, 1788. The reason for sending the First Fleet was simple: to get rid of the ‘criminal class’ the rest of Georgian and Victorian England was sure existed (Hughes 1987:1), the ‘enemy within’. ‘Crimes’ such as prostitution (formal or informal) and homosexuality both flourished in and outraged middle-class England, and these Victorian values dominated the Australian colonial project for a long time also. The foundation of Australian law is the English common law system and its morality with regard to sexual mores has constructed particular frameworks that continue to permeate the Australian legal landscape.

The tension between the Indigenous people who had inhabited Australia for at least 40,000 years, and the white settlers, was soon impossible to ignore. The Aboriginal way of living – hunting, gathering, roaming the country for food and water but leaving no boundaries, buildings or capital behind – was utterly foreign to the English. Colonizing land previously claimed by others was something the colonists were used to – in North America, New Zealand and India this had certainly occurred enough times – but the Aboriginal concept of collective guardianship of land put them, in the words of a contemporary commentator, barely above ‘the brute’ (Hughes 1987:273).<sup>149</sup> As labourers, they were of no economic use to the settlers who had more than enough convicts to choose from. It did not take long for the conflict over land between the natives and the white to escalate.

The story of Australia’s birth is a story of Othering, of constructing whores and deviants, of forcing women into slavery and then punishing them for the results. Three main Others will be discussed in this chapter: *women, Indigenous Australians, and homosexual men*. Often, two or more of these subgroups interplay. It was, for instance, the fear that convict men would resort to sodomy and other ‘unspeakable’ evils that influenced the decisions to transport women convicts from England, to provide sexual services to men and save them from having to commit these acts. For both women and men sexual violence *was* punishment, but also punishable – the offence and the retribution sometimes forming a ‘double bind’ (Hughes 1987) almost impossible to escape. Jeremy Bentham, writing about the Woolwich hulks, declared

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<sup>149</sup> At the time of the white invasion, there were over 500 Aboriginal languages and dialects, reflecting the vast diversity of clans that had little to do with one another and who were often in a state of low-level tribal warfare (Hughes 1987:274).

the raping of male prisoners to be so commonplace it was hardly worth a mention: ‘An initiation of this sort stands in the place of garnish and is exacted with equal rigour... [As] the Mayor of Portsmouth, Sir John Carter...very sensibly observes, *such things ever must be*’ (Bentham, draft letter, Jan 24, 1803, quoted in Hughes 1987:265, italics in original).

The first trial of a man for homosexual offences in Australia happened in 1796, but overall there was little mention of it in official reports, magistrates’ bench-books or letters to England.<sup>150</sup> Few trials for sodomy were carried out in the new Australia: out of 24 men tried for ‘unnatural offences’ in New South Wales and Van Diemen’s Land (Tasmania) between 1829 and 1835, 12 were convicted, but only one of these men was executed. The ‘doubly damned’ (Hughes 1987:272) status of being a convict *and* a homosexual (which was also a criminal offence) meant there was little political will to improve the situation, save for two reasons: religious people who saw it as an offence towards God, and nationalists who viewed it as a stain on Australia itself and, by extension, the English (Hughes 1987).

The narrative was constructed as one of ‘situational homosexuality’ rather than acts based on sexual preferences, that would dictate that in any situation where men were living together in closed quarters without access to women for a period of time, male-on-male sex seems the inevitable result.<sup>151</sup> The penal system, relying on male power and strength for its very survival on a harsh, uninviting continent, allowed for sexual violence to occur or even, as some contemporary writers speculated, actively encouraged it as a means of social control (Cook 1830; Hughes 1987:270).

The law offered no protection for Indigenous Australians. The self-perpetuating cycle of violence operated on its own logic: because Aborigines, having no grasp of English law, could not be either prosecuted or sworn as witnesses, and therefore it would be a waste of time to go through the formalities of a trial in cases relating to Aborigines as

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<sup>150</sup> Anecdotal testimony concerning ‘crimes that...would make your blood to freeze, and your hair to rise erect in horror upon the pale flesh’ (Bishop W. Ullathorne, speech to Molesworth Committee, undated; quoted in Hughes 1987:266) did find its way back to England, and no doubt contributed to the view of the new colony as inhabited by savages of various origins.

<sup>151</sup> Similar narratives have been constructed to explain homosexual activities on ships, in single-sex boarding schools, and prisons. Sexual violence in these circumstances is said to be less about lust and more about ‘sadistic humiliation, in which sexuality [is] merely the instrument of a deeper violence – the strong breaking the weak down’ (Hughes 1987:269). By comparison, see Abdullah-Khan (2008) for contemporary construction of male rape.



either victims or offenders. The Aborigine was outside the law and any white man could do whatever he wished to them with legal impunity (Woods 2002). Such a complete absence of legal rights put Indigenous Australians even below white women in the eyes of the law, and it is not surprising that the next 150 years of Australian history are a map of white hegemony: oppression, murder, dispossession and sexual violence were tools used systematically to eradicate many, and subjugate the rest, of Australia's first peoples. Only the most outrageous massacres of clearly innocent people such as women or children had any form of legal or political repercussions.

Aboriginal women were, in all of this, the lowest of the low. Their only value to the white settlers lay in their potential as servant or sexual object, and for Aboriginal men they presented a currency to trade for alcohol, weapons or food (Reynolds 1976). Sexual slavery and torture of women and children along with other forms of extreme, gratuitous violence was all constructed along the frameworks of white authority and black deviance.

If life was harsh for Indigenous Australian women, it was not much better for their convict neighbours. One in seven transportees to the new colony between 1788 and 1852, or some 24,000 in total, were women. Though prostitution was frowned upon and evidence of the 'immoral character' of the underclass in Georgian and Victorian England, the new colony's women faced what was essentially enforced prostitution in the form of arranged marriages. While prostitution was never a transportable offence (Hughes 1987:244), theft was, and more than 80% of women transportees had been convicted of theft. The image of the despondent, incorrigible prostitute of low morality and character permeates the literature concerning women's experiences of the colonisation of Australia. Feminist historians such as Anne Summers and Miriam Dixson have analysed the Othering of women in early Australian history from a male power structure, with Summers explaining that:

'It was deemed necessary by both the local and the British authorities to have a supply of whores to keep the men, both convict and free, quiescent. The Whore stereotype was devised as a calculated sexist means of social control and then... characterised as being the fault of the women who were damned by it.'

(Summers 1975:286)

Female convicts on board the ships bound for Sydney faced a difficult choice even as they sailed along the Thames: as ‘marriageable’ they were expected to provide the sexual favours deemed necessary for the men (of various ranks and stations) in the colony. Seeking out an officer or sailor on board the ship provided protection from the rest, but also locked them into a relationship based on sexual services and mutual exploitation that confirmed the ‘immoral’ character that formed part of the reason for their banishment in the first place. A steward on board the *Lady Juliana* noted simply that ‘Every man on board took a wife from among the convicts, they nothing loath’ (quoted in Hughes 1987:251). Upon arrival in Sydney, the ordeal was not over: the women were simply administered to either officers (as servants), privates, or ex-convicts (Woods 2002), ‘rendering the whole Colony little better than an extensive Brothel’ (T.W. Plummer, letter to Governor Macquarie, May 4 1809, quoted in Hughes 1987:253).

The ‘doubly colonized’ (Hughes 1987:261) risked victimisation by sexual violence at every turn, starting on board the ship and continuing for the rest of their lives. A girl could be sold into sexual slavery, brutally punished for even petty offences, labelled as more unreformable than even the male convicts, and unable to escape the ‘double bind’ of first being pushed into a life of sexual subjugation and then punished for it (Hughes 1987:258-264; Reynolds 1976).

### **The Federation years: the development of Australian sexual offending legislation 1901 to 1965**

The Federation years established Australia as an independent nation with its own Federal Parliament, State and Territory Parliaments and Legislative Assemblies and its own police forces. The Federal Parliament had endeavoured to combine the best of government practices from Great Britain and the United States, but the social mores of the time were predominantly English. The ‘Victorian inheritance’ as an ideal was strong in Australian at the turn of the century, with ‘modesty, marriage and maternity’ and the anxieties surrounding the new breed of Australians placed a particular value on white Australians bred from good stock. Birth rates had fallen between the 1860s and the 1880s, first among the upper classes and later along the working classes too and white women were called upon to do their duty and reproduce – within marriage (Featherstone 2011:20-22).

Reality was different: in the 1904 NSW *Royal Commission into the Decline of the Birth Rate and the Mortality of Infants* (the 1904 Report), which expressed anxiety and fear about the declining birth rates also noted the ‘selfishness’ of Australian women in using birth control: ‘a topic so scandalous – and indeed so informative – that the Royal Commission would not reproduce it for public consumption’ (Featherstone 2011:22). Women’s sexuality was a non-topic in these years, where public and political debate so strongly linked female sexuality to reproduction (for instance, while male homosexual activities were illegal, female ones were not; the idea of a female sexuality independent of men was invisible in legal and public debate).<sup>152</sup> In the early Federation years, incest was regularly reported in the press but whilst if proven was seen as abhorrent, it was as often the victim’s past, her character (boys were almost never seen as possible incest victims) and her behaviour at the time of the assault that were reported and dissected (Featherstone 2011:43-44). Indicative of the assumed male sexual entitlement that strongly ran through male-female sexual relationships at the time, it was seen as women’s responsibility to keep male sexuality in check, even when the woman was a minor.

As in Sweden at the time, rape was by all accounts much more common than official statistics would reflect in the early twentieth century. The male sexual license, the focus on women’s behaviour in avoiding victimisation (and victim-blaming, should they nevertheless fall victim to sexual violence) and the under-policing of sexual violence all led to rape being mainly a question for feminists. Moreover, when rape was prosecuted it was mainly as a response to patriarchal rights being threatened, meaning that intrafamilial sexual violence rarely went to trial (Featherstone 2011:52). It was also seen as impossible to be held to account for the rape of an Indigenous woman or a prostitute (Featherstone 2011). By the early 20<sup>th</sup> century, in the majority of states ‘rape was no longer punishable by death, and juries were increasingly allowed to look for “mitigating” circumstances to further reduce the sentences’ (Featherstone 2011:53) – sentences that already tended to be light were they to be imposed at all.

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<sup>152</sup> Meanwhile, a not insignificant number of children were born out of wedlock: in 1903 the rate was as high as ‘17% in the frontier region of Queensland. In NSW and Victoria, the rates were at 15.4% and 10.0% respectively, with Tasmania and WA standing at 13.6% and 15.1%. The non-convict Lutheran state of SA had the lowest rates of ex-nuptial pregnancy, at a still significant 7.6%. (Featherstone 2011:26)

‘It is almost impossible to estimate the extent of rape in this period, simply because the sources reflect only those charged and/or convicted. Criminal justice records are notoriously poor in terms of estimating prevalence: not all women reported rape; policing was inadequate and as numerous historians and social theorists have noted, it was extraordinarily difficult to get a conviction for rape – even when the evidence would seem overwhelming. Many cases, then as now, simply slipped through the system, unreported, or not followed up, through lack of evidence or unwillingness to prosecute.’

(Featherstone 2011:51)

### **The postwar era: 1965-2000**

The 1945-postwar era in Australia was one marked by an increasing influence from the United States, both in terms of cultural and political references, and a corresponding decline of British values and attitudes. The postwar period saw an increased focus on immigration, infrastructure and communication, urban development and a gradual shift in Indigenous rights and politics from an explicit ‘White Australia’ policy to one of first assimilation, to integration, and finally citizenship (both formally, from 1967 onwards, and in terms of civic participation).

These were formative years for women’s rights, as feminist groups put issues such as domestic violence and sexual assault on the public agenda. No longer content for these matters to be relegated to the domesticity of ‘private’ dealings between husbands and wives, women’s awareness groups demonstrated how societal structures such as politics and law supported and upheld the male superiority that played a direct part in victimising women, and demanded legal reform to better protect women both in public and in private (GD Woods, personal communication, 2013).

David Brown (2005:343) notes how the period from the mid-1980s onwards, legislative reform in the criminal justice field in Australia came to be

‘driven by the rise of victim concerns, the increased politicisation and media exploitation of law and order culminating in the development of an “uncivil politics of law and order” and a “popular punitiveness” demanding increased

police powers, restricted judicial discretion in sentencing and heavier penalties. Among the consequences... is the tendency to sideline, by-pass or ignore official law reform reports as unresponsive to political imperatives, requiring instant responses to media legitimisation crises around particular cases.'

Moreover, 'law reform commissions and their work may lose credibility and authority in the face of a more general "anti-elites" movement, expressing the rise of a "public voice" challenging traditional forms of expert discourse' (Brown, Farrier, Egger, McNamara, Steel, Grewcock and Spears 2011:22).

The 1990s saw a formidable explosion in the public discourse around sexual violence directed at children in the UK and northern Europe, which generated significant community anxiety and shaped a political response that emphasized retributive and restrictive aspects of penalty together with a new focus on community information, involvement and notification. The increased attention was mirrored in Australia where public awareness of issues such as child sexual abuse grew out of the realisation first initiated in Europe. Stories had emerged in the 1990s of Catholic priests in Australia, Northern Ireland and the United States sexually abusing children with the church failing to act on the accusations (Greer 2003; Jewkes 2004). Cases of severe physical and sexual abuse in residential child care homes across England and Australia had exposed the pervasiveness of the problem of abuse in state care institutions. These cases, and the 2013 Royal Commission into Institutional Responses to Child Sexual Abuse that was set up as a response, exposed the systemic failures in protecting children and took sexual violence against children out of the home and placed it firmly in the public arena.

The public was no longer satisfied with the idea that the criminal justice system could adequately handle the release and supervision of convicted sex offenders into communities without the community's awareness or involvement. In a shift away from expert-focused release conditions, the 1990s wave was one away from 'what the offender needs' to 'what the public wants'. A parallel to the shift in criminal justice from offender-focused to victim-focused policies, sex offender regulation similarly saw a move from an offender-rights focus to the (perceived) rights of the community as a whole. The new sex offender was one that attacked children for sexual gratification (often, if erroneously dubbed 'paedophiles' in the media) and this

‘stranger danger’ was constructed in media and political discourse as a pervasive threat to every child in the community.<sup>153</sup>

### **Surveillance and control: Regulatory reform in Australia from 2000 onwards**

Under contemporary Australian sentencing principles there is a multitude of sanctioning types, though they broadly fall into four categories (Edney and Bagaric 2007:5-6). The first is a *finding of guilt*, including a dismissal, discharge or bond. The second (and most common) is a *fine*. The third is *imprisonment* for any length of time. ‘The fourth general form of sanctions consists of what are generally known as *intermediate punishments*....generally imposed when the offence is too serious to be dealt with by a fine, but not serious enough to warrant a term of imprisonment.’ (Edney and Bagaric 2007:6) They can combine, for instance, a fine with ‘an order to undertake some form of counseling or training... designed to have a rehabilitative effect [such as] community service orders, home detention, suspended sentences and intensive corrections orders.’ (Edney and Bagaric 2007:6). Australian sentencing relies on four key principles: ‘deterrence, community protection, denunciation and rehabilitation’. (Edney and Bagaric 2007:5)

There is an increasing tendency, in the past two decades, to create new law as well as to expand existing law, resulting in a marked increase in the amount of legislation that now governs Australian life. This holds true for both Code and traditionally non-Code states and territories, and affects in particular the field of criminal law: ‘In effect the non-Code jurisdictions are increasingly putting their law in legislative form. Hence the large amount of legislation in this area of law’ (Lanham, Bartal, Evans and Wood 2006:12).

Some of the reforms are mainly symbolic, to be sure, with attempts to show the public that ‘something is being done’ about particular issues now regular political goals in themselves (Brown *et al.* 2011:21). One such reform is evident in the sentencing guidelines where mandatory minimum penalties has become a political tool to instil a sense that the perceived increase in violent and sexual crime is being combated by

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<sup>153</sup> The UK charity Childline received phone calls from 9,857 children in 2001/2001 that claimed to have suffered abuse; 95% of these knew their abuser ([www.childline.org.uk](http://www.childline.org.uk)).

harsher prison sentences to deter and incarcerate dangerous offenders. New South Wales introduced such measures, through its *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 (NSW)*, where fixed non-parole periods apply to perpetrators of violent and sexual offences (the latter set at seven years, or ten years non-parole periods for aggravated sexual assaults). At the same time, the multitude of exceptions – there are around 300 mitigating and aggravating circumstances that can be invoked to negate the sentencing minimum guidelines (Edney and Bagaric 2007:41-42) may hint at the perceived forcefulness of the Act being somewhat compromised in reality.

Nevertheless, the effects on the regulatory landscape in the area of sexual offending have been far-reaching and profound. While Australian state and territory law has always criminalized the act of rape, the traditional common law definition of rape consisted of the penile penetration of a woman by a man, who was not her husband, and who knew that the woman was not consenting, or realized that she might not be. Today, statutory provisions that criminalize rape (or sexual assault, a term sometimes used to signify the violent assaultive part of the crime; see Australian Law Reform Commission 2010 section 24.86) have been updated to reflect new understandings of sexual victimisation as not only an offence against the victim's genitals but against their dignity, bodily and sexual autonomy and consent. Marital immunity in the case of husbands raping their wives has been abolished in all States and Territories.<sup>154</sup>

Under current legislation, offences in each jurisdiction share several common traits:

- Definitions have widened beyond the traditional act of rape as penetration of a vagina by a penis, to comprise of 'sexual intercourse' without the consent of the victim, or 'sexual penetration' without a person's consent.
- Sexual offences can be committed by a person of either sex against a person of either sex.

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<sup>154</sup> Interestingly, a form of marital immunity defence remains in cases of sexual intercourse with children: 'In South Australia there is a defence of marital immunity [for consensual sexual relations between husband and wife] even where the child is under 12. The Northern Territory legislation also makes express provision for marital immunity.' (Lanham *et al.* 2006:312) Put differently, while sexual intercourse with a child below the age of consent is criminalized in all States and Territories, South Australia and Northern Territory makes exemptions for sexual relations inside marriage even if one of the parties is below the age of consent (for instance, where a couple have legally married overseas and subsequently moved to Australia).

- The crime of ‘aggravated sexual assault’ is codified (albeit slightly differently) in every Australian jurisdiction (Crofts 2011:148), even the common law states (SA, Vic and NSW). However, in NSW sexual assault has largely been codified and the influence of common law has decreased substantially (Brown *et al.* 2011).
- The sexual act does not have to be done to serve the offender’s sexual gratification but can have other, non-sexual motives (Crofts 2011:138).
- The jurisdictions have developed a large amount of legislation in recent years, and regularly include new forms of sexual behaviour in definitions of criminal offending.<sup>155</sup>
- Preventive detention legislation for serious sexual offenders has been enacted in QLD, WA and NSW (the latter in the *Crimes (Serious Sex Offenders) Act* 2006).
- There is a distinct tendency to increase the legal age of consent for heterosexual intercourse (16 in all states and territories except in South Australia and Tasmania where it is 17; Commonwealth legislation, which covers offences overseas, sets the age of consent at 16).
- Different ages of consent for homosexual intercourse have increasingly been abolished<sup>156</sup> (Queensland has however retained 18 as the age of consent for sodomy irrespective of the sex of the participants).
- For children, the age of criminal responsibility is 10 in all Australian jurisdictions. Between age 10 and 14, what in common law is known as ‘*doli incapax*, or diminished responsibility, operates, whereby a child can only be found guilty of a crime if ‘the prosecution proves that the child knew that his or her conduct was wrong’ (Lanham *et al.* 2006:12).
- Sexual activities with children are prohibited irrespective of whether the child consents, though ‘there is some variation in the age limits, in the mental

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<sup>155</sup> Moreover, the *Criminal Code Act 1995 (Cwlth)* includes provisions concerning the offences of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and sexual violence.

<sup>156</sup> In NSW, this occurred in 2003 when the higher age of consent for male homosexual intercourse, and all other ‘special sections relating to the criminalization and different treatment of homosexual sexual relations’ (Crofts 2011:142) were replaced by more neutral language. Lesbian sex has never been criminalized in Western Australia but male, private, consensual sexual relations with another man remained a criminal offence until 1989. In 2002 all discriminatory treatment based on sexuality was finally removed from the law.



element required for the offence and in the available defences’ (Lanham *et al.* 2006:309).<sup>157</sup>

- ‘Sexual offences against children are classified by either the age of the child, the child’s relationship with the defendant, or both’ (Crofts and Burton 2009:275).<sup>158</sup>

The language differs between states, with South Australia and Victoria referring to the term ‘rape’ while in NSW the offence equivalent to rape is labelled ‘sexual assault’ (Crofts 2011:135). Moreover, under Victorian and ACT legislation, consent is a defence in cases where there is a minor age difference between the parties involved, namely if the defendant is not more than two years older than the victim.<sup>159</sup> Similarly, in Tasmania consent can be upheld as a defence when the victim is 15 or over and where the defendant is not more than five years older; the same defence can be upheld where the victim is aged 12 or above and the age difference is not more than three years (Lanham *et al.* 2006:314-315).

Specific sexual offences that involve children as victims include ‘sexual conduct falling short of sexual intercourse, and sexual intercourse or other acts of indecency with children above the age of consent...where the defendant is in some position of trust or the sexual conduct is of a homosexual kind. There are also offences in some jurisdictions of maintaining a sexual relationship with children and of allowing sexual acts with children to take place on one’s premises. Other offences include abduction of children for sexual purposes’ (Lanham *et al.* 2006:315-316).<sup>160</sup> Minimum

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<sup>157</sup> In Queensland, sodomy of a child aged under 12, carnal knowledge (of girls only) of a child aged less than 12 and maintaining a sexual relationship of a sexual knowledge with a child under the age of 12 years (the latter meaning committing more than one sexual act with the child over any period) are all punishable by life imprisonment.

<sup>158</sup> ‘...incest has never been an offence at common law, though the ecclesiastical courts exercised some jurisdiction over sex between family members because of the religious prohibition on consanguinity in relation to marriage and procreation. The criminalization of incest by statute in the 19<sup>th</sup> century occurred as a result of Victorian moral reformers. In all Australian jurisdictions, it is an offence to have sexual intercourse with someone who is related, irrespective of the age of the persons concerned...The severity of potential punishment varies significantly across jurisdictions, from a maximum of three years imprisonment in Western Australia, to life imprisonment in Queensland. In New South Wales and Queensland, attempting incest is also an offence, punishable by up to two years and 10 years respectively.’ (Bronitt and McSherry 2010:677)

<sup>159</sup> Swedish legislation similarly holds that a ‘minor’ age difference (interpreted in case law as being around two years; see *NJA 2007 s. 201*) can be a defence against prosecution, in particular if the younger person is close to the age of consent (*brottsbalken* Chapter 6:14)

<sup>160</sup> The incest prohibition was one of the earliest examples of states criminalizing through statutes rather than common law, with all states introducing such statutes in the years between 1876 and 1924 (Bronitt and McSherry 2010:680).

sentencing guidelines tend to be higher for sexual assaults of child victims, sometimes with explicit reference to what the community expects in this regard: see, for instance, the case *R v MJR* (2002) where Spigelman CJ argued that sexual assault has ‘come to be regarded as requiring increased sentences ... by reason of a change of community attitudes’ (*R v MJR* (2002) 54 NSWLR 368 at [11]). Five years later, the same Chief Justice held (in *DBW v R* (2007) that ‘the effect of sexual abuse was not a matter for expert evidence’ (cited in Judicial Commission of New South Wales 2014<sup>161</sup>), again referring to the public as ‘knowledgeable about...the effects of child sexual abuse’ (*DBW v R* [2007] NSWCCA 236 at [39]) which would require longer prison sentences.

Moreover, a strong and explicit focus of much of the legislation that was enacted around Australia between 2003 and 2006 was the containment and surveillance of the convicted sex offender post-release. The sex offender registration schemes that were enacted during that era, coupled with legislation to allow preventive detention as well as indefinite sentencing, extended supervision orders and extraordinarily long prison sentences for sexual offences, all had an impact on the criminal politics landscape that cannot be overstated.<sup>162</sup> Their rationale rests on the idea that continued surveillance of known (assumed dangerous) criminals that have served their sentence will have an effect both on actual crime rates in the community, and feelings of safety in the neighbourhoods where the offenders reside. For instance, the *Crimes (Serious Sex Offenders) Act* 2006 (NSW), which specifically mentions sex offenders as serious criminals, spells out its objectives in section 3: ‘The primary object of this Act is to provide for the extended supervision and continuing detention of serious sex offenders so as to ensure the safety and protection of the community. Another object of this Act is to encourage serious sex offenders to undertake rehabilitation.’<sup>163</sup> Indefinite sentencing schemes can also be found in Queensland, South Australia, Tasmania,

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<sup>161</sup> Accessible at [http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sexual\\_assault.html](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sexual_assault.html) (accessed 2015-01-01)

<sup>162</sup> ‘Preventive detention, whereby a term of incarceration is extended beyond the term of the original sentence, is to be distinguished from *indefinite sentencing*, which occurs where the sentencing court has power, usually under specific legislation, to impose an indefinite sentence, generally in cases involving serious sexual and/or violent offenders who meet specified criteria indicative of their being a serious danger to the community.’ (Howard and Westmore 2010:493)

<sup>163</sup> The NSW *Crimes (Serious Sex Offenders) Act* (2006) allows for two types of substantive orders: extended supervision orders and continuing detention orders, though it is unclear how these orders are to encourage offenders to initiate rehabilitative arrangements.

Victoria, Western Australia and the Northern Territory (Howard and Westmore 2010:493, fn.66).

A landmark case in Australian case law is *Fardon* (*Fardon v. Attorney-General (Qld)* (2004) 223 CLR 575 [2004] HCA 46), which upheld the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) that had been challenged by Fardon, a convicted sex offender. However, in the High Court judgement Gleeson CJ defended the tendency to legislate in manners that may discriminate against certain types of criminals. He noted: ‘Legislative schemes for preventive detention of offenders who are regarded as a danger to the community have a long history. Inebriates have been the subject of special legislation of that kind. So have recidivists, or “habitual criminals”’ ([s13] in *Fardon*). He went on to note that

‘people suffering from mental disorders frequently come into collision with the criminal justice system, and discretionary sentencing decisions must take into account a number of sometimes competing considerations, including the protection of society. The law is a normative science, and many of its rules and principles are based upon assumptions about volition that would not necessarily be accepted by psychiatrists.’

(Gleeson CJ[s11] in *Fardon*)

However, Kirby J, who was the only dissenting Justice in *Fardon*, had a different view from Gleeson CJ (at [s. 126]):

‘As the Act’s provisions show, it targets people who will almost inevitably be unpopular with the community and the media who can be expected to take considerable interests in orders of the type sought under the Act. As framed, the Act [the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)] is invalid. It sets a very bad example, which, unless stopped in its tracks, will expand to endanger freedoms protected by the Constitution. In this country, judges do not impose punishment on people for their beliefs, however foolish or undesirable they may be regarded, nor for future crimes that people fear but which those concerned have not committed.’

Australian legislation regulating convicted sexual offenders has undergone radical transformation in the past decade. Every State has developed, or is in the process of

doing so, legislation that is aimed at better targeting this cohort of offenders. The dominating trend is extending the detention of sex offenders. Several States, including Victoria and New South Wales, have introduced the practice of sentencing convicted offenders to indeterminate prison terms, where eventual release is conditional upon a series of conditions to be met; these typically include lengthy participation in treatment programs and other forms of evidence pointing to the offender's wish to 'reform'.

This 'new criminalization', and 'the virtual disappearance of decriminalization from the agenda, and along with it any attempt to take a critical stance toward the concept of crime' (Cohen 1988:235) is a suitable reference point for Australia's 'new' sex offender legislation. Cohen continues:

'Criminalization is the process of identifying an act deemed dangerous to the dominant social order and designating it as criminally punishable. This fateful decision produces a peculiar illusion...that acts of conduct were divided originally into positive/negative, criminal /virtuous. The criminal law draws a simple line of demarcation. Unlike social norms that we know as subtle, continuous and negotiable, we start to talk about a dichotomous variable, crime/non-crime. In principle...an act cannot demonstrate a little of both properties. Strictly speaking, there cannot be degrees of criminality...'

(Cohen 1988:257)

He exemplifies this: 'If we define more acts of sexual exploitation as crime, the result cannot be less crime but more crime. And if we succeed in raising consciousness about these acts, then more of them will be reported' (1988:258). Moreover, overcriminalization is problematic because it produces too much law, and too much crime, and this in turn can undermine the respect for the law itself (Husak 2007). Recent examples of this 'punitive turn' (Garland 2001:42) include the Australian legislation that has created sex offender registers and continued detention orders.

### **Sex offender registers and continued detention orders in Australia**

Partnered with a focus on longer prison sentences is the surveillance of offenders in the community, either once released from prison or as an alternative (for those whose

sentencing does not include prison terms) to imprisonment. GPS monitoring of offenders has been proposed and is currently being considered as a means of electronic surveillance of those deemed at risk of re-offending. Recent measures in Australia include risk assessment of offenders according to static and dynamic variables, risk management approaches, treatment in sex offender Treatment Programs, and registration of convicted sex offenders on state-based Sex Offender Registers that link up with the Australian National Child Offender Register (ANCOR).<sup>164</sup> In 2001, New South Wales became the first state to enact legislation that required sex offenders and other serious offenders to register with the police. A slate of legislative initiatives followed, with most States having emulated the initiative by 2005. South Australia was the last jurisdiction to introduce such measures in 2006. Unlike the United States, where in many jurisdictions the registers are publicly accessible<sup>165</sup> the Australian registers rather function as a tool for police to monitor the whereabouts of convicted sex offenders post-release.<sup>166</sup>

ANCOR is operated and monitored by CrimTrac<sup>167</sup>, and allows police across State and Territory jurisdictions to ‘register, case manage and share information about registered persons’ (CrimTrac 2011). The register specifically targets persons who have served and completed their sentence (CrimTrac 2011). It includes sex offenders and others who have committed ‘serious offences against children’ (CrimTrac 2011). ANCOR uses information from each Australian jurisdiction, which in turn has its own legislation to classify offending into registrable and non-registrable offences; this can vary, in wording or content, between the various states and territories. On 1<sup>st</sup> March 2011 there were 12,596 registered offenders across Australia.

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<sup>164</sup> Australia has stopped short of community notification when a sex offender is registered or moves to a community, unlike many US states and the UK (in Scotland, limited community notification is now being implemented; this offers the police powers to notify persons who are in direct contact with a registered sex offender, in cases such as a single mother entering into a relationship with a registered sex offender).

<sup>165</sup> See <http://sex-offender.vsp.virginia.gov/sor/> (accessed 24 January 2014)

<sup>166</sup> Though as it is estimated that 95% of all sex offenders never go to court or are not convicted (McAlinden 2007), only about 5% of all sex offenders would end up on the register.

<sup>167</sup> Established in 2000, CrimTrac is the national information-sharing public service institution for the various police, law enforcement and national security agencies of Australia. Its headquarters are in Canberra, ACT. As each State and Territory has jurisdiction for law-and-order matters within its own borders, and the Australian Federal Police for issues concerning national security, CrimTrac was established as a means for the effective sharing of law enforcement information over these borders by the nine police services and the Commonwealth. CrimTrac also ran a trial information-sharing project with New Zealand police.

ANCOR and the Managed Person System (MPS) together form the National Child Offender System (NCOS), aimed primarily at supporting police in targeting online crime prevention and in sharing information about persons suspected of crimes relating to child sexual abuse. While the two systems share some similarities, the MPS also includes persons who have been charged but not convicted of a crime. It also continues to monitor offenders whose reporting obligations have been completed (CrimTrac 2011).<sup>168</sup>

Current US and Australian initiatives to reform sex offender legislation focus on offender registration and community notification as well as testosterone-lowering treatments for male offenders (nothing similar is available to female offenders). These provide a political response to ‘understandable community concerns and distress’ (Berlin 2003:512) rather than being based on empirical evidence and expert opinion. Richard Wright agrees, and notes that in the American context, ‘policymakers have chosen to allow sex offender laws to be driven by the demonization of offenders, devastating grief experienced by a subset of victims, exaggerated claims by law enforcement, and media depictions of the most extreme and heinous sexual assaults’ (Wright 2009:4). The result, he argues, is that emotive responses – by the public and political groups – for justice leads to a demand for simplistic and symbolic efforts to prevent and punish sexual assault. For instance, the US Congressional proposal to greatly expand sex offender registration through the Children’s Safety Act of 2005 (passed by the House of Representatives though stalled in the Senate) continues the dubious path of offender registration and community notification, despite an overwhelming body of evidence pointing to the troubling moral, social and human rights effects of such schemes, the uncertainty over their usefulness as crime prevention tools, and the channeling of resources away from other areas of offender management (Wright 2009).<sup>169</sup>

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<sup>168</sup> An innovative cooperative arrangement between police and the private sector is the Child Exploitation Tracking System (CETS). CETS is the result of collaboration between CrimTrac, police agencies and Microsoft. It aims to build automated processes for identifying children at risk of sexual abuse through screening of seized material which matching it with previously identified material. Another benefit is that police exposure to child exploitation material is reduced, a significant factor that benefits the police officers working with the material both from an ethical and an occupational health perspective.

<sup>169</sup> Moreover, the UK Sex Offender Register, which has been in place for more than a decade, has seen the gradual process of increasing restrictions on offenders, with little or no debate around the basis for such restrictions. Once implemented, Registers can be changed or ‘strengthened’ quite easily (Thomas 2008); this has occurred in the UK where the legislation has been extended numerous times with little

It is difficult to measure or quantify the ‘success’ of offender registration, as measuring how many offenders that abstain from committing crimes as a direct result of registration is impossible. A report commissioned by the UK Home Office found that ‘...forces had no agreed way of quantifying the contribution of sex offender monitoring to improve community safety... no single measure of effectiveness emerged from this study as suitable for performance measurement’ (Plotnikoff and Woolfson 2000:50). Moreover, social workers fear that registers draw attention to ‘stranger danger’ and away from the greater threat posed by families and extended families (Community Care quoted in Thomas 2008:229). By far the most common form of child sexual abuse is that which occurs in the home, or by a person known to the child. Nevertheless, many of the new measures aimed at surveillance and control of sex offenders focus on the danger of these offenders to all and any children, anywhere, any time.

Law rarely develops in a vacuum. Influences come from many sources, including international media and community attention being brought to light and serving to inspire local lawmakers to emulate what is seen as good legislative initiatives from other jurisdictions. So too in Australia, which frequently looks to its Anglophone allies for ideas on regulatory solutions to community problems. In particular, UK and US legislation concerning the management of crime and disorder tend to resonate with the Australian political psyche. The debate in Australia around the best means by which to manage sex offenders in the community follows closely that of the United States, where ‘public opinion’ (as expressed by mass media and public petitions) has led to longer prison sentences, electronic surveillance of those managed in the community and extended supervision which takes the form of either continued detention in mental hospitals or close supervision post-release and a tight regulation that restricts the offender’s choice of accommodation, work, social interaction and even what the offender is allowed to ingest (e.g. alcohol bans).

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debate, often immediately following a single highly publicized crime (such as the murder of Sarah Payne in 2000).

## SWEDEN

### The legislative process in Sweden

In Sweden, legislation can only be created by the national Parliament *Riksdagen*, which has authority to delegate part of its competency to the Government (*Regeringen*). A law created by the Government, known as a *förordning*, is as valid as legislation emanating from parliament (*lag*). As a general rule, however, government-initiated *förordningar* are limited in their penal consequences and can only result in a monetary fine, not imprisonment (Andersson 2002:54). The legislative process consists of several steps. The government appoints a committee via a committal directive (*Dir*) to examine a particular issue. The committee produces a report called either a departmental text (*departementsskrivelse, Ds*) or an official governmental inquiry (*offentlig utredning, SOU*). Based on such a report the government then drafts a *proposition* that is presented to *Riksdagen*, the national Parliament, which can accept, reject or return the proposition (for further work). If the proposition is accepted *in camera*, it becomes a statute (*författning*) and becomes part of the collection of Swedish law called *Svensk Författningssamling (SFS)*. All of these preparatory works are publicly accessible and form the basis for public debate on any proposed legal reform.

The Swedish criminal legal system has elements of civil and continental law, including the presence of special courts and processes for certain types of cases (such as administrative courts). General deterrence is the political and philosophical foundation for the Swedish criminal law system, and in court principles of proportionality, humane treatment and fairness are paramount. Specific deterrence, through incapacitation or rehabilitation, is not a primary goal of the courts but rather the responsibility of the criminal care system. Protective interests (*skyddsintressen*) that courts take into account include, among others, the victim's right to sexual and physical integrity. The Swedish civil law system bears much resemblance to the Germanic legal system. Geographical proximity and centuries of trade and close contacts between Swedish and North German merchants laid the foundation for the development of two legal systems that, despite administrative differences (such as the



German federal/state system), continue to inspire one another and reflect similar values.

## **The regulatory framework for sexual offending in Sweden**

Sexual offence legislation is, Wersäll and Rapp suggest, ‘a compromise between what is theoretically desirable and what is practically doable’ (2007:440, personal translation). For Sweden, it is also increasingly a compromise between Swedish and European values, and Swedish legal research can no longer be conducted entirely independently of what occurs in the European Union regulatory system. Swedish criminal law and procedural law are no longer exclusively national legal systems (Persson 2007), just as Australian legislative responses to sexual violence are not an exclusively state-and-territory matter.

Diesen and Diesen (2009) note that contemporary Swedish legislation pertaining to sexual offences can be divided into three conceptual baskets:

- Rape and sexual assault
- Sexual assaults against children
- Sexual offences with a Swedish connection (e.g. by a Swedish citizen) committed overseas

The main home for Swedish sexual offending legislation is Chapter 6 of *brottsbalken* which defines regulatory ramifications of various sexual offences. *Brottsbalken* should be read above all as a sentencing manual for legal courts, rather than a guide for behaviour; it never specifies, for instance, that it is illegal or wrong to rape but uses a passive voice, indicating that ‘the crime of rape shall be punishable by...’. Its second function is to be implicitly normative, by indicating that behaviour which is punishable is also by extension wrong and should be avoided. *Brottsbalken* contains, in many instances, a three-point scale to determine the severity of a crime, ranging from ‘lesser’ (*ringa*) to ‘aggravated’ (*grovt*) crime.<sup>170</sup> Mitigating and aggravating

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<sup>170</sup> Rape cannot be considered a ‘lesser’ crime but can be ‘aggravated’ depending on the circumstances in each case.

circumstances include the age of the perpetrator and victim, whether weapons were present, and the threat of or actual violence.<sup>171</sup>

For an act to be considered a sexual offence, two requisites need to be fulfilled under Swedish law. Firstly, *the means or circumstances dimension*: there must for instance exist some form of threat, violence, exploitation of the situation or the victim's age must be less than 15. Secondly, there must also be *a sexual dimension* to the act. Intercourse or other forms of sexual acts must have a sexual purpose. Moreover, there must be, on the part of the offender, *intent* to commit the sexual act (as is the case under Australian law also).

In Swedish criminal law, a crime is defined as an action described as a crime in law and for which a penalty is assigned (the legality principle). Only the state bears legitimate claim to assigning blame and penal punishment, although individuals may at times influence the process at various stages of a particular case (Jareborg 2001). Put simply, a crime is an action which brings about a legal or penal response (punishment is defined as a monetary fine or a term of imprisonment: *brottsbalken* Chapter 1:3). To criminalize an action is simply to attach a punishment to it in accordance with the law. Regulatory consequences of illegal or criminal actions range from monetary fines to non-custodial sentences and probation, delivery to special care (i.e. psychiatric treatment facilities) and imprisonment.

The penal scale for sexual offences consists of periods of imprisonment from 12 months to several years. Overall sentencing options are longer in Australia than in Sweden; in the former, the rape of a child can result in 25 years in prison whereas in Sweden the top of the sentencing scale is ten years. In practice, it is extraordinarily uncommon for an offender in Sweden to be sentenced to the top of the sentencing scale – the vast majority of offenders are sentenced along the prison terms dictated by the lower-to-medium scales.

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<sup>171</sup> Certain legislation has done away with this scale entirely: for instance, the legislation banning female genital mutilation (*lagen om förbud mot könsstympning av kvinnor 1982:316*) considers each such act to be considered a form of aggravated assault.

## Early Swedish law 1000-1527

Sweden, as much of Western Europe, underwent a 'judicial revolution' around 1000 years ago, when feudal and rural customary law was increasingly replaced by centralized authoritarian power influenced by Roman law (Lernestedt 2003:36). Sweden's judicial revolution occurred against the backdrop of a Swedish kingdom arisen from the ashes of conflict between warring feudal lords. The king's position as regent in the medieval eras was weak, without much real decision-making power, and the kinship system was for a long time more socially relevant (Lernestedt 2003).

An offence could be remedied by revenge or monetary compensation (*bot*). Whereas rural customary law is restorative, focused on problem-solving between social equals aiming to return to an order momentarily disturbed, central authoritarian power law is punitive. Its focus is on deterrence, protection of society (and the property of those in society) and retribution (Lernestedt 2003). The judicial revolution led to a shift in the perception of crime from a conflict between two individuals towards a professionalization and centralization of the 'conflict-resolution system'; the crime becomes symbolically aimed at the State which is said to be also adversely affected by individual wrongdoing (Lernestedt 2003).

As Sweden gradually became Christianized and formed part of the Catholic Church's territory, its legal and moral codex also supplemented traditional customs. The concept of guilt became central to that of wrongdoing (Lernestedt 2003), and retribution was a spiritual as well as financial duty. The first penal law was the *edsöreslagstiftningen* enacted by King Birger Jarl in the mid-13<sup>th</sup> century. Its focus is on peace, in four distinct areas: peace in the home (as in protection against intruders), peace in church, peace during the *Ting* (the annual meeting that dealt with merchant disputes as well as criminal matters) and peace for women.<sup>172</sup> These 'national' laws were complemented by regional law (*landskapslagarna*) and King Magnus Eriksson's town and country laws (*stadslag* and *landslag*) which are documented around 1350. Women's peace also included girls, though not boys, and only applied to sexual violence outside the home.

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<sup>172</sup> These 'zones of peace' were not Birger Jarl's own invention: they can be traced back to Germanic law and existed as customary law in Sweden prior to their legal codification.

The ‘women’s peace’ law<sup>173</sup> penalized rape but other sexual transgressions, such as sexual relations outside marriage, were tolerated and not subject to arduous legislation (Lernestedt 2003:38). Over the centuries, the Church increased its influence over moral issues and sexual offending was widened to include a range of offences that were deemed to be sinful and thus an offence to God. Historically, sexual offending has thus been considered aimed at the male head of the household, against the family and against the order of society, and against God (Nilsson and Wallqvist 2007:138). It was not until the end of the 19<sup>th</sup> century that Swedish law began conceptualizing rape as an offence that violated the woman herself; and it would be another century before the definition of rape moved away from a focus on sex-as-violence to new constructions that emphasized rape as a violation of the victim’s integrity and sexual autonomy.

### **The development of Swedish law 1527-1914**

Sweden left the Catholic Church in 1536 and formally adopted the Lutheran-reformed religion now commonly known as Protestantism. As Head of the State, King Gustav Vasa also became the Head of the new Swedish Church, a change that resulted in the close symbiotic relationship between church and state that was to remain until 2000 when they were formally separated. This led to the role of the king acquiring a status as holder of both of religious values and of the law; symbolically, he was to become the people’s protector and guarantor of peace as well as of morality. Worldly and spiritual control of the people blended and transgressions of the law gained a moral element that contributed to a more punitive and repressive legal climate over the two centuries that followed (Lernestedt 2003:41). The principle that legitimized the regent as God’s vessel on earth gave regents freedom to construct crime as an offence simultaneously to society, to the Crown and to God.<sup>174</sup>

The criminal political rhetoric of the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> century bears much resemblance to contemporary anxieties about crime. To the policy makers of the time:

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<sup>173</sup> The phrase has a newfound in current Swedish legislation in an attempt to draw on Sweden’s alleged strong history of protection and justice.

<sup>174</sup> In 1435 the first origin of a national Parliament was constructed in the town of Arboga, but it was not until King Gustav Vasa gathered men together into ‘national meetings’ (*riksmöten*) in Västerås in 1527 and again in 1544 that any sort of representation of the people can be traced.

‘...evil was constantly *expanding*: evil, anger and the vile customs never rest. Life is increasingly distancing itself from the good old times of the past. The only way to keep evil at bay is to increase deterrence, by increasingly punitive measures or by other means.’

(Lernestedt 2003:42, italics in original, personal translation)

Offences such as extramarital sexual relations (‘whoring’), incestuous relationships, bestiality and homosexual relations were all at various periods of times subject to the death penalty.<sup>175</sup> In the 16<sup>th</sup> century sexual transgressions were increasingly harshly dealt with but in some cases with little success: despite increasingly punitive sentencing of men and boys found guilty of bestiality (including the death penalty), the practice continued and it was feared that the public announcement of this type of crime at the time of execution in fact alluded others as to its possibility.<sup>176</sup> A new regulatory route was therefore initiated in 1734: as many offenders had been young men herding cattle and sheep, the law stipulated that this was from now on to be women’s work (an early example of regulatory creativity using non-criminal means).

A different approach was employed in the lead-up to the 1734 law reform, where it was feared that including homosexual acts in the Code regarding Misdemeanours (*Misgierning*) could similarly inspire others, hitherto ignorant of the possibility, to commit such offences. These ‘strange acts, that rarely occur’ (*Förslag till Allmän Criminallag* 1832, personal translation) were simply left out of the criminal code altogether (Lernestedt 2003:43). This tactic of silencing in order to not put ideas in people’s minds continued in the next round of legal reforms in 1900-1909. Documents from the committal investigation illustrate this line of thinking with regard to bestiality and homosexual acts: ‘To introduce [into law] about those multiple sodomy sins, seems imprudent; better then to remain silent as ignorant’ (Preparatory committal work to the Law of the Kingdom of Sweden, 1900-1909, personal translation).

Overall, monetary fines were a vastly more common punishment than imprisonment (von Hofer 2011). In Sweden there was also a general acceptance of execution as an

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<sup>175</sup> Coincidentally, in 1608 so was children’s disobedience to their parents in accordance with Mosaic rules (Lernestedt 2003:42).

<sup>176</sup> The ‘wrongness’ of bestiality stemmed partly from the fact that it constituted fornication or adultery outside marriage, and partly because it was feared that the animal could bear offspring that would be half human, half beast. Both the human offender and the animal therefore tended to be executed together to prevent the possibility of offspring. See Sarnecki (2010:15-18).

appropriate punishment to certain crimes against the natural order of things: between 1800 and 1830 there were on average 18 executions per year in Sweden (Olsson 1993:99), a number that slowly dwindled in the following decades until the death penalty in times of peace was formally abolished in 1921.<sup>177</sup>

As mentioned, Swedish jurisprudence was dominated by German ideals until the early 20<sup>th</sup> century, in part due to the close geographical and philosophical proximity of German and Swedish academic intelligentsia (Strömberg 1989:65). At the turn of the 20<sup>th</sup> century, however, two professors at Uppsala University broke with this dominant Germanic idealism and forged the early path of what was to become known as the Uppsala School. Axel Hägerström (1868-1939) and Adolf Phalén (1884-1931) came to directly influence Swedish jurisprudence for the coming century (Strömberg 1989:65). Vilhelm Lundstedt (1882-1955), a disciple of Hägerström, argued that since there is no objective foundation for justice, it must be subjective, namely a collective utilitarian approach to usefulness. That which is good for society as a whole is ‘good’ (Strömberg 1989:69). Lundstedt emphasised the social function of punishment as essential to determining justice: citizens will do what is just for fear of punishment, and punishment pushes those who have erred towards rectifying their actions. The preventative effect of punishment will be the result of a subconscious process: ‘the punishment creates and reinforces the moral inhibitions of people in general, it serves to create morality’ (Strömberg 1989:70, personal translation). In other words, it is general deterrence that is the main objective behind penal law (a thesis which has continued to this day). And yet, Lundstedt conceded that legislation must have at least a partial anchoring in prevailing community attitudes – law will not strengthen the social order if it is not found to be acceptable by a majority of citizens (Strömberg 1989:70).

Karl Olivecrona (1897-1980) emphasised the performative nature of legal rules: legislation enacts a legal relationship, such as parents acting as legal guardians for their children (Strömberg 1989:73). Enacting legal rules in Parliament serves a performative purpose that depends not only on the threat of sanctions for disobedience (the general deterrence effect) but also on a range of psychological mechanisms on the part of the receiver, such as citizens’ belief in the legitimacy of the state apparatus and

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<sup>177</sup> Executions were abolished altogether in 1973.

respect for the constitution that flow onto respect for the newly enacted law (Strömberg 1989:74).

### **Swedish Law 1914-1984: Integration and care as prevailing values**

While Sweden has had legislation protecting ‘women's peace’ (*kvinnofrid*) – essentially anti-rape legislation – since the 13<sup>th</sup> century,<sup>178</sup> the motives behind the criminalization of sexual transgressions have varied over time (SOU 2010:71:51). Until 1779 rape was an offence punishable by death in Sweden, but not because of its infliction of pain and humiliation on the victim: the regulatory system viewed women as chattels of men, and criminalizing rape sought to protect men’s property.<sup>179</sup> Rape constituted a criminal offence against the victim’s patriarch (husband, father or brother) and it was the male head of the household, as the injured party, that sought and was awarded compensation.<sup>180</sup>

For centuries, the issue of rape was based on two assumptions: one, that it was an act of violence (the Swedish word for rape, *våldtäkt*, literally translates as ‘taking by violence’), and two, that it was the ‘taking’ of another man’s woman, whether wife or daughter (Diesen 2007:57). Seen in this light, the lack of legal regulation of marital rape until 1965 is not so illogical: one cannot take what one already owns and women were assumed to have consented to sex upon marriage, making any refusal legally irrelevant. The idea that rape violates the victim/woman’s dignity first entered into legal debate in the late 19<sup>th</sup> century, but it was not until 1965 that the abolition of marital immunity was codified.

It is useful to speak of four eras of legislative development during the latter half of the 20<sup>th</sup> century. *The first* wave occurred between 1965 and 1984, where rape within marriage was criminalized as one of several reforms to strengthen women’s sexual integrity. It was, however, limited to acts of sexual intercourse between a man and a woman. *Between 1984 and 1998*, the legislation became increasingly gender neutral in

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<sup>178</sup> The phrase has been taken up by modern legislators, and is today used for legislation concerning systematic domestic violence, including sexual violence occurring in the home.

<sup>179</sup> Cf. Russell (1929/2009: ch. 5) for a discussion on the pre-Christian and early Christian ethics on sexuality.

<sup>180</sup> Australian courts held similar views from the colonial era well into the 20<sup>th</sup> century (Featherstone 2011).

its language, criminalizing acts that included same-sex couples and recognizing that women could also offend. *The third legislative wave*, between 1998 and 2005, saw the introduction of several new types of offences, penal severity was increased and there became a stronger focus on the *humiliation* (that is, the violation of the victim's sexual integrity) of the sexual act (*kränkning*) than, as previously, the *sexual* in the sexual act. The fourth wave, beginning with the overhaul of *brottsbalken* in 2005 has seen an expansion of the requisites for rape and other sexual offences so that more types of sexual behaviour is now considered criminal.

Leif GW Persson (1981) has noted that criminological research pertaining to sexual violence in Scandinavia follows similar international patterns over time, with important eras of change occurring in the 1940s, the early 1960s and the mid-1970s. Until the late 1940s, research into sexual violence concentrated on explaining the biological, genetic or medical deviance of the perpetrator, with remnants of the eugenics debate of the 1890s permeating the view on sex criminals. The first four decades of the 20<sup>th</sup> century gradually saw a shift away from biological explanations of crime towards mental defects: sexual 'abnormality' was explained in psychiatric, psychoanalytical or psychological terminology (Persson 1981:18). Men detained in asylums, prisons or mental health clinics constituted the subjects for this research. Towards the late 1950s and the early 1960s, advancements in sociological and psychosocial theory opened up for a shift towards the study of situational factors influencing sexual violence. Though the treatment paradigm dominated regulatory approaches to the management of offenders in Sweden, Scandinavia and elsewhere, it was however not without its critics: Norwegians Vilhelm Aubert (1959; 1963)<sup>181</sup> and Nils Christie (1960) and Finn Inkeri Anttila (1967) were early critics of the paradigm.

The 1970s saw a formidable explosion in the research on sexual violence in Scandinavia. For the first time, victims of sexual violence became the objects of study, and the relationships between perpetrator and victim began to form part of the understanding of the patterns of offending. This coincided with greater social movements that in particular include the women's movement and associated feminist ideologies; women's experiences were brought into public debate and so did their social rights. Sex offending was brought to the forefront of the political agenda that

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<sup>181</sup> Aubert's 1963 book is, tellingly, entitled 'Offending and illness' (*Forbrytelse og sykdom*).



sought to demonstrate how sexual violence is intrinsically linked to women's economic, social and political circumstances and forms part of a larger systemic social ideology of traditional gender relations that negatively affect women. The women's movement in Sweden used rape research to open up to wider questions of gender and injustice in society, and took a determined victim focus mirroring developments in Australia, North America and Europe (see Feild and Barnett 1977; Brownmiller 1975).

In November 1971 the Swedish government formed the Sexual Crimes Committee (*Sexualbrottsutredningen*) which began its work in February, 1972. Its instructions were to conduct a thorough evaluation of the *brottsbalken* as it pertained to crimes of vice (Persson 1981:6). A key reason for the evaluation, as stated in the committee directives, was the so-called sexual liberalisation that had occurred in the 1960s resulting in a change in how society viewed sexual offending. In particular, the committee directives noted that an overhaul of the regulations concerning the age of consent for homosexual activity, concerning the crime of incest and the penal consequences of pimping (SOU 1976:9:25). The committee published its findings in 1976 and advocated an overall amelioration of the legal regulation of sex offending, suggesting that sexual offending in general should be sanctioned in less punitive ways. For instance, it was proposed that the label 'rape' should only apply in those cases when the offender had shown 'particular callousness or roughness' (*synnerlig hänsynslöshet eller råhet*), that 'less grave' sex offending should largely result in only monetary fines and that sexual crimes should increasingly be investigated at the initiation of the victim rather than the public prosecutor (SOU 1976:9).

The committee proposal was rejected *in toto* in February, 1977 and Minister of Justice Sven Romanus called for a new committal investigation into the legislation pertaining to crimes of vice (Persson 1981:9). The new committee's directives bore strong traces of the community debate and highlighted a new understanding of the plight of victims, stating that 'In many court cases the *woman's* responsibility for the development of events is highlighted in a way that, rightly, is viewed as offensive from *women's points of view*' (quoted in Persson 1981:9; italics added, personal translation). Whilst

this showed an increased sensitivity to the complexities surrounding rape, the crime was still seen as something that men did to women and girls.<sup>182</sup>

In sum, the Swedish model, with egalitarianism, inclusion and conformity as pathways to equality, dominated the regulatory reforms throughout the post-1945 era. This model viewed crime as an aberration by those who do not know better or by deviant criminals in need of treatment to return to a state of (crime-free) normalcy, or alternatively as a matter of inadequate discipline. Over time, medical and behavioural experts were gradually replaced in the public arena by jurists advocating neo-classicist perspectives on legal reform on the one hand, and left-wing liberals consisting largely of social scientists on the other (Andersson 2002:59).<sup>183</sup> The 1970s saw general prevention theory replacing the treatment paradigm as dominant ideology, viewing general prevention not as a facet of penal theory but as the ‘natural effect’ of punishment (Andersson 2002:71).

Until the 1970s, ‘ordinary’ sexual violence such as heterosexual rape had had a marginal place in the preoccupation of legislators and policymakers. Other sexual violence such as male-on-male rape and child molestation had been completely obscured: there was little room in Swedish legislation for it, and even less public debate. Persson advances two explanations for the relative lack of debate. The first is that sexual violence was assumed to be the work of a small group of mentally sick or deranged perpetrators (for which there was certainly treatment options, in closed settings, but few general or specific crime prevention measures). The second explanation was a certain resignation, a relegation of sex crimes to the group of ‘eternal human problems’ that simply formed part of the darker side of society: unfortunate, to be sure, but perpetual and unavoidable (Persson 1981:232). It was not

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<sup>182</sup> Moreover, the committee found it understandable that *women* could be offended by this court praxis; it did not seem to think that men could be equally offended by such a view. The Sexual crimes committee (*Sexualbrottskommittén*) announced its findings in 1981, four years after beginning its work (see SOU 1981:64).

<sup>183</sup> The two perspectives overlapped to some degree in the 1977 report ‘A new penal system’ (*Nytt Straffsystem* (Brottsförebyggande Rådet (Brå) 1977:7). The two camps can be, somewhat simplified, illustrated by their approach to the individual’s role in crime prevention and control. The treatment critics of the 1960s criticized the penal system and crime policy initiatives as too focused on measures on the individual level, seeking explanations to criminal behaviour by psychiatric, medical and pathological explanations. They advocated a crime policy based instead on socioeconomic and structural changes in society (Andersson 2002:60). Marxism-inspired critics politicized crime by advancing theories of drugs and criminal behaviour as a protest against society (Nestius 1970:48) and penal law as class-based punishments of the collective (Andersson 2002:61); see Cohen 1996 for an account of the influence of Marxist thought on criminological theory).

until the advancement of the women's rights agenda that sexual violence was given a unique ideology in its own right amongst a dawning realisation that sexual assault is not something that a few violent men do to a few unfortunate women. The 'regular guy' came into light as the new perpetrator and caused unease: if just about 'any guy' could do it to just about 'any girl', how can the legislator safeguard against it? One means is to make sex crime legislation more punitive to demonstrate the unacceptability of these offences. A second option is a strengthening of court praxis (something that did occur in Swedish courts from the latter half of the 1970s onwards).

### **1984-2000: New managerialism and new approaches to punishment**

Where the treatment approach had sought explanations in the deviant pathology of the offender, the 1980s focus on the causes of crime looked instead to structural change, and general crime prevention was a cornerstone in this philosophy (Brottsförebyggande Rådet (Brå) 1977). In a move away from determinism, critics of the treatment paradigm questioned whether it was not time to acknowledge that no particular socio-economic group was more destined to become criminal than others. If 'ordinary people' commit crimes, there could be nothing inherent or pathological about some individuals that might predispose them to a criminal lifestyle and thus it is more honest to acknowledge that prison is, and should be, an institution not to treat but to punish and deter others from making similar choices (Sveri 1974; Elwin, Heckscher and Nelson 1971; see also Christie 1960). The 'treatment doesn't work' paradigm quickly influenced a second wave of treatment pessimism in the form of 'nothing works'-perspectives (Andersson 2002; Lipton, Martinson and Wilks 1975; Martinson 1972; Martinson 1974)<sup>184</sup> that led to the dismantling of rehabilitation programs across the Western world, including Sweden.

Sexual violence and the social control of vice was the focus of extensive governmental research in the 1980s, with a slate of official inquiries (*Statens*

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<sup>184</sup> For criticism of Martinson et al.'s research method and findings see Palmer (1975), Adams (1976); Wilson (1980). The criticism is that the conclusion that nothing works in rehabilitation and treatment is an exaggeration and misrepresentation of what the findings actually said. Martinson eventually admitted in 1979 that he and his colleagues had left out data that might have led to different empirical results and that 'some things might work' after all. By then, his initial pessimistic findings had taken on a life of their own and were treated as fact (Lipton 1998; Sarre 1999).

*Offentliga Utredningar, SOU*) investigating various aspects of sexuality and society and leading to several overhauls of the criminal law.<sup>185</sup> The 1984 reform of *brottsbalken* widened the definition of rape to include not only sexual intercourse (which was still limited to acts between a man and a woman) but also sexual relations that can be equated to intercourse, notably anal and oral intercourse. The language was also altered to reflect gender neutral language and was modernised and simplified: the crime of rape was divided into three grades: normal, less serious, and aggravated rape. The 1984 reform also stipulated that any pre-existing relationship between offender and victim was irrelevant to the finding of guilt, and the focus was more clearly shifted to the offender's actions.

The first 'real "law and order" election' (Tham 1998:374) in Sweden occurred in 1991 – when the Social Democrats lost the majority they had held since 1982 – and centred around critique of the welfare state gone overboard, particularly in areas of social order. However, the 1980s had already seen a toughening up of social democratic policies in the law and order field, with focus on crimes hitherto under-regulated, including sexual and domestic violence and with a new 'just deserts' penal ideology replacing rehabilitative efforts (Tham 2001). Between 1991 and 1994, the liberal government built on this, and when the Social Democrats returned to power in 1994 their reformed crime policy sought to combine 'getting tough' on crime with ameliorating the social conditions still believed to be the causes of crime (Tham 1998).

In 1998 a second reform of *brottsbalken* took place, whereby the sex offending legislation was widened so as to include not only acts equal to intercourse from a sexual point of view (acts that had a 'demonstrable character of intercourse') but also acts that, in view of the degradation and other relevant circumstances are to be considered equal to a forced sexual intercourse. The focus shifted from a view of the act as merely sexual to a focus on the humiliation involved for the victim. Moreover,

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<sup>185</sup> The issue was regularly subject to further reflection in the form of SOUs in the 1990s. These include *SOU 1995:15 Könshandeln* (The purchase of sexual services); *SOU 1995:17 Homosexuell prostitution* (Homosexual prostitution); *SOU 1995:91 Ett reformerat straffsystem* (A reformed penal system); and *SOU 1997:29 Barnpornografifrågan. Innehavskriminalisering m.m.* (Child pornography, including the criminalization of possession).

the criminalization of the purchase of sexual services was introduced in 1999, which defined sellers of sexual services as crime victims and buyers as offenders.<sup>186</sup>

Swedish crime policy in the 1980s and 1990s mirrored in important aspects the crime policy trends of other Western liberal democracies. New managerialism and market-economy approaches to managing ‘every day crime’ led to, in moves similar to those in North America, Australia and Britain, a responsabilization of authorities and individuals who are given the responsibility to prevent and manage crime in their own communities. *Managerialism* (whereby the needs and wishes of the individual are rendered secondary to institutional practices and processes based on organisational efficiency) as a regulatory approach spreads the burden of responsibility (Andersson 2002:202) and leads to a dissemination of what was once thought to be the state’s tasks in providing safety. Social democracy underwent changes in this era and took steps towards more liberal notions of rationality and risk management. Voters no longer content with ideas of solidarity and inclusiveness questioned the social democratic paradigms upon which Swedish society had been built, and began leaning towards centre-right individuality and freedom as more relevant values. This prompted social democratic crime policy to change, and generate new language around ‘common-sense’ ideas around justice as supreme to those advanced by criminologists or social scientists – language then incorporated by politicians when formulating policy based on what the public ‘demanded’.

In 1980, Klaus A. Ziegert used Sweden as an example of a society that had successfully managed to separate its legal system from other normative expectations, legal roles and procedures and political values:

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<sup>186</sup> The prohibition on the purchase of sexual services was later incorporated into *brottsbalken* when this was overhauled in 2005.

Here all interaction systems are covered by comprehensive legal programmes which link the procedure of legal examination to societal (=state) measures after a strategic plan. Accompanying the preoccupation with organizing above all the legal structures of legal programmes, we also find a high level of implementation of these programmes and active legal roles together with the creation of new ones in order to safeguard the integrity of persons and individual rights versus social action.

(Ziegert 1980:85)

Others were not so sure. The ‘nothing works’ thesis had found resonance both on the Left and Right ends of the political spectrum (Sarre 1999; Cullen and Gendreau 1989) in Sweden – but for vastly different philosophical reasons. On the Left, critics of the treatment paradigm view social deviance as an expression of systemic failure and seek explanations outside the individual pathology of the offender. It is the social, structural and economic conditions that hinder an individual from achieving a crime-free existence (Andersson 2002:65). This view has been commented upon by Garland (2001:15), who notes that such ideals depend on an idea of ‘...the perfectibility of man, to see crime as a sign of an under-achieving socialization process, and to look to the state to assist those who had been deprived of the economic, social, and psychological provision necessary for proper social adjustment and law-abiding conduct’. Put simply, the normal is to live a law-abiding life, and offending is a sign of failure – so ‘treatment’ should facilitate a ‘return’ (inherent in the word ‘rehabilitation’, to bring back to a state of health) to normalcy.<sup>187</sup> On the Right, the slogan that ‘nothing works’ justified efforts to advance tougher law-and-order agendas that favoured longer prison sentences over treatment and care. Unrelated to the crime prevention aspect, but pivotal to improving the experiences of the victims, was a realisation of the arduous process for victims of sexual violence in seeking legal redress.

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<sup>187</sup> It is a thought that still prevails in much sex offender treatment, as if sexual deviance is on par with drug or alcohol abuse and can be treated and fixed once and for all given a good enough treatment program.

## **New millennium, old problems: Regulatory reform in Sweden from 2000 onwards**

The two foundational principles of the criminal law system made explicit in the legislation of the 1970s – general deterrence and proportionality, or ‘humanity in sentencing’, continue to have an impact on legislation to this day, though at times less visibly. Indeed, while law and order issues have dominated political debates in many European liberal democracies since the 1970s (and continue to do so), this is less true in Sweden than elsewhere. Swedish criminal law has certainly become more punitive in the last two decades: more acts have been newly criminalized, and concepts have been expanded to cover more situations (such as in definitions of rape and sexual assault).

Emerging language focusing on the public’s ‘general sense of justice’ (Andersson 2002:201) sees civil society as at once the bearer of safety *and* a factor heavily influencing crime policy; no longer merely the recipients of policy delivered from above, citizens increasingly expected to have their voices heard and acknowledged. Expert-driven research has over time given way to community-driven reforms and the resulting policy divided crime into two main strands. One is the petty ‘everyday’ crime that affects people’s daily lives but lead to limited harm (Andersson 2002:201), where the responsabilization process is most clearly demonstrated, and the other ‘serious’ crimes such as violent and sexual offending, drug crime, economic crimes and youth crime (Andersson 2002:200).

The most comprehensive reform of *brottsbalken* stipulations on sexual violence dates back to 2005, and focuses less on the acts involved and more on the means and circumstances by which the assault took place. There were three aims of the 2005 reform with regard to sexual offence legislation (SOU 2010:71:51):

- To extend and clearly denote each person’s absolute right to personal and sexual integrity and sexual autonomy;
- To highlight and strengthen, in the legislation, the protection of children and young persons against sexual violations; and

- To create, through a reform of Chapter 6 of *brottsbalken*, clear and well defined norms, to modernise the language of the legislation and to phase out obsolete or inappropriate concepts. [prop 2012/2013:111]

The 2005 reform saw an introduction of several new penal provisions aimed at protecting children (SOU 2010:71:28), and an increase in the severity of penalties pertaining to the rape of a child (*våldtäkt mot barn*). Moreover, provisions pertaining to the sexual assault of children (*sexuellt övergrepp mot barn*) and the sexual exploitation of a child (*sexuellt utnyttjande av barn*) were also introduced.

Significantly, the 2005 reform widened the definition of rape to include exploitation of a person in a helpless condition for sexual purposes (something that had previously been considered ‘sexual exploitation’ and not ‘rape’), in situations such as when this helplessness is due to intoxication, drug use or circumstances such as being in a remote location alone with the offender. A much-debated court case (*B4646-03*, known as *Tumbafallet*) had a direct influence on this reform.

In 2003 a woman met a group of men at a pub and invited them to her home. The woman had consumed alcohol and was clearly intoxicated. Over the course of at least four hours, she had sexual intercourse with at least six men, some of whom arrived at her home after the initial group of men had contacted them. Her memories of the night are fragmented but the next morning she claimed to have been raped. Under the legislation at the time, the men were charged with the lesser charge ‘sexual exploitation’ as it could not be proven that had either physically threatened or used force in order to rape the woman. All defendants were acquitted in the High Court. Community debate, in part media-driven, saw this as an affront to common-sense ideas of what constitutes a rape and the courts, though correct in their interpretation of the law at the time, were heavily criticized. Following the acquittal, Minister of Justice Thomas Bodström welcomed new legislation about to be entered into force under which the men ‘could have been charged with aggravated rape’, adding that there was a symbolic value in defining a crime as aggravated rape as a chance to ‘affect attitudes’ (Svenska Dagbladet 2014-05-05).<sup>188</sup>

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<sup>188</sup> Available at [http://www.svd.se/nyheter/inrikes/starka-reaktioner-pa-hds-tumba-dom\\_144647.svd](http://www.svd.se/nyheter/inrikes/starka-reaktioner-pa-hds-tumba-dom_144647.svd) (accessed 2015-01-01)



In 2006 the so-called Alliance of centrist-liberal parties (the ‘new’ Moderates, the Christian Democrats, the Centre party and the People’s Party) ended the 16-year run of the Social Democrats. While tougher sentences for recidivist offenders, an expansion of the prison system and the police force, and longer prison sentences were all introduced by the social democratic governments of the 1990s, these initiatives took off from 2006. The 1990s saw a shift from decades of social democratic focus on social order and ‘soft criminal policy arising out of a concern for the underdog’ (Tham 1998:369) to a new era of heightened focus on individual criminal responsibility, pairing discipline with punishment similar to neo-conservative movements in the rest of Europe.<sup>189</sup> With so-called modernity came a shift towards exclusive society, where consumerism in a post-Keynesian landscape of merit, choice and liberalism has done away with much of the solidarity, inclusion and tolerance (Young 1998:67-68).

With this responsabilization, a new philosophical view on crime came along: crime was no longer an inevitable if unfortunate side-effect of modern society, but a deviance that responsible law-abiding citizens should rightfully be expected to be protected from. The victims of crime were given a previously unparalleled role in the debate and were increasingly seen as rightful ‘consumers of justice’ (Andersson 2002:202), their voices given a legitimacy to propose solutions to the crime problem that had previously befallen experts. David Garland notes that the criminological theories of the time were a kind of practical criminology that relied on control:

‘The theories that now shape official thinking and action are *control theories* of various kinds that deem crime and delinquency to be problems not of deprivation but of inadequate controls. Social controls, situational controls, self-controls – these are the now-dominant themes of contemporary criminology and of the crime control policies to which they give rise.’

(Garland 2001:15)

Swedish child pornography legislation has also undergone several reforms in recent years. Distribution of sexual images of children were first prohibited in 1992 following a change in the law on freedom of speech (*yttrandefrihetslagen*, or YFL),

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<sup>189</sup> Tham, conducting a comparative study of the development of criminal policy, poverty and inequality in order to see how ‘crime [has]...developed’ (Tham 1998:370) notes that while inter-country statistical comparisons are always hazardous, there is some merit in making comparisons ‘for trends rather than levels’, (Ibid.) especially over longer periods of time (von Hofer and Tham 1989; European Sourcebook of Crime and Criminal Justice Statistics 1995).

and in 1999 a further change criminalized possession of sexual images of children (Diesen and Diesen 2009:183). Another reform took place in 2005 when the legislative language was changed to widen the scope of what was considered criminal. The 2005 changes included an introduction of a ban of cartoon or other animated material that could be considered child pornography (for more detail on child pornography offences, see Chapter 6).

### **Contemporary Swedish law: continuity and dissonance**

The trend since 1984 has been one of regular expansions of the sexual offence legislation, with a focus on an increase in the severity of penal responses. An overall shift in focus has been away from the sexual act itself towards the *sense of violation*, something reinforced in the 2005 reform; in the legislative motives it is mentioned that for all types of sexual offending, it is the violation of personal dignity and physical and emotional integrity that forms the common denominator (prop. 2004/2005:45:21). The 2004 legislative proposition to the 2005 reform (prop.2004/2005:45) highlights three facets of the criminalization process that form part of the values underlying the legislation. Firstly, while it is not society's or the law-maker's role to influence adult voluntary sexual behaviour based on moral norms and that, in principle, a person aged 15 and above should be free to exert any lawful expression of sexuality. Secondly, the purpose of the criminalization is nevertheless to reduce the frequency of sexual abuse and violations. Thirdly, the criminalization itself is intended to affect societal and individual values and underscore the severity of sexual offending *per se*. Put simply, values such as an 'absolute protection against sexual acts' (SOU 2010:71:53) for children under the age of 15 was complemented with a certain level of protection for children aged 15-17 against certain particular sexual acts (including sexual exploitation of children for the purpose of producing child pornography) and sexual freedom for adults otherwise.

Moreover, as a member of the EU, Sweden is committed to ratify and adhere to EU legislation. More importantly, the legal systems of those member states no longer function fully in isolation. European influences shape Swedish law both formally and informally, and Sweden has also had some success in shaping the EU agenda in diverse areas, including criminal law.

The positioning in the EU has at least two strategic advantages. Firstly, it sends a message to its larger neighbours that Sweden is 'small but not unimportant'. Secondly, it positions itself towards the electorate in Sweden that the country is autonomous from the European 'beck and call'. In 1995 when Sweden took up membership of the EU there was a fear among Swedes that Sweden would 'disappear' and just be a net contributor of money with very little influence on any real issues. Taking a principled stand on moral issues such as the purchase of sexual services and human trafficking has become a means for displaying a sense of independence towards the citizens at home, whilst also reiterating to the rest of Europe that Sweden is a force to be reckoned with (Kulick 2003).

### **Conclusions: Reflections on the law-creating process in Australia and Sweden**

Traditionally focused more on care and rehabilitation than rights and responsibilities, Swedish crime policy has increasingly shifted towards zero-tolerance approaches and hardening rhetoric (von Hofer and Tham 1990:31; Tham 2001); a process that began in the 1980s and has continued since. Sweden has not been immune to the winds of change sweeping across the European continent; the famously humane welfare state that Sweden spent decades building is being dismantled, in an era of liberalism and individual responsibility replacing collective welfare. The optimism of the 1960s and 1970s and the belief in scientific approaches to solving the crime problem has been replaced by politically pragmatic realism: treatment, it is assumed, is more expensive than supervisory punishment, and when it demonstrably fails to make a difference, it becomes difficult to justify (Lenke 1990).

The late 1980s and early 1990s saw a rise in neo-classical penalty in Scandinavian crime politics (Lenke 1990), now motivated not only by the classical references to general and specific deterrence, incapacitation and revenge, but also by the oft-quoted public fear of crime and references to the failure of treatment and rehabilitation efforts to reform prisoners (Sarnecki 1990:53). This resulted in unprecedentedly high levels of imprisonment, and corresponding reductions in softer alternatives of punishment (Tham 2001:33). Drug and alcohol abuse were now seen as 'choices' made by the

offender and exercising their free will, and no longer acted as mitigating circumstances (Lenke 1990).

This may be in line with what Leif Lenke (1980) predicted more than thirty years ago: that as the political influence of the lower classes increases, there is a corresponding decrease in tough penal policies centred upon general deterrence and an increased focus on humane, inclusionary policies. Capitalism and increased societal wealth would thus favourably affect treatment and rehabilitation options, whereas in times of financial crisis, neo-liberal solutions would highlight tough sentencing and punishment over care. The Swedish model of humane criminal justice certainly still exists – the deprivation of liberty itself is seen as the punishment (Sveri 1990:98-99), and prison stays are therefore made comfortable and safe by European and American standards – but its penal policy has irrevocably changed (Tham 2001).

Sweden, as other jurisdictions<sup>190</sup>, has also seen the shift away from an inherent legitimacy bestowed on experts, such as criminologists, as societal engineers (Knutsson 1990), and a rise of the ‘public as expert’. This marginalisation of expertise (Scheingold quoted in Sarnecki 1990) opens the door to populism through ‘common-sense’ approaches to regulating offenders. What the community wants is reduced to what is successfully articulated through media and by politicians in their efforts to ‘represent’, rather than inspire, the people (Sarnecki 1990:59-61). Criminalizing in order to ‘send a message’ is done with a full realization that simply getting tough on criminals will most likely have little or no effect on reoffending rates (Sarnecki 1990:63; Morris and Hawkins 1970; Aspelin 1986; Kyvsgaard 1989; Mathiesen 1988; Bondeson 1990).<sup>191</sup> Sweden has certainly taken a less populist route than many European counterparts in its regulatory reforms of sex offender legislation. Public policy changes continue to rely heavily on evidence-driven expertise from a wide range of stakeholders, while law reforms are slow and the result of much reflection and deliberation. However, gradual expansions of the requisites for rape and other

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<sup>190</sup> For Norway see Mathiesen (1990); for Finland see Takala (1990); though see also, for a differing opinion on Finland, Törnudd (1990), who is critical of Lenke’s (1980) thesis of the overlap of prosperity and solidarity, and asserts that this model cannot be applied unmodified to Finnish conditions.

<sup>191</sup>Contemporary criminologists seem to agree with Beccaria that increasing prison sentences has little effect on crime rates and that certainty of punishment is a stronger deterrent than severity (Törnudd 1990:85; Knutsson 1990:107), both for first-time and persistent offenders. Nevertheless it is ‘just deserts’ that has taken over as the prevailing principle in Swedish sentencing policy.

forms of sexual violence can be seen as increasingly punitive responses to ‘what the public wants’.

With freedom of expression and the principle of public accessibility enjoying constitutional protection, media play a vital role in facilitating criminal justice debates on a community level. These debates now also increasingly occur on Internet sites. Both media and the public can access court documents and the details of convicted offences, and though media as a general rule will not publish names of convicted sex offenders, journalists and the public regularly comment on particular sentences through the use of emotive language.<sup>192</sup>

An interesting case in point is community notification of convicted sex offenders. In the absence of official Swedish venues for community notification, alternative means of publicly naming and shaming offenders have crept up. Several internet websites have been created where ‘ordinary’ citizens publish names, dates of birth and other identifying data of convicted sex offenders along with details of the court sentence, arguing that this will ‘improve neighbours’ chances of saving their children from paedophiles, regardless of what the State might say’ (Nyheter24 2009, personal translation<sup>193</sup>). Another purpose, ostensibly, is to ‘initiate a debate about the low sentences that sex offenders receive’ (www.kriminellt.com, personal translation), although it is unclear how this might be achieved by publicising names, photos and details of offences perpetrated by convicted offenders.<sup>194</sup>

Moreover, extraterritorial applications of a nation’s criminal law rely on the idea of universal condemnation of some particularly heinous acts. Both Australian and Swedish residents can be convicted in their domestic courts for certain sexual offences committed in another jurisdiction, even if the behaviour is not criminally regulated in that particular jurisdiction.<sup>195</sup> In particular, child sex offences are now explicitly regulated in this manner, having both symbolic and material effects. Symbolically, criminalizing sexual contact with all underage children irrespective of where the offence occurs is a step towards impacting on community attitudes; it is the

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<sup>192</sup> In July 2015 a prosecutor convicted of multiple counts of child rape, among other offences, was however named and his picture appeared in tabloid media.

<sup>193</sup> Downloaded from <http://nyheter24.se/> (accessed 2015-01-01)

<sup>194</sup> <http://kriminellt.com/kontakta-oss/> (accessed 2015-01-01): ‘Syftet är att väcka debatt angående dom låga straffen som sexförbrytare får’

<sup>195</sup> This does not apply to Swedish citizens purchasing sexual services abroad.

regulator's way of stating that children in other countries or states are as valuable as the ones at home, and that child sex predators can be held responsible for their abuse irrespective of where it occurred. In a more concrete manner, it is also hoped that child sex offenders do not move to other jurisdictions with less restrictive regulatory schema in order to escape police scrutiny.

While many features characteristic of Australian sex offending are shared by Sweden, including the relatively stable number of offenders (despite public fears of these crimes being on the increase), legislative reform is characterised by a tempered approach towards how Swedish sexual crime legislation should better serve the community. For instance, the 2005 updates of *brottsbalken*, while changing the requirements for finding a person guilty of rape and sexual assault, did not generally increase the penalties for offenders and in some cases even lowered the penalty scales (such as for 'serious sexual exploitation of a dependent person', a clause aimed at crimes whereby a teacher or employer exploits the dependent nature of the relationship that exists with a student or employee).

Regulatory reform in Sweden is deliberate and allowed to take time: for instance, the changes to sexual crimes legislation that occurred in 2005 were the result of a process that began with the creation of a governmental investigative committee in 1998. SOUs (governmental official inquiries) tend to allow one to two years for the proposed measures to be implemented and key decisions to mature. For instance, the 2002:3 SOU on mental disorders, crime and culpability proposed a slate of measures to construct a more proportionate and purposeful system of sanctions that satisfied suggested public protection measures as well as more care and treatment where needed, on the one hand saw an urgent need for this to be reflected in amended legislation as soon as possible. On the other hand, the inquiry report discusses the difficulties of creating a 'perfect system' that balances justice and societal protection with humane and ethical regulatory solutions (SOU 2002:3:226-227) and therefore proposes a humble approach to the particular difficulties that mentally sick offenders present. That this should be allowed to take time is made explicit:

'The implementation of our proposals involves rather extensive amendments. However, set against the background of the problems that exist with the current system, it is important that this is done rapidly. Set against the background of

reasonable time being allocated for the legislative consultative procedure, future preparation of the matter within the Government offices and processing of the matter within the Riksdag (Parliament), we consider that this reform can first enter into full force on 1 January 2004.’

(SOU 2002:3:35)

In other words, a full two years was allowed for implementation and still considered ‘rapid’.

Australian legislation, by contrast, occasionally proceeds with remarkable speed: the *NSW Crimes (Serious Sex Offenders) Act 2006* was created with the specific purpose of hindering the imminent release of a convicted paedophile from prison, and the 2007 creation of Federal legislation targeting child sexual abuse in the NT saw the three readings of the proposed bill in the House of Representatives take place all within the same day, ostensibly in the interest of swift and decisive action to respond to the ‘epidemic’ emergency in the Territory.<sup>196</sup>

The SOU 2002:3 was one of the first governmental inquiries to introduce public protection as an objective of the criminal law sanctioning system, which had until then been chiefly concerned with individual deterrence through incapacitation or treatment as well as general deterrence through the ‘moral formation’ that sentencing offenders should have. The inquiry showed some unease with the thought that public protection might ‘be allowed to influence...criminal proceedings’ (SOU 2002:3:30), but defended itself by continuing:

However, one cannot ignore the public protection interest in this context. Society has legitimate cause for taking into account public protection aspects, primarily in connection with serious offences against life or health. However, set against the background of the difficulties that are always linked with anticipating relapse into crime, a starting point must be that it involves serious criminality of a type that violates integrity particularly, i.e. in principle it must involve offences that are directed towards someone’s life or health. Furthermore, it should be required that the risk of relapse is assessed to be manifest.

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<sup>196</sup> The *Northern Territory National Emergency Response Act 2007 (Cwlth)* entered into force in 2007 and was superseded in 2011.

In sum, neo-liberal streams of accountability, dangerousness and risk began to influence Swedish criminal politics well before the 2006 election that led to a change in political power to the liberal Alliance. Swedish crime politics therefore provide ample opportunity to analyse the same variables that have played out in Australian crime politics in the last decade, in order to compare and contrast the elements of a theory of crime politics that would find resonance in both countries. The next chapter offers such a comparison.



## CHAPTER 6: TOWARDS A THEORY OF CRIME POLITICS

### Introduction: Crime, emotions and politics

Crime has meaning. It generates emotional responses (Durkheim 1964; Erikson 1966) but it also has real and sometimes lasting effects on individual and collective safety, health, economy and dignity. While criminal acts are committed by individuals, criminality *per se* is a structural societal problem (von Hofer and Tham 1990:29). Nevertheless, criminal responsibility is individual in penal law; they are acts, for which individual punishment is imposed, based on each individual person's responsibility for wrongdoing (von Hofer and Tham 1990:29). Crime politics is a pendulum between tolerance and severity (Takala 1990).

Crime has meaning, but that meaning is sometimes misunderstood. Police, politicians, jurists, judges, criminologists, journalists and citizens speak different languages in the crime politics discourse.<sup>197</sup> This chapter begins to map and illustrate the elements of a theory of crime politics, highlighting some key features that are particularly poignant (and at the same time problematic) in the field of sex offending and its various forms of regulation. The aim is to provide a starting point for a new discourse, based in the sociology of law but that may be of use to readers of legal philosophy or criminology as well.

The relationship between crime as a fact and crime as a problem is not a given (Andersson 2002:51). A society free of crime is a Utopian illusion, both empirically and symbolically; Durkheimian-inspired structural-functional ideas about the symbolic functions of crime see the existence of crime (and criminals) in a society as enabling the majority to solidify and strengthen community bonds and reaffirm its values. Moreover, the 'crime problem' has a life of its own, constructed by political and scientific frames and verbalised through particular knowledge discourse. 'Knowledge discourse' becomes 'truth discourse' when it is accepted and reproduced. But the truth discourse in crime politics can also be questioned and developed (Andersson 2002:53): if it is true that 9% of convicted child sex offenders will

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<sup>197</sup> Berger (1963) reminds us that while a lawyer seeks to understand how the law views the criminal, a sociologist attempts to understand how the criminal views the law.

reoffend within 5 years, then it is also true that the majority may not (bearing in mind that the actual numbers cannot be ascertained, there is still reason to think that many of the remaining 91% will abstain). Is the statement that paedophilic offenders 'will reoffend' then true or false?

A functionalist response to this would be that it does not matter. Governments (in particular, but not only, neo-liberal ones) focus on relatively minor but high-visibility (emotive) issues in order to direct public attention towards specific sub-groups in society that are made out to be a threat, in order to generate artificial perceptions of coherent unity and solidarity among the majority population; and that this creates a mindset of fear that affects the population debate on other thorny (but more salient) issues. It is therefore irrelevant to a functionalist whether recidivist rates are 5%, 9% or 23% since the public perception of threat operates by reference to variables other than statistics.

Christie's long-standing assertion that crime does not 'exist' but becomes real only when acts are infused with meaning through a process of human interaction (Christie 1998:121) is illustrated by the diverging discourses apparent in assignments of deviance of paedophiles. A sexual deviant is subject to psychiatric intervention until the person has committed his first offence; then the criminal justice system takes over and reclassifies the behaviour as 'illegal'. The frames of meaning (Sasson 1995; Girling, Loader and Sparks 1998) change, and so do the solutions. One frame may be a discourse of illness, the other a discourse of police resources. Common frames in crime discourse are those of (the crisis of) legitimacy, state control, legal authority, deviance, parental control, poverty and inequality, poor neighbourhoods and media influences on the fear of crime.

### **Redefining 'the crime problem' in modernity**

'Our practices of punishment are no longer in the service of a social restitution in which justice is decided and regulated by the executive and juridical arms of the state. Rather, they are a contest between a criminal manifesting danger and a community at risk demanding a new form of retribution and a new type of social defence.'

(Dean 1999:171)

Crime politics is a field of inquiry that theorizes about the nexus between politics as a process of knowledge distribution on the one hand, and the ensuing legislative policies on the other. It juxtaposes the ‘hot’ politics with the ‘cold’ law. Crime politics blends political ideology with media attention, increasingly driven towards exposing failures and shortcomings in the criminal justice system and individualizing blame (Wiklund 1990).

The crime-as-representation-of-law discourse rests on the foundations of human nature, commercialized mass media and political and crime politics ideology. The result has been a focus on violent crime, a normalization of the excess and the exception with governments ‘governing through crime’ (Simon 2007). Violence permeates social control and its regulation – who can legitimately use it, when, and for what purposes? – forms part of the hegemonic order. Violence does not need to occur in order to regulate: the mere threat of violence is enough (Becker 1963).

This is as true in Scandinavia as it is in Australia, the UK and the US. The effects on each country’s crime politics have been profound. In fact, even in 1990 Mathiesen was arguing that the processes that shape penal law in Sweden and Norway were remarkably similar to Western Europe and the US (and Australia, one might add) due to the same social and cultural influences. In particular, Mathiesen found three tendencies that all coincide in Western and Northern European penal law developments and which still hold true:

- An increase of the power, real and symbolic, is given to *police* to define the parameters of the crime problem at the expense of other actors such as prosecutors, courts and prisons.
- In public space, mass media and in particular television has not only increased its influence but also fundamentally altered its *delivery* as well as its *contents*. The focus of news has changed from the written word to imagery (Postman 1985), a cultural shift that has led to a reliance on icons and symbols to represent truth. We live in a ‘viewers’ society’ (Mathiesen 1990:21; Mathiesen 1985) where newspapers also increasingly change modes of delivery to

tabloid-style 'infotainment' and where news becomes merchandise (Mathiesen 1990).

- Political ideologies in most Western countries as well as Australia and the US are moving towards right-wing populism. Extreme right-wing parties now form part of the political landscape in most liberal Western democracies and even sit in parliament in places such as Denmark, Norway, the Netherlands, Belgium and Sweden (this prediction has been remarkably accurate). The existence of these extremists on the political tableau has generated a general shift towards the right among established parties which seek to reclaim disgruntled voters by adjusting their ideologies closer to the centre. This has been the case with the Social Democratic parties of Norway and Sweden. In 2006 Swedish voters opted for an 'Alliance' of liberal-right parties that saw individual gain and individual responsibility as better suited to modern Sweden than worn-out concepts of solidarity and community. In Australia, where crime policy is chiefly a matter for State and Territory governments, the trend for both Labor and Liberal policies in the past decade has moved in similar directions, touting individual responsibilities over community responses in crime and social justice matters.

The Scandinavian welfare state ethos of universal and free education, improved housing conditions and strives to achieve greater economic equality (in the hope that this would lead to a decrease in crime alongside poverty and a generally greater quality of life for citizens) was certainly not without parallel in Australia (Tham 1998:3 68). While this was the dominant ideology of the social democratic parties in the Scandinavian countries for the better part of the 20<sup>th</sup> century, the crime-free society it was hoped this would result in did not manifest.<sup>198</sup> The continuance of crime has been explained by various, dissenting voices: while one argument would hold that the welfare state is too soft on crime and has led to a breakdown in family authority and other societal control structures, an opposing argument would be that the welfare state actually encourages crime both because of its extensive over-regulation and administrative burdens, which provide incentives to cheat (Tham 1998:369).

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<sup>198</sup> For a similar development in the UK see J. Young (1986).

Too much control stifles initiative and entrepreneurialism, leading to what has been dubbed ‘learned helplessness’ (Tham 1995; Maier and Seligman 1976; Miller, Seligman and Kurlander 1975; Seligman 1991) and a reliance on the state to provide financial, social and even emotional security. Moreover, young people and others wanting to rebel against the over-protective state may turn to negative outlets for their pent-up aggression, resulting in violent and destructive or deviant behaviour (Tham 1995).

In Scandinavia as elsewhere, modern neo-liberal penal politics have become ‘merchandised’ – goods that, unlike in the 1950s and 1960, rely less on theoretical, philosophical, scientific and ethical considerations and more on marketability and popularity of proposed solutions (Mathiesen 1990). In this market-based governance, legislative proposals need to be branded and ‘sold’ to a consumer market that relies on iconic recognition over substance. David Garland similarly argues in the Anglo-US setting that the loss of legitimacy that the treatment ideology suffered during the latter half of the 20<sup>th</sup> century had a crucial impact on the change in political direction:

‘This fall from grace of rehabilitation was hugely significant. Its decline was the first indication that the modernist framework – which had gone from strength to strength for nearly a century – was coming undone. Rehabilitation had been the field’s central structural support, the keystone in an arch of mutually supportive practices and ideologies. When faith in this ideal collapsed, it began to unravel the whole fabric of assumptions, values and practices upon which modern penalty had been built.’

(Garland 2001:8)

Crime policy relies on representations of knowledge, stemming either from expertise or elsewhere, such as media or vocal politicians. These representations infuse policy with meaning, rationality and legitimacy. Crime politics has become a discourse in its own right:

‘... crime policy [has] shifted direction, from exercising a social responsibility which acknowledged that deviants had a place in society, to existing for the sake of law-abiding citizens. Crime policy is today legitimised by way of its existence for and its agreement with the public’s “general sense of justice”. Crime policy

has gone from being an instrument for the reform of society to being that which is to uphold the citizens' confidence in the state's exercise of power.'

(Andersson 2002: preface)

The denser our regulatory systems, the more rule-breaking will occur and attempts to regulate by legislation will inevitably lead to more illegal acts (Andersson 2002:11). Importantly, mere regulatory reforms to name and shame solve very little: 'Criminalization is not per se a solution to a "problem" but rather a way to define something as a "problem" (Andersson 2002:11, personal translation). Moreover, there is no inherent or natural rationality or legitimacy in the tools and practices utilised in crime policy (Andersson 2002:11); they are subject to constant modifications and re-legitimising attempts. A society torn between two entirely new variables – the dangerous criminal on the one hand and the fearful and vengeful community making demands on the other – leads to consumerist justice: we pay taxes, so give us the regulatory system we want. The dangerousness, injurious effects and costs of crime (to individuals and to society at large) become the justifications for particular crime policy (Andersson 2002:117-118); and how citizens *feel* about the legal system, and the laws upon which it is built, takes centre-stage in this actuarial New Penology identification, classification and management of 'dangerousness' (Feeley and Simon 1994:173).

## **Culture and criminalization**

The regulation of sexual offending is a complex landscape of formal, semi-formal and informal regulatory tools (Weeks 2000:145). Formal modes of regulation occur through the auspices of the church and the state (Weeks 2000); for the latter, a key process of regulation consists of two powers: to criminalize, and to decriminalize, particular acts.<sup>199</sup> A different form of state initiatives that are formulated in conjunction with interest groups entail medical, public health and social welfare regulation. These include medical re/classifications (of sexual preferences and paraphilic propensities as psychological deviance), bureaucratic administrative practices, educative practices in schools and in the social organisation of sexuality

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<sup>199</sup> Regulating by omission, that is, *not* addressing a particular societal problem is of course another possible way of regulating the issue: by choosing not to criminalize particular behaviour, lawmakers send signals as to the behaviour's perceived harm (Flyghed 2002).

through various promotions of social norms through shaming and alienation of deviants.

Administrative procedures such as criminal checks for persons wanting to work with children in schools and sports associations is a form of self-responsibilization, where the community itself is given responsibility for discovering and weeding out potentially dangerous offenders and lessen the risk of victim exposure for such persons. Electronic surveillance and GPS monitoring of convicted offenders, now a popular if contested legislative move in several US states (and now being introduced in some Australian states), relies on a police force resourced and equipped to monitor these offenders' movements, conduct personal, vehicle and home checks and assist any offender found to be violating parole back to prison. Other forms of surveillance, such as monitoring social network sites such as Facebook and Twitter for evidence of sexual offending remain controversial but no longer implausible.

Good crime politics require 'a great measure of social imagination and consequence awareness' (von Hofer and Tham 1990:30). There are always costs, financial and other, involved in every police action, every sentencing act, and every new criminalization of deviant behaviour. To balance costs and achieve something like good crime politics, von Hofer and Tham (1990:33) propose limiting criminalization to acts threatening individual and public rights (and steer clear of criminalizing to protect abstract societal interests such as 'common decency', 'good taste', 'childhood', 'morality' or 'community values', to name a few plausible alternatives).

<sup>200</sup> Using non-legislative regulatory tools (such as technological and administrative structures of responsabilization), crime prevention strategies, designing cityscapes to obstruct crime in public spaces<sup>201</sup>, and public education are also measures that can impact positively on the debate in contemporary crime politics discourse. Adequate

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<sup>200</sup> The tug-of-war between different paradigms in the regulatory approach to prostitution, or sex work, has seen Europe divided between those heralding a criminalization of buyers of sexual services spearheaded by Sweden (the first European country to legislate to this end in 1999), and those in favour of 'realistic regulation' of sex-as-work through the operation of legal brothels and increasing work and employment conditions of the sex workers. The conflicting values evident in the skirmishes between the 'prostitution as exploitation' camp and the 'sex as work' camp have transnational effects. US aid to non-governmental agencies in developing nations to combat human trafficking and sexual slavery is conditioned upon collaborating agencies in the receptor country taking an abolitionist stand in the prostitution debate. To declare prostitution to be 'work' that should be acknowledged, legalized and regulated is to miss out on donor dollars.

<sup>201</sup> Crime Prevention through Environmental Design (CPTED) is an interesting concept to combat at least certain types of crime.

funding to the psychiatric sections of healthcare, the education section and social welfare may be good value in terms of reducing crime in the next generation.

Yet there are only so many regulatory tools for managing and minimizing the harm that stems from child sexual offending. Moreover, resources are finite for police departments, criminal justice department and psychological and psychiatric treatment facilities. The traditional governing of society conducted by a government dishing out budgetary allocations based on needs is changing, as neo-liberal ideas about modern governance means shrinking coffers. How does this affect the politics relating to crime, and to crime policy? I argue that the crime politics – as conceptually distinct from crime policy, which is a specific and coherent result of particular processes – of Western Europe, Scandinavia and Australia have surprising and enduring similarities.

Moreover, increasing ethnic and religious heterogeneity in a community changes its culture. This may induce anxiety in those who wish for things to remain as they ever were, leading to a desire for new scapegoats. When the Outsider can no longer be found in the stranger from a different community, country or religion – when ‘they’ are among ‘us’, and here to stay – the outsider must be found elsewhere. In the increasingly ethnically and religiously diverse communities of Australia and Sweden today (with one in four Australians born overseas, and not necessarily in the United Kingdom or Ireland as was mostly the case sixty years ago, and with Sweden having accepted hundreds of thousands of migrants and refugees in the last two decades), religion or a shared upbringing do not suffice to find common ground. The new common variable for postmodern multicultural societies must be found in something that is still held as universally valid. The law can fill this role, reducing anxiety by providing assurance in the continued social stability that once the church or nation used to fill. The result may therefore be an increased reliance on criminal law to provide answers to not only matters of law and justice, but about societal relationships in a wider sense. This is fertile ground for the opportunistic politician. Theories that assist in mapping contemporary crime politics can therefore serve a useful role in understanding the legal-political process behind reforms in the field of criminal regulation.



## Elements of a theory of crime politics

A new crime politics theory that incorporates modern approaches to deviance as individualized, pathologized, moralized and permanently attributing characteristics to its bearer is discussed below. In the field of sexual offending, it is clear that the current approaches to the regulation of deviance rely on six facets. They are *the politicalization, the scientization, the moralization, the emotionalization, the medialization, and the victimalization* of deviance.

The politicalization (or politicisation; see Sarre 2011) of deviance is the conscious political framing of certain acts of crime to form part of a political narrative. The scientization of deviance (including its medicalization; see Grattet 2011) is the introduction of perceived neutral or value-free medical and scientific language into contentious issues (such as when deviance is explained in psychiatric terms, or dangerousness is estimated through actuarial scales of risk). The moralization of deviance sees the deviant as conscious of their wrongdoing and thereby worthy of blame. The emotionalization (Karstedt 2002) of deviance is a shift from efforts to keep social crime control free of emotions and rather granting them status and legitimacy.

The medialization facet has been introduced here in order to highlight the intrinsic role that media – both traditional and social – play in shaping perceptions of deviance. Rather than merely reporting on crime, media has become a stage for advancing beliefs about what deviance is or how it should be controlled (sometimes using moral, scientific or emotional references to support claims). Lastly, the victimalization (Boutellier 2000:16) of deviance shifts the centre of attention from objective parameters of deviance to subjective experiences on the part of the victim of the deviant act.

Taken together, they paint a picture of a state legitimization of character attribution that has grave consequences for how sex offenders, in particular child sex offenders, are characterized in political discourse, in media and in public debate. Interestingly, while the trend is further advanced in Australia, the UK and the US, similar processes are operating in Sweden and the rest of Scandinavia, where the hegemony of expert discourse is slowly being chipped away and giving way to lay interpretations of

offender behaviour. Political discourse, rather than stemming this populist tide is rather capitalizing on it, reassuring the public that it is being heard and that ‘effective’ solutions are being considered. The combination of factors plays out differently in each country, to be sure, but both Australia and Sweden show remarkably similar traits in discourse, if not in the resulting legislative particulars.

### **The politicalization of deviance**

Since the early 1980s, Western Europe, Australia and Scandinavia have undergone a transformation of the nation-state that has had wide-ranging effects on how government does business (see, for England and Australia, Rhodes 1996; 1997; for an introduction to governance in Sweden, see Björk, Bostedt and Johansson 2003). The governance literature establishes patterns of transfer of power and regulatory initiative from the traditional state-centred focus to a multiplicity of actors on the regulatory arena. Kooiman and van Vliet (1993:64) point out that ‘...political governance in modern societies can no longer be conceived in terms of external governmental control of society but emerged from a plurality of governing actors.’ New Public Management (NPM) and plural regionalism are changing regulatory approaches to safety and security issues including the privatization of prisons, criminal care and care providers.

Bidhya Bowornwathana (1997) describes the typical modern state apparatus as smaller, flexible, responsible and fair, with reduced tasks and a global vision. It is a market-driven vision of governance where corporations take over public tasks through privatization of goods and service deliveries and drive a more streamlined administration with fewer areas of responsibility. In NPM, citizens are seen as capable customers demanding choices of goods and services from an ‘entrepreneurial government’ (Osborne and Gaebler 1992). Political leaders are given the task of formulating goals rather than visions, and are given a role of coordination rather than leadership (Björk *et al.* 2003:115). Political choices, then, need to be popular and resonate with a public used to demanding quality and satisfaction. This has had an ideological impact on fields of public policy not traditionally thought of as popularity-driven, such as criminal justice and the legislative process.

The bureaucracy of any neo-liberal Western democracy is invariably said to be too large and costly, with privatization the most common solution to reduce the cost for the state. NPM styles of ‘streamlining’ service delivery and make it more efficient, smart and cost-effective, have seen prisons being increasingly privatized around Western Europe as in the United States, in a move to provide a criminal justice system that can harbour both the punishment of prisoners and provide essential security delivery to society. In Sweden this happened primarily during the Alliance era 2006-2014, but the process had been initiated earlier. In Australia, both Labor and Liberal governments have introduced neoliberal ideas of privatisation and market-driven solutions to societal problems.

The responsibility for crime prevention and social control rests increasingly on the shoulders of individuals, with the Keynesian welfare state ‘steering’ rather than ‘rowing’: overseeing the security apparatus but not directly involving itself in its minutiae (Osborne and Gaebler 1992; Garland 1996).<sup>202</sup> In efforts to ‘roll back the state’ governments are increasingly pressuring public sector institutions to either apply corporate efficiency or scale back its commitment (Bevir 2009). Criminal justice and the prison system form part of the NPM privatization credo; but this also creates a dilemma for the state in harbouring its continued relevance. Situating individual private safety from threats such as domestic or sexual violence as the responsibility of the individual has been an ideological struggle. Moreover, as police and justice resources struggle to meet demand and yet remain accountable, effective and ethical, governments ignore the link between the front-end crime policy decisions that criminalize and assign regulatory responsibility to offenders on the one hand, and shrinking budgetary resources to back-end dispensers of discipline on the other, at their own peril.

### **Pain, pathology and punishment: sex offenders and the new penalty**

Punishment plays a key role in this shift. As a generator of modern myth, it is the conceptual twin of the crime debate: when there is wrongdoing (crime), there must be a way to make things right (punishment). The prevalence of punishment in the public

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<sup>202</sup> Osborne and Gaebler were not, however, the first authors to use this concept; the phrase itself was coined by E.S. Savas (1987).

crime debate overshadows other regulatory means of steering behaviour towards or away from particular behaviour. Cruelty has become a new factor of crime policy and indeed at times a goal in itself (Simon 2001:126) in politics that have moved from a 'social engineering perspective' to a 'moral engineering perspective' (Stenson 2001:23). For sexual offenders, 'punishment' usually equals 'prison' in public demands, with occasional side-references to 'treatment' or 'rehabilitation'. 'Prison', moreover, usually means 'longer prison sentences': no matter what the current penal scale is in one's particular jurisdiction, it never seems enough (see, however, Jerre and Tham 2010).

David Garland questions the common assumption of juridical punishment as an obvious form of crime control: 'punishment's role in modern society', he argues, 'is not at all obvious or well known' (Garland 1990:3) and its moral foundation of rehabilitation of the erring prisoner has been struck out of both language and thought in many jurisdictions (Garland 1990:6). The new rationale for punishment as a basis for criminal sanctions relies on retribution as a worthy and rational end in itself (Garland 1990:6). Those who engage in crime politics combine the variables of the treatment philosophy – 'the normalizing apparatus of enquiry, individualization and classification... developed in the treatment era' (Garland 1990:6; Cohen 1985) with visions of modern penality. Sex offenders can therefore be classified as pathologically sick, deviant or mentally insane *and* be subject to lengthy incarceration, even as prison-based treatment programs for sexual criminals are dismantled or devalued in budgets. It is a conceptual hat trick: they are insane, but yet responsible for their actions; sick, but not worthy of treatment; individually responsible for their deviance but not rehabilitated as 'nothing works' with these individuals. Deviance, classified collectively and applied individually, no longer hinders the responsabilization process for criminal offenders. To view deviant behaviour as at once sick and self-elected is at odds with those philosophies that point to illness as an excuse for lenience. The space between individual responsibility and pathological illness is a void that has been filled through the re-emergence of moral arguments that herald penal inconvenience, even degradation and pain detached from any correctional purposes, as appropriate reactions to crime (Garland 1990:8). Harsh punishments require relational distancing (Black 2011): unforgiving penal practices are easier to impose when offenders are reduced to single-dimensional icons of evil.

## Governing through sex: sexual offending and crime politics

Criminalization is a social process that hinges on two things: state power, and legitimation (Berger and Zelditch 1998). Law is the ultimate signifier of the politics of distributive justice, because the redistribution of rewards is intrinsically linked to the distribution of power (Berger and Zelditch 1998:265).<sup>203</sup> Whereas the idea of crime as a social process stems from a historical-genealogical discourse, criminalization as a social process derives its intellectual roots from state theory and international relations discourses. Penal law has rarely faced a loss of legitimacy *per se*, Andersson (2002) notes, only the power behind the punishment. Drawing on Foucault's (1977/1987) idea that it was the shift from monarchist absolutism to plural democracy that led to modern penalty as a means to legitimise a power no longer God-given, it has always been the prerogative of the national state to demonstrate its power by deciding whether, how and when to punish the criminal and assert its legitimacy (Andersson 2002).<sup>204</sup>

Motives for obeying the law even when it is not in one's best interest can at least in part be explained by habit, on the one hand, and altruism on the other (Tyler 1990). A key other explanation is the continued belief in the myth of the sovereign state (Svanberg 2008:57; Tyler 1990): we obey the law because it's the law, and because the government (state) tells us to. In conjunction with the family, community, church and trade unions, the state successfully upheld law and order in the 19<sup>th</sup> century, but as many of these influences have faded away the state continues to hold relevance as the primary dispenser of norms. Crime has become redefined as an inevitable part of the 'risk society' something most of us can expect to experience at some point in our lives (Ericson and Haggerty 1997; Svanberg 2008). Meanwhile, costly treatment and rehabilitation efforts that may or may not 'work' on serious criminals are difficult to

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<sup>203</sup> Berger and Zelditch (1998) use the concept of 'power' to denote 'control over rewards and penalties' which is somewhat different to how power is viewed in International Relations theory.

<sup>204</sup> Crucial here is the notion of *status*: power is respected and obeyed when it is perceived to stem from a legitimate source, one with status and symbolic authority. The perception is important because many decisions regarding the distribution of power, justice and rewards are in fact *non-decisions* (Bachrach and Baratz 1962; Bachrach and Baratz 1963; Zelditch, Harris, Thomas and Walker 1983; Zelditch and Ford 1998) – choosing not to take action – which in themselves are an exercise of power and authority (Flyghed 2002; Zelditch and Ford 1998).

justify in the NPM order, and it is tempting to do away with it completely by adapting the crime politics discourse to populist assumptions that ‘nothing works’ anyway.<sup>205</sup>

Minogue, Polidano and Hulme (1998) observe that the dynamic process of change works not only to reform government efficiency but also has a deeper ideological basis: in the modern state, ‘people...are treated not merely as consumers or customers [as in NPM]...but as citizens who have the right to hold their governments to account for the actions they take, or fail to take’ (1998:5). They continue: ‘Issues of accountability, control, responsiveness, transparency and participation are, therefore, at least as important as issues of economy and efficiency’ (Minogue *et al.* 1998:5).<sup>206</sup> There is, in other words, a clear liberal democratic ideology underpinning this ambition in the global political arena (Björk *et al.* 2003:120; Minogue *et al.* 1998; Rhodes 1996) and a normative framework constructed around public will. The public becomes the ‘employer’ giving missions of representativeness to politicians who can be sacked if they do not perform satisfactorily. Voters now ‘demand’ tougher penalties for certain crimes, and legislation that ‘reflects community values’ has become a political goal *per se*.<sup>207</sup> With the majority of Australians basing their beliefs about the criminal justice system on media accounts (Broadhurst and Indermaur 1982), politicians face the ungrateful task of providing education and nuance through the same medium.

## **The scientization of deviance**

It has become a truism in regulatory circles to speak of the ‘risk society’ we now live in (Beck 1992; Ericson and Haggerty 1997). Now is the era when constructed frameworks of science are utilised to explain the inexplicable and contribute to an

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<sup>205</sup> Neo-liberal rhetoric that places the responsibility for crime control on service delivery providers, encouraging ‘smart policing’ and ‘community responsibility’ would also do well to reflect upon the ethics of criminalization: ‘smart policing’ requires ‘smart criminalization’ in the first place. But it is usually the back-end of service delivery, not the front end of legislation formation and criminalization processes that tends to constitute the focus in analyses of the new minimal state.

<sup>206</sup> An alternative understanding of governance is exemplified by the *multi-level governance* created within the European Union, between the EU body itself and its member states as well as between the various actors on transnational, national and subnational levels (Björk *et al.* 2003:124). These networks occur in both formal, semiformal and informal ways, with relationships being ‘fluid, negotiated and contextually defined’ (Pierre and Peters 2000) and, to some degree, self-regulating coordination processes (Ibid.; Björk *et al.* 2003:124).

<sup>207</sup> The Australian Survey of Social Attitudes (AUSSA) also found that a majority of respondents (63%) indeed believed that judges *should* ‘reflect public opinion about crimes when sentencing criminals’ (see also Roberts and Indermaur 2007).

increasing expectation that virtually everything can be explained, measured, controlled and regulated. This has trickled down into the way sex crimes are viewed, and the result has been management approaches that seek to calculate, by more or less scientific methods including the use of auditing tools, the risk that a sex offender poses to the community.

The welfare state began its retreat in the 1990s across Europe, including Sweden (Tham 1998), France (Bailleau 1998; Faugeron 1998), Norway (Christie 1998) and England (Taylor 1998). It gave way to market ethics, increases in penal severity and a normalisation of the crime problem discourse; an ideological dismantling of non-prison-based sanctions such as rehabilitation and a shift from the state as provider to a responsabilization of the 'community'. Mental hospitals closing down in favour of community care (Taylor 1998) are one form of redefining what has traditionally been seen as the state's responsibility. Swedish welfare, which has been described as 'exemplary' (Taylor 1998:21) was scaling back. In Australia, this has led to the privatization of care provision, prisons and the professional services that have in the past decade attempted to assess offenders' risk of reoffending in a bid to make communities safer.

Risk assessments are nothing new to the postmodern society but forms an integrated part of the modernity project (Castel 1991; Andersson 2002). To think in terms of risk is to break down a holistic, three-dimensional person into a number of risk factors (Castel 1991:281), so that they are reduced to an anonymous combination of variables. The 2002:3 SOU by *Psykansvarskommittén* (the psychiatric culpability committee) includes a lengthy and thoughtful discussion of the consequences of thinking in terms of the so-called 'risk society' (Beck 1992) and the problems involved in legislating to curb 'dangerousness' (SOU 2002:3:268-274). The report points out the arbitrariness that comes with deeming some offenders 'dangerous' (and, implicitly, others consequently 'harmless') as an either-or determination and that risk determination and evaluation is fraught with value judgements (2002:269). However, the report concludes: 'The interest in protecting possible new victims of serious violent or sexual crimes weighs...more heavily than the individual right to freedom, at least in situations when the person has already committed a serious act and there is deemed to be a more significant risk of recidivism' (2002:269, personal translation) and 'most people probably find this reasonable' (2002:269, personal translation). Interestingly,

the SOU frames its argument for ‘dangerousness’ with ‘violent or sexual crimes’, although the inquiry had a broader scope in terms of assessing psychiatric needs for all offenders.

The inquiry moreover notes a philosophical objection to risk assessments: ‘A paradox relating to this is that risk assessments at heart assume that people’s behaviour is to some degree predictable (determinism) while at the same time we assert that crime can only be committed by people with a free will and freedom to act.’ (SOU 2002:3:271, personal translation) Since risk predictions operate on a group level – they are done on clusters of people, not individuals – it remains impossible to predict which particular individual in a group that will reoffend and who will not.<sup>208</sup> This is the obvious shortcoming of the risk management approach to managing sex offenders – its depersonalisation, whereby the risk calculation uses sophisticated instruments to determine whether a person *such as A* is likely to reoffend but never conquers the logical leap that follows, the assumption that this can tell us *whether A will offend*.<sup>209</sup>

### **The moralization of deviance**

In addition to its tangible adverse effects – physical pain, loss of property, violation of a person’s dignity or societal costs –, crime acts as a moral violation of symbolic boundaries (Erikson 1966; Ben-Yehuda 1990), and criminalization can fill a sacred or, increasingly, profane role of re-establishing the boundaries. Criminalization can act as a marker for morality and also influence perceptions of harm. So-called public demand has thus come to fill a role of morality per se: the public want it so it must be good. This type of grassroots democracy has seen the state of California legislate in law and order matters based on community initiatives. The result is a secular issues-driven morality, based on piecemeal regulatory approaches rather than coherent systems of belief. Legislation that purports to reflect community/societal values feeds into this new morality and appeasing public perceptions and feelings have become a political goal in itself.

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<sup>208</sup> The SOU notes, not without some humour, that after all a person cannot reoffend to a degree - in a particular case, the person will either offend or not offend, but never partially offend; SOU 2002:3, p.273.

<sup>209</sup> In a related vein, Krygier (2009:65, unpublished draft) states that law can only offer us ‘tolerable threshold conditions, not total security or foresee-ability’. The idea that the law can deter offenders and thus protect us from victimization is equally chimerical, and yet perhaps necessary to keep deep existential anxieties at bay.



Moral formation, or more accurately put, moral modification, is now an explicit goal of certain Swedish legislation, for instance with regard to sexual offending. It stands, at times, at odds with ‘the public view on crime’ which is not unproblematic. If the legislator is to formulate legal responses to what the public wants, how can it then proceed with criminalization of behaviour that the public at large does not find particularly problematic? Meanwhile, legislation regulating sexual offending has undergone changes towards becoming ‘morally neutral’ (Wersäll and Rapp 2007), and these offences are no longer viewed as crimes against common decency or public morality (but rather against a person’s physical and sexual dignity and integrity).

Law encapsulates rules for behaviour and sanctions for wrongdoing. The law is normative in the sense of encouraging what should occur and discouraging that which should not. There is a process of wrongdoing, punishment and a return to normalcy that is followed. Three different areas act as starting points for *guilt*: the judicial, the religious and personal morality that are intrinsically linked and yet separate. In criminal law, the element of justice is a result of legal transgressions containing three aspects: pleading (or being found) guilty, punishment and compensation (Olsson 1993:37). In faith, these mirror the confession of sins, regret (repentance) and making good. Through this personal conscience, or the inner morality, is linked to the outer world’s norms (Olsson 1993:38).<sup>210</sup>

‘Moral entrepreneurs’ are crucial in defining deviant and criminal behaviour in individuals or groups (Becker 1963; Gusfield 1963). These ‘moral crusaders’ attempt to rouse public opinion through the media and by leading social movements and organizations to bring pressure on the authorities to exercise social control and moral

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<sup>210</sup> This is not new. Hughes (1987) argues that as the moral power of the Church of England began to fade in eighteenth-century England, a new icon took its place: the rule of law became a ‘supreme ideology, a form of religion’ (1987:29) complete with rituals and symbolism. The judge took over the moral role previously played by priests, admonishing and calling for repentance. The courtroom became the new chapel and a scene to act out dramas of human error and forgiveness. There was no contradiction in handing out a death sentence, and comforting grieving widows and children soon to be made fatherless at the same time (Hughes 1987:30). The law had become the new morality play where the common law dictated the rules and the divine, in the form of royal decrees that could occasionally when circumstances so allowed intervene with grace to save the repentant sinner. Even the public execution served a moral purpose, and in the eighteenth century parents would bring their children to witness a criminal die to teach them a moral lesson. The ritual that preceded the hanging was again reminiscent of religious ritual and served to reinforce two messages: one, the absolute and indiscriminate supremacy of *law*, the other the supremacy of the *state*: a state that would not hesitate to execute children as young as ten if they were seen to pose a threat to the social order.

regulation' (Thompson 1998:12-13). Becker characterizes the moral crusader as 'fervent and righteous and holding to an absolute ethic; what he or she sees is truly and totally evil with no qualification' (Thompson 1998:13; Becker 1963:147-148). The symbolic issues of these crusades allow formerly prominent groups threatened by immigration or other social changes to reassert their power and their values through legislation (Thompson 1998:13; Gusfield 1963; see also Zurcher and Kirkpatrick 1976 for debates on drugs, abortion and pornography). However, there are also cases where genuine commitment to a cause leads to activism, without considerations around loss of status or power (Jenkins 1992 calls this the *interest group theory*; see also Goode and Ben-Yehuda 1994:116; see Thompson 1998:17 on the link between moral indignation and the tendency to search for legitimacy for a particular issue by depicting it as a struggle between good and evil).<sup>211</sup>

Calls for reforms of sex offending legislation may come from a number of places, from victims rights' groups to moral crusaders whose interest in the issues is principled rather than personal. Herein lie some of the great difficulties in reconciling greatly diverse interests. Personal narratives of victimisation can be hijacked for political purposes and used to prove a point about the constant risk that sex offenders pose, for instance. Moreover, deviance attribution in the field of sex offending is a complex web of discourses.

The harm principle (Feinberg 1987) is evident in many of the regulatory pathways towards combating sexual offending. How it is codified has, however, differed greatly over time and space. Principles of harm and morality are often invoked to defend particular criminalization choices: sexual behaviour that harms (someone else, or oneself) is more likely to be labelled illegal. The harm that stems from criminal forms of sexual expression can also extend to the community, society, public taste, the relevant deity in the jurisdiction or even humanity itself (if harm is understood not merely as physically injurious acts, but also a more seeping, undermining threat that alters collective perceptions of sex).

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<sup>211</sup> Current debate around homosexuality in Uganda links traditional opposition to gay sex with nationalistic propaganda, positioning homosexual activity as a 'Western' concept threatening to 'undermine' traditional 'African' family values. As such, nationalism is both strengthened and legitimized by reference to the 'outside' threat. Similarly, the signification spiral operates in Swedish politics by linking prostitution to human trafficking, casting a moral shadow of oppression and slavery on the sex industry.

When 'society', 'public order', 'community standards' or 'childhood innocence' are perceived to be harmed by what one or several people do, legislation enters into a shadow land of principles, values and beliefs. How exactly is one's community 'harmed' by the knowledge that two adult men have consensual sex in their home? How are children 'harmed' by cartoon child pornography? How can a theatre play, a photograph or piece of literature sexually offend?

From a moral perspective, photographs of naked children do offend because they inflict the image on the viewer. Child pornography is wrong, in this view, because no one should look sexually at a child, and when a person is unwittingly exposed to it anyway, it corrupts their mind by planting something there that should not be there. The mind goes from 'not-knowing' to 'knowing' (Arendt 1958) and once it 'knows', it can never 'not-know' again. This idea of harm sees it as objective, though it is psychological or emotional – one is harmed even if one does not know, or admit to it.

When the harshness cannot be justified on religious grounds (such as when bestiality, sodomy and adultery were considered crimes against nature and thus offences against God), it must be justified by reference to that which it damages. However, to justify the imposition of suffering on those who harm, one must find, construct or classify harm in the victim. In some cases, such as in cases of rape or sexual assault this is self-evident. Other times, though, it is not as straightforward. When the 'victim' of homosexuality cannot be found in the willing adult consenting participant, the victim must instead be classified collectively. Gay sex is reclassified as threatening society itself because family values, collective senses of decency and propriety or 'the children's morality' are threatened by expressions of deviance. When children cannot be found to be harmed physically by animated *manga* cartoons, it is 'childhood' and innocence themselves that are under attack. Then the punishment becomes logical, justified, and even necessary to allow society to return to an imagined equilibrium of decency and peace.

The labels we assign to criminals and victims, sex offenders and paedophiles, describe our worldview and how we view humanity. Svend Ranulf (1938/1964) hypothesized that moral indignation is a distinct middle-class phenomenon. It is the right of the privileged in the relationship to name the Other, and the naming act implies a relationship between the two variables in the relationship (de Saussure 1960): the

signification act works in two directions so that the meaning given to the Other is inverted in the signifier ('you are – therefore I am not'). Othering is a collective process:

'...from a purely functionalist point of view, the derivation of our meanings, whether they be true or false, plays an indispensable role, namely, it socializes events for a group. We belong to a group not only because we are born into it, not merely because we profess to belong to it, nor finally because we give it our loyalty and allegiance, but primarily because we see the world and certain things in the world the way it does (i.e. in terms of the meanings of the group in question). In every concept, in every concrete meaning, there is contained a crystallization of the experiences of a certain group.'

(Mannheim 1936/1991:19)

Sociologists have for some time used the concept of *verstehen*, to empathetically see 'the inner world of others' (Valier 2004:64). This is a form of mutual communicative understanding that consists of truly relating to another person – walking in someone else's shoes, carrying their burdens. The process of Othering, by contrast, can be described as a conscious framing of alienation and externalizing those not deemed to fit into the majority group. As such, it is the antithesis of *verstehen*. The Othering process is to consciously see the differences and not the similarities:

'woman is the other of man, animal the other of human, stranger the other of native, abnormality the other of norm, deviation the other of law-abiding, illness the other of health, insanity the other of reason, lay public the other of the expert, foreigner the other of state subject, enemy the other of friend.'

(Bauman 1991:8)

Murray Edelman (1964/1985; 1988; 2001) speaks of politics as the construction of symbols in order to create an imagined meaning that only makes sense inside this construction. In a Durkheimian vein, he sees the creation of the Other as a conscious political strategy: 'The practice, apparently growing, of constructing demons to explain unfortunate conditions is a strategy for avoiding the analysis that is necessary to understand and remedy the conditions' (Edelman 2001:24). Othering is thus not a strategy undertaken alongside attempts to solve political or societal problems, but supplants such attempts. Rather, politics '...deals far more consistently and powerfully

with the construction of beliefs than with the allocation of values. It shapes beliefs about who are worthy and who unworthy, about the consequences of governmental actions, about what situations are problems, about the prevalence or absence of well-being, and about many other conditions.’ (Edelman 2001:33)

Garland (1996) has ordered British crime policy of the 1990s into two parallel streams: *symbolic denial* on the one hand, and *responsibilization* on the other. Symbolic denial is the process by which the state conducts symbolic functions such as criminalization of particular behaviour or regulatory reforms in order to avoid having to admit a loss of control over ‘the crime problem’. The responsibilization process is the process whereby the causes of crime are simplified and the responsibility to solve the crime problem is transferred to civil society and private individuals.

Symbolic denial includes at once a demonization and dehumanization of the Other, whereby the offender is posited as fundamentally different from ordinary citizens (Garland calls this *a criminology of the other*), whilst the responsibilization process depends on an image of the offender as a reasonably ordinary person, albeit one with particular rationalities and characteristics (*a criminology of the self*, in Garland’s (1996) words). Criminology-of-the-other measures often include action from the state as crucial to solving ‘the crime problem’: more police officers in the street, more punitive legislation, longer prison sentences (Andersson 2002:129) while responsibilization rests on the shoulders of the ordinary person in the street. There is undoubtedly a dilemma here: are offenders ‘mostly like ourselves’, or fundamentally different? Swedish crime policy of the 20<sup>th</sup> century would indicate a defence for the former view, while Australian policies would point to a worldview closer to the latter. Nevertheless, arguments in favour of either rely not only on cognitive assessments but also on emotions which complement detached deliberation.

### **The emotionalization of deviance**

Regulation can be thought of as an emotional process. While it has long been recognised that emotions form a crucial part of self-regulation and other informal forms of social control, the influence of emotions on legal regulation has not been well understood. The law tends to be perceived as inherently rational and based on

objective, neutral standards of reason. Emotions, by contrast, are viewed as unstable, changeable, and associated with a lack of control (Lange 2002). The ‘messy individuality’ of emotions is contrasted with hard and fast ‘categorical rules’ (Bandes 1999); the result is a perception of ‘emotion’ and ‘cognition’ as in tension with one another (Lange 2002) and a distancing of emotion ‘in particular from reason and rationality’ (Lange 2002:199; Goleman 1995).<sup>212</sup> In addition, ‘lawyers have not considered emotions as a social fact but have discussed them from a normative angle’ (Lange 2002:199), focusing on a debate as to whether emotions should play a part at all in legal proceedings (Lange 2002) but overlooking the impact of emotions on the formation of, and exercise of, law and regulation. Sigmund Freud argued that ‘outer laws’ are created to regulate and restrict the often strong emotions that manifest in our psyche – a necessity in a society that wants to remain civilized.

Emotions are a ‘link concept’ (Lyon 1996:57) between the legal and the social realm: on the one hand, ‘emotions are clearly anchored in a private sphere of civil society’ (Lange 2002:206), but, on the other hand, ‘they are also involved in the creation of social structures, such as forms of governance and law’ (Lange 2002:206).

Emotions form part of the regulatory landscape in a number of ways. Firstly, the use of emotive language in criminal justice discourse is evident in much contemporary literature on the behaviours and characteristics of different types of offenders such as sex offenders. This ‘emotionalization’ (Karstedt 2002) has had a direct impact on legal reform in the sex offender field in Australia, the United Kingdom and the United States, and it is increasingly evident in Swedish crime policy also.

Secondly, the use of emotion to influence public opinion and voter behaviour by politicians (such as playing on public fear or anger in debates on rehousing of paedophiles) has led to discussions about the biogenetic and social makeup of offenders in media and in communities (such as Internet ‘bloggers’ and authors of letters to the editor making use of emotive language to make a point about an

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<sup>212</sup> Sex offenders, on the other hand, distort, minimize or justify their own emotions and those of their victims in order to avoid taking responsibility and blame for their offending. A common justification for criminal acts stems from not ‘seeing’ the victim’s real emotions (Goleman, 1995:365; Kwarnmark 1999:1081) and projecting what the offender wishes to see instead, for instance by telling themselves that the act is consensual.

offender's perceived risk of danger to the community or to make calls for regulatory reform).

A third example of the influence of emotions on regulation can be seen in the role of subjective and personalised evidence in legal court proceedings. For instance, victim impact statements are now routinely used in Australian courts (but not in Swedish courts – yet<sup>213</sup>) in order to give victims a voice that has previously been denied them. However, victim impact statements are also used by the prosecution to emphasize the harm done by the alleged offender, and impact on the conditions of sentencing as this harm is demonstrated by the victim's personal story.

A fourth reason for including emotions in the set of tools that determine a regulatory outcome is based on Selznick's definition of regulation as 'sustained and focused control exercised by a public agency over activities that are valued by a community' (Selznick 1985:363). There are two important elements to this definition: the first is the definition of regulation as an 'activity in the public interest' (Lange 2002:205). The second is the subjective determination of community values, in a wider sense. Values may be based on 'objective' demands for greater personal freedom, greater wealth, or other tangible rewards. But ultimately, even these material values boil down to foundational human values around equity, justice and fairness. Put simply, every 'activity...valued by a community' has an emotional aspect to it because values are intrinsically linked to how we feel about our lives, our circumstances and our relationships with others (Goleman 1995:21).

Closely connected with this is the research by Dolf Zillman which found the primary driver behind anger to be a sense of fear, not only from physical danger but, more frequently, an imagined symbolic threat against one's self-esteem, dignity or way of life, or a perceived insult or degradation (Zillman 1993; see also Kemper 1978; 1991; Goleman 1995:85-86). It is also entirely possible for individuals to *choose* to maintain

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<sup>213</sup> Historically the victim has played a relatively insignificant part in the Swedish criminal trial procedure, damages awarded to a victim of a sexual offence are relatively low by Anglo-American standards and relatively little attention is paid to the effects of the victimisation in the longer term. Assistance to crime victims remains the responsibility of social welfare services under the Social Services Act (*socialtjänstlagen*, SFS 2001:453) which has a long history of viewing crime as a 'holistic, societal problem' (Ljungwald 2011); see also Ljungwald and Hollander 2009 rather than a matter of individual rights and responsibilities. Though this is changing, a century of social democratic approaches to crime is slow to give way to the neo-liberal trend towards increased responsabilization of offenders and greater focus on victims of crime.

a particular emotion (Goleman 1995): a sense of outrage over the release of a convicted paedophile from prison can self-sustain itself for weeks, months or even years and allow the person in question to maintain a sense of injustice that spurs them to action.

Emotions can be both rational and ‘logical’. Emotions, whether introspective (e.g. embarrassment or shame) or outwardly directed (e.g. anger, disgust) can have very different effects on regulatory reform. Emotion can be used for oppression and condescension, and to manipulate. Debaters can use emotions to obscure or render irrelevant opposing views, precisely because emotions form such a powerful base for decision-making. The illusion of supremacy of intellect over emotion has led to a disregard of populist sentiments as erratic: ‘Political elites have always regarded their own enthusiasm as rational, which they hold in stark contrast to the emotional enthusiasms of the political mass. Conventional political analyses similarly tend to operate without acknowledging the importance of the underlying emotions of political elites’ (Barbalet 2006:32; see also Jasper 2006:30).<sup>214</sup>

Emotions are ‘intentional’ in that they refer to some object in the world. One is fearful of *something*, angry about *something* (Clarke, Hoggett and Thompson 2006:6) – fearful of the harm that a sex offender can cause, or angry about the early release of a paedophile from prison because of a perceived injustice in the criminal justice system. In other words, they are contextual and relational.

Stephen Farrall (2001) has argued, in a similar vein, that the ‘distant suffering’ by moral spectators (Boltanski 1999; quoted in Karstedt 2002:303) has more to do with a sense of obligation: people feel, for instance, that they *ought* to be angry about crime rather than having actual emotional responses. Emotions, Susanne Karstedt (2002:310) notes, ‘are “indicators” of our moral beliefs and convictions [but] do not constitute them’. It is a form of role playing (Thomas and Znaniecki 1919; Cooley 1922; Mead 1934; Becker 1963:89). As community members we are *supposed to* be angry about the imminent release of a paedophile from prison; as parents we are *supposed to* feel fearful about those potential child molesters who prey on vulnerable

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<sup>214</sup> Idealism is often expressed by emotive affect, while law is believed to be about ‘rationality’ – lack of emotions – and ‘logic’. However, idealism is not illogical, in the true sense of the word, nor is it malleable or necessarily associated with a lack of control. Moral/ethical dilemmas that stem from emotionally charged issues in regulation can also have both logical and rational bases.



children and teenagers on the Internet. Fear, anger and other emotions in these situations are to some degree a *learnt response*, something that goes with the acting out the role of the good parent, concerned community member and the responsible politician (Holmes 2004:123; Harré 1986:6; Belli 2010).

Emotions have, at times, been well recognised by scholars as influencers of politics and law, and are used deliberately to shape political campaigns (Neuman, Marcus, MacKuen and Crigler 2007; see also Hall 2005:19) on the role of passion in politics and law). In politics, stirring up emotions is a powerful way to unite – find a common ‘enemy’, invent a ‘threat’, and use a combination of fear, hope and pride to direct energy and consciousness towards solving the ‘problem’ at hand – conveniently ignoring larger societal issues in the process. Max Weber famously stated that action in a political community is ‘determined by highly robust motives of fear and hope’ (Weber 1970:79).<sup>215</sup>

The harnessing of emotions for particular political purposes, such as the use of disgust to marginalize and de-humanise groups in society (Karstedt 2002:311), can even lead to the attempted destruction or annihilation of that group. The 1936 Nuremberg Laws that prohibited marriage between Jews and other Germans were also accompanied by propaganda that Jews were paedophiles; the deprivation of civil status was thus accompanied by a deprivation of human status which enabled the Holocaust to begin a few years later. In the 1994 Rwandan genocide, concerted and wide-ranging efforts to de-humanize Tutsi members of society began years before the massacres were carried out – a necessary precursor to enlist otherwise law-abiding civilians into committing sexual violence, torture, mutilation and murder on a massive scale (Mullins 2009).

## **Emotions and language**

‘[There] are no ‘neutral’ words and forms – words and forms that can belong to ‘no one’; language has been completely taken over, shot through with intentions and accents... All words have the ‘taste’ of a profession, a genre, a tendency, a

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<sup>215</sup> See, however, Jack Barbalet’s caution against using ‘conventional emotions terms, like hope and fear, without being aware that their received sense and meaning comes from a usage that may not properly serve political analysis’ (Barbalet 2006:32-33).

party, a particular work, a particular person, a generation, an age group, the day and hour. The word in language is half someone else's...

[Language does not pass] freely and easily into the private property of the speaker's intentions; it is populated – overpopulated – with the intentions of others. So, although the meaning of a word is to do with how it is used by the speaker at the point of contact between the speaker and those to whom the speaker's words are addressed, a word is not available to be used in just [any] way the speaker pleases. Expropriating it, forcing it to submit to one's own intentions and accents, is a difficult and complicated process...'

(Bakhtin 1981:293-294)

Shared memories rely on a common language, agreed-upon definitions to describe what took place. Legislation is created by language and linguistic signifiers: a newly enacted law establishes what we now see as rape, or child pornography, or other forms of blameworthy sexual behaviour. It sends a message: what we used to see as acceptable is no longer acceptable. Criminalization creates new language through imagined shared meanings. Words such as 'paedophile' or 'child molester' become linguistic signifiers that are used to convey a commonly understood meaning: when 'a paedophile' is convicted in a court, it seems superfluous to ask 'what did he do?'

Carl Schmitt's (1925) analysis of our obsession with 'debunking' truth and discovering the 'real' meaning of words and statements noted that humans live in a continual fear of being misled, putting us constantly 'on guard against disguises, sublimations and refractions' (Mannheim 1936/1991:57). Much in the law-and-order debate concerns itself with conveying particular messages to the public about the necessity of their own responsabilization, for instance by avoiding getting into dangerous situations (such as catching a train home after dark or leaving windows open overnight). The 'already-spoken' language of private security companies and community police officers regulate how we feel about our own 'private security', as we construct our own behavioural responses based on the advice given by these actors. The listener can choose to accept or reject others' interpretation of particular life experiences ('*is walking home alone dangerous or safe?*'). Our thoughts and our speech are formative of one another (Shotter 1993:33; Harris 1981; Edwards and Potter 1992; Wittgenstein 1953).

By using language to name our world, linguistic choices determine our perspective on how we view a sexual assault and places it in particular circumstances (as ‘sex gone wrong’, ‘conjugal rights’, ‘ethnic cleansing’, ‘guerrilla warfare’ and so forth), ultimately determining also whether it is a ‘crime’ or something else entirely. The process of definition by which particular behaviour is (re)defined and institutionalized as a societal problem (Lindgren 1993:210) – the claim formation – rests on particular assertions and actions designed to increase interest in the particular ‘problematic’ behaviour.<sup>216</sup>

### **The medialization of deviance**

News media have exerted an exceptionally powerful influence in Australian public opinion since the 1970s (Grabosky and Wilson 1989:1), and many get information and a certain amount of entertainment from news media reporting on crime, prison conditions, spectacular prisoner escapes, or misjudgements in parole decisions:

‘The difference between an embarrassing incident blowing over, or developing into a scandal is often a function of an editorial decision to drop a matter or to keep pursuing it. For crime and criminal justice to become a major public issue, it is often sufficient for the media simply to declare it to be one.’

(Grabosky and Wilson 1989:1)

In the past decade there has been in Australia a wave of community action, debate and calls for legislative, judicial and administrative reform – what could be called ‘civic engagement’ with issues surrounding the complexities of sex offender regulation. Several State and Federal legislative changes, the enactment and implementation of new legislation and calls for more punitive responses to offenders gave a picture of communities full of hate, vengeance and fear. This coincided in some places with the release from prison and subsequent community placement of a convicted paedophile.<sup>217</sup> In this, mass media has taken a leading role. Crime has become ‘medialized’. The media coverage of particular offenders, the calls for change by

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<sup>216</sup> Steve Woolgar and Dorothy Pawluch (1985) call this ‘ontological gerrymandering’: a conscious manipulation by which a constant fact (recidivism rates, violence against women) is discursively defined differently by different claims makers.

<sup>217</sup> The release of Mr Ferguson in 2004 (see p.24, fn 22) and Mr Jones in 2005 (see p.24, fn 23) almost universally portrayed communities as fearful, hateful, angry and ready to resort to violence in order to keep convicted sex offenders from moving into the community.

concerned parents and community members and the promises made in haste by equally aghast politicians follows a news cycle of intense reporting that then trickles down as new threats arise and demand attention, dominate the headlines and new problems are brought to the fore in the ‘social problems marketplace’ (Hilgartner and Bosk 1988).

A similar process has occurred in Sweden through conventional media (Pollack 2001) which report on crime in increasingly sensationalist terms and with a focus on the victim and their suffering. In Scandinavia, uniquely high levels of daily newspaper subscription rates has been held to lead to less sensationalist reporting of crime and dramatic events. However, as the subscription rates decrease (down some 20% between 1986 and 2008; Wadbring and Hedman 2011) and newspaper offices shut down (what has been coined ‘the death of newspapers’<sup>218</sup>), national tabloids take over a larger share of the market. With this comes a need to sensationalise in order to sell; at times, for instance, tabloid paper *Aftonbladet* has teamed up with commercial TV programs in order to maximise attention to particular issues, such as Internet-based threats and abuse aimed at women, children or ethnic and religious minorities.<sup>219</sup>

This media process follows the ‘dedifferentiation’ between culture and meaning (Lash 1990; Pedersen 2001) where signs and icons are used to convey meaning and not only represent, or signify, reality but *become* the real world.<sup>220</sup> Postmodernity, argues Scott Lash, is ‘figurative’ rather than ‘discursive’: postmodern movies centre upon explosive, eye-catching imagery, not ‘logical’ storylines, and media uses imagery similarly to convey meaning (by publishing a picture of a convicted paedophile on the front page of a newspaper, or by using suggestive words: see Lash 1990; 1991; Lash

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<sup>218</sup> Svenska Dagbladet 2015-03-19 ([http://www.svd.se/nyheter/inrikes/regeringen-vill-stoppatidningsdoden\\_4420379.svd](http://www.svd.se/nyheter/inrikes/regeringen-vill-stoppatidningsdoden_4420379.svd), accessed 2015-04-03). The daily sales rates of the two leading national daily newspapers in Sweden, *Dagens Nyheter* and *Svenska Dagbladet*, decreased by 6.1% and 8.4%, respectively, in 2014 compared to 2013. See <http://www.medievarlden.se/taggar/orvesto-konsument> (accessed 2015-04-13).

<sup>219</sup> When, for instance, Channel 3’s program ‘The Troll Hunters’ (*Trolljägarna*), a show devoted to finding and ‘outing’ persons guilty of stalking and abusing others on the Internet, the subsequent reporting in *Aftonbladet* highlighted those exposures where the perpetrator was found to have been sexually abusive, used sexually abusive slurs or otherwise engaged in vilification and threats against others. As such, the TV show and the media reporting fed on one another, maintaining interest in the weekly program and selling newspaper copies.

See <http://www.aftonbladet.se/nyheter/article20364668.ab> (accessed 2015-04-13)

<sup>220</sup> In only the space of a few short years, icons such as X-Boxes and iPhones have been developed not only as actual products but also, in parallel, as cultural icons with a linguistic meaning. We say ‘Do you want to see my iMac?’ rather than ‘Do you want to see my computer?’ and assume others to understand.

and Urry 1994; Bauman 1992). An image of a scraggly sex offender conveys a thousand words, supposedly, about the danger these individuals pose. Alongside this real-life drama, crime fiction television increasingly devotes itself to answering the question ‘why did the offender do it?’ in terms of human pathology or psychiatric labels rather than by reference to class or socio-economic circumstances.<sup>221</sup> Contemporary crime control ‘unfold[s] in the shadow of monstrosities’ (Valier 2004:1).<sup>222</sup>

Human knowledge has been communicated through various media for thousands of years, but visual imagery in the form of symbols, pictograms and letters has brought about a change in the way we approach and code information and language. A relatively recent but dramatic shift in the way information is approached is the Internet and cyberspace, ‘the world’s largest shopping mall’ (Svedjedal 1996, n.p.) where everything is available and rarely subject to quality control. Modern media relies on imagery and symbols to convey messages: ‘style is substance and meaning resides in representation. Consequently, crime and crime control can only be understood as an ongoing spiral of inter-textual, image-driven, media loops’ (Jewkes 2004:33; Ferrell 2001) and ‘menu-based news’ (Perse 2001:44).

A society that values the written word less than imagery (Postman 1985) becomes a ‘viewer’s society’ (Mathiesen 1985; Mathiesen 1990), where icons are simpler to understand than complexity. Combined with a shift towards the political right with an emphasis on individual rights and responsibilities, tabloid media needing increasingly strong and graphic entertainment (with the use of atypical but high-impact events such as serious violent assaults) to retain the interest of viewers and the shift – in Scandinavia as elsewhere in Europe – away from previously cherished values of solidarity and community (Törrönen 2004; Ljungwald 2011) in favour of individual responsibility, crime is increasingly explained in panicked terms that focus on evil,

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<sup>221</sup> See, for example, US series *Criminal Minds* that is almost exclusively devoted to depicting gruesome, viscerally disturbing murders (often also including sexual victimization) that are then solved by a special team from the FBI whose breakthrough to solving the crime is generally the result of forensic evidence and psychological profiling of the offender. The offenders are almost without exception posited as men with a psychological or psychiatric illness, anti-social behaviour and lacking normal social skills and relationships, reinforcing the stigma around mental illness and the stereotype that the ‘typical’ rape/murder of a woman or child is conducted by a crazy, lone stranger (Houlihan n.d.).

<sup>222</sup> The CCTV footage of James Bulger, and the names Megan Kanka, Polly Klaas, Sarah Payne, Holly and Jessica have been given iconic status in our collective consciousness, and contemporary society has been called ‘pictographic’ and ‘iconocentric’ (Valier 2004:1).

deviant individuals responsible for wrongdoing. Yvonne Jewkes uses the term 'threshold' to convey the idea that a news story must have a certain something to pique public interest: news stories which contained *drama and risk; celebrities; a sexual component; the macabre; an ironic angle; and the counter-story* are increasingly frequent (see also Hall *et al.* 1978; Roshier 1973). The rise of the paedophile discourse is a logical extension of this.

Milton Rokeach's (1973) link between values, attitudes and beliefs demonstrates the interplay between previously held attitudes (towards, for instance, a social construct like 'sex offenders') and their reinforcement when new information flows in (these days, often through media). Human beings are more prone to recall information that supports one's opinion than information that challenges it, and to interpret information in a way that supports previously held convictions (Gilovich 1991; Hartwig 2007). In other words, different persons reading the same information (for instance, a newspaper headline claiming that 20% of all sex offenders reoffend within five years) will interpret it differently: those who believe that sex offenders cannot be rehabilitated will understand the heading to mean that 'many' sex offenders reoffend, while those who believe in the human capacity to change will interpret it to mean that the vast majority of sex offenders *do not* reoffend over time. This heightened media attention, the use of symbolic imagery and subsequent community concern has shaped 'understandings of criminalization, crime control and victimisation' (Mythen 2007:467; Greer 2005:174) on a global level.

### **Media representations of crime**

Journalists play a key role in constructing deviance and normalcy (Grabosky and Wilson 1989:139; Ericson 1987) and provide a form of moral guidance on right and wrong. Modern-day moral panics are intrinsically linked with media reactions, either created or fuelled by media attention (Sarre 2011; Valier 2004). The reporting paradox is that while the most common types of crime (crimes against property) receive little media attention, crimes of violence, which are unusual, get much greater coverage (Grabosky and Wilson 1989:11). While journalists tend to view their first and foremost role as *informing the public* as an 'essential requisite of a democratic society' (1989:11) an additional role of media is *entertainment*. A third role of course

is to bring in *profit* for its owners (Grabosky and Wilson 1989:12). A fourth role that Grabosky and Wilson point to is ‘to provide a focus for the *affirmation of public morality*’ (1989:12).<sup>223</sup> Crime news serves the function of a morality play (Grabosky and Wilson 1989:12; Katz 1987:48-52) when media discourse, similarly to court judgments, tends to fashion criminal offending as modern-day versions of morality plays.

Mathiesen (1978:49-55) points to five means by which media partake in the ‘disciplination process’ of citizens:

- firstly by *individualizing* an act, by pointing to the persons involved as responsible for unfortunate events rather than larger systemic failures (such as when a parole officer recommends the release of a convicted sex offender who then reoffends).
- This, in turn, leads to a process of *normalization* – by linking the inexplicable to other known circumstances (‘we know that this type of erroneous prediction is common among officers who often operate under great stress’).
- Thirdly, the single act or omission is *encapsulated* into criticism of current circumstances with a view to improving matters (‘the Department of Justice is currently reviewing their employment process with a view to better being able to screen those who apply for work here and thereby reducing this type of incidents’).
- The fourth element of this management strategy is to *adhere* to the critique (‘the minister of Justice is the first one to admit that the prison routines have been inadequate and hopes that the Ministry can learn from this unfortunate event’).
- Last but not least, a *delegation of responsibility* sets the scene for continued drama: this includes measures such as announcing that in the near future, responsibility for the area under critique will be taken over by a different department. This pattern of public control fulfils the public’s need for

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<sup>223</sup> When an English newspaper reported that a group of adults on a housing estate had engaged in sexual abuse of their own and others’ children, the perpetrators were physically attacked by neighbours. Nothing was done, however, among the same neighbours to report the matter to the police or social authorities, nor to physically intervene to remove the children from the supposedly abusive environments. Anger towards the offenders seemed easier to muster than compassion for the victims (La Fontaine 1990:231-232).

information and reassurance; creates a simple but strategically effective pattern for dramatizing an event for mass media; and ensures that politicians can, paradoxically, be the subject of reproach and responsibility at the same time.

When offenders or prisoners are the subject of media attention, it is rarely flattering. In order to make stories more newsworthy, there is a great deal of sensationalizing. This can be done by adding emotive adjectives to the person's status (words like 'dangerous', 'mad psychopath', 'child slayer', 'animal', 'sex fiend' and so forth; Grabosky and Wilson 1989:69), or by speculating as to the person's propensity to commit new, horrifying crimes. One event, for example the release of a convicted sex offender, will lead to a string of articles on similar themes, 'milking' (Fishman 1980) its newsworthiness to the limit.

### **Moral panics and sex offenders**

'Moral Panics...form part of a sensitizing and legitimizing process for solidifying moral boundaries, identifying 'enemies within', strengthening the powers of state control and enabling law and order to be promoted without cognisance of the social divisions and conflicts which produce deviance and political dissent.'

(Muncie 2001:55-56)

Svend Ranulf's *Moral Indignation and Middle Class Psychology*, first published in 1938, was an attempt at analysing the conditions under which 'a disinterested demand for punishment appears in society' (Ranulf 1938/1964:x). The 'disinterested' public is not directly affected by a wrongdoing but who view punishment as necessary for the public order *per se*. Moral indignation becomes the luxury of the middle class who wish to see others punished for their immorality.<sup>224</sup>

Moral panics are not exclusive to modern society. Medieval European history has seen moral panics break out over witchcraft and Satanism – a semi-formal form of regulation of a community's sexual and social behaviour that coincided closely with formal penal law (Mathiesen 1990; also Thompson 1998:1). The deviant or criminal

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<sup>224</sup> Jewkes (2004:13) sums this approach up when she points out that horrified media columnists, for instance, are never concerned about the wellbeing of *their own* children but always fretful about the 'offspring of the already threatening "underclass"'.



activities of women in particular have often been presented as potentially immoral and a threat to society across time, as have sexual deviants. Perpetrators of crime are particularly prone to be regarded as ‘folk devils’ (Cohen 1972) and elicit a strong sense of righteousness (Thompson 1998:8). Stanley Cohen’s definition of moral panic stressed the *collective* behaviour that determines the action of a group: mass hysteria, mass delusion, riots and rumours form a *politics of anxiety theory* (also Pearson 1983).<sup>225</sup>

But Willem de Haan (1998) questions the implication that the public holds *disproportionate* levels of fear and anxiety not correspondent to real levels of crime, (as measured by police statistics, for instance).<sup>226</sup> Rather, moral panics contain a grain of truth, an actual problem (Mathiesen 1990:13) that is given symbolic importance and comes to represent all wrongdoers in that category. For instance, a single paedophile reoffending whilst on parole is taken as evidence that (all) paedophiles will reoffend, and thus present a constant danger to children in society. By focusing on the worst incidents, these can be condemned ‘as if these are typical and representative.’ (Thompson 1998:17; Goode and Ben-Yehuda 1994:120)<sup>227</sup> Moral panics are the triumph of perception over substance.<sup>228</sup>

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<sup>225</sup> While American sociologists tend to explain moral panics in terms of social or psychological factors (e.g. anxiety or stress), British researchers tend to emphasize factors such as crises of capitalism or state authoritarianism (Thompson 1998:16). For instance, Stuart Hall and colleagues (1978) linked anxiety over black muggings to economic crises and unemployment.

<sup>226</sup> In particular, he notes that discarding public fear as merely an expression of a ‘moral panic’ disregards the very real dangers that members of the community face in their daily lives. Being the victim of random or violent crime *is* a ‘disorienting’, vulnerable experience that may ‘shatter the victim’s belief in the world as a rational, hence predicable, place over which they have at least some control.’ (de Haan 1998:398)

<sup>227</sup> The term ‘moral panic’ has been criticised on a number of levels. The term is seen by some to be overly emotive and value-laden, indicating that the concern is irrational or not genuine (Thompson 1998:10). Waddington argues that the term ‘is a polemical rather than an analytical concept (1986:258); he points to the lack of criteria of proportionality to determine whether concern in a particular case is justified or not (Thompson 1998:10; Waddington 1986:247). Jock Young (2009) warns against using the catchphrase ‘moral panic’ as an all-encompassing derogation of seemingly incongruent or irrational public behaviour, without factoring in the circumstances in which it was first used (the dramatic riots of 1968 and their effect on the literature on the sociology of deviance). The original moral panic of 1968, Young (2009) notes, was rooted in great societal changes in the value systems of Western societies but simultaneously referred to relatively distinct perceived threats to established values (drug use and promiscuity).

<sup>228</sup> Indeed, the term ‘moral panic’ itself, Thompson (1998:vii) notes, is ‘sometimes used in connection to phenomena that have nothing to do with morals at all’. More to the point, it is a problematic phrase: ‘Its meaning is taken to be self-evident and it is used not only by sociologists but also by the mass media. As such, it provides a good example of the explanatory problems faced by social science because they concern a ‘pre-interpreted’ world of lay meanings’ (Ibid.).

Moral panics around sex often rely on psycho-medical explanations for offending behaviour – homosexuals as ‘sick’, paedophilic rapists as ‘deranged’ and the spread of AIDS as the ‘gay plague’ (Sontag 1989; Blaikie 1991; 1996:129). Using words like ‘epidemic’ (such as in relation to the supposed ‘epidemics’ of teenage pregnancy; Blaikie 1996) fuels the sense of emergency. A popular and oft-repeated ill in society is ‘the decline in family values and moral discipline’ (Thompson 1998:3; Blaikie 1996; Jewkes 2004). That the causation chain of a moral panic is phrased in medical terminology or systemic failure does not hinder the solution being individualized. Rather than advocating systemic change, redirecting budgetary resources or overhauling the criminal justice system, solutions are phrased in terms of the victim (Ryan 1971) or the perpetrator needing to take responsibility for their own misfortune: single mums are encouraged to ‘go back to work’, paedophiles need to ‘seek treatment’ and parents need to ‘take control’ of their delinquent children.

While sociological literature has used the language of moral panics to explain sudden outbursts of social concern over particular issues that intrinsically form part of the Othering agenda, others have pointed to the changing nature of society as leading to fewer and less intense such panics. As Jock Young (1998:84) points out, it is difficult to blame the Other when crime becomes so pervasive in society, so spread across class and ethnic groups that scapegoats are not readily found merely among minorities. Moreover, moral panics have become so frequent and diverse that the very ‘problem’ at the heart of them is often called into question (McRobbie and Thornton 1995). Social media has lessened the influence of tabloids and state media, and in a world inundated with reality TV, Twitter and constant news updates on the Internet those at the heart of scandals are as often the ones who go public about them in the first place, lessening the moral impact of ‘old media’ breaking the news.

Media perceptions of community fears can also be biased (such as when Swedish regional newspaper *Skaraborgs Läns Tidning* opened a piece on a convicted serial rapist with ‘He was called the MP3 man and spread fear around Western Sweden’, without further specifying the degree to which this fear was assessed or quantified<sup>229</sup>). In Australia, media clearly played on the supposed fear and disgust of community

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<sup>229</sup> Börje Andersson (11 February 2015) ‘*Så satte han skräck i Väst-Sverige*’. <http://www.skaraborgslanstidning.se/artikel/244104/sa-satte-han-skrack-i-vast-sverige> (accessed 2015-04-13)

residents in their reporting of the whereabouts of Dennis Ferguson following his release from prison in 2004. For instance, *ABC News* in 2009 published a photograph of Mr. Ferguson on a beach, with children playing in the background, with the headline ‘*Ferguson’s beach frolic “horrible”*’ – the latter a quote by Bravehearts charity executive director Hetty Johnston. Relating to ‘the photo controversy’ in its text, the ABC article does not mention their own role in creating the controversy in the first place, nor how Mr. Ferguson, who has been legally blind his entire life and was supervised and in company of others at the time the photograph was taken, could pose a threat to the children on the beach (who were clearly visible in the background).<sup>230</sup>

Malin Åkerström (1998) uses Noelle-Neumann’s (1986) ‘spiral of silence’ theory to highlight that opinions and attitudes expressed by ‘the public’ that do not resonate with the majority’s concern are often taken to be insignificant or erroneous. For instance, when respondents are asked about whether they feel fearful of sexual violence, focus lies rather on *how* fearful they are – somewhat, a great deal, or very fearful. Those who respond that they are not fearful at all are given little space. Thus a moral panic is expected to have started if ‘many’ – meaning some, but not all – newspapers report on a matter, or if ‘several’ parents express concern over a paedophile living in their community.<sup>231</sup>

Common sense-approaches to explaining social phenomena rely on an illusion of shared meaning, something Anthony Giddens refers to as a ‘double hermeneutic’ (1977:12). What we believe to be ‘common-sense’ and unquestioned truths are, however, ‘culturally derived mythologies specific not only to individual cultures but also to particular points in time’ (Jewkes 2004:12; see also Barthes 1973; Foucault 1977/1987; Geertz 1983). Baudrillard noted in 1976 that signage and new technology – through ‘media, computers, information processes, entertainment and knowledge industries [have replaced] industrial production and political economy as the organising principle of economy’ (Sarup 1996:110). Baudrillard took up Marshall

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<sup>230</sup> Brigid Andersen (28 October 2009) ‘*Ferguson’s beach frolic “horrible”*’. <http://www.abc.net.au/news/2009-10-28/fergusons-beach-frolic-horrible/1120294> (accessed 2015-04-13)

<sup>231</sup> Using the example of street robberies – ‘muggings’ – in his hometown Amsterdam, de Haan similarly critiques the theories by Stuart Hall and colleagues (1978) that relied on ‘the public’ having particular concerns that were inflated by media attention but where the authors neither asked citizens about their concerns nor their interpretation of the media reporting (de Haan 1998:397-398; Sumner 1981:283).

McLuhan's ideas on the role of media as *creators*, not merely reencounters of events (McLuhan 1964). Media brings private things out in the open and normalises the exceptional. 'The media now provide a simulacra of actual events which themselves become more real than "the real" which they supposedly represent.' (Sarup 1996:112; McLuhan 1964; Baudrillard 1975; 1976; Poster 1988; for a critique of Baudrillard, see Norris 1992.)

### **The victimalization of deviance**

Crime – real, or perceived – threatens our feelings of 'ontological security' (Giddens 1991; de Haan 1998; Lerner 1980), and the loss of trust can lead to higher degrees of moral indignation than physical or monetary injury (de Haan 1998:395). Ontological security stems from the predictability that daily routine offers, and when this is shattered by a random event such as an act of violence it can lead to the victim experiencing severe, long-term feelings of vulnerability, anxiety and fear (de Haan 1998; Lejeune and Alex 1973:272-273). Such a loss of trust affects a person's life-world (Giddens 1991; Silberman 1978) and those around the victim, starting a spiralling insecurity that in turn affects the choices made by the victim and their community.

Historically, the victim of sexual offences has played a rather insignificant role in the determination of guilt and punishment of the offender. That the role of the victim is increasingly acknowledged is evidenced by several recent formal and informal changes in the way the state treats offenders and victims. Initially introduced above all to assist female victims of sexual violence, the practice of appointing a legal counsel to support and assist the victim has become increasingly common in many jurisdictions.<sup>232</sup>

Hans Boutellier (2000) describes the development of acknowledging disproportionately more rights for victims of crime to influence policy in recent years as the victimalization of deviance. The shift stems in part from an acknowledgement

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<sup>232</sup> First introduced into Norwegian and Danish practice in the early 1980s (SOU 2007:6 p. 106), the idea that victims, in particular child victims of sexual and domestic violence and victims of rape, could benefit from a special injured party counsel to advocate their rights was established in the 1986 governmental inquiry into the matter (SOU 1986:49, *Målsägandebiträde*).

of the particular hardships facing victim of sexual violence – in Sweden this came in the form of the 1982 government inquiry (SOU 1982:61, *Våldtäkt och andra sexuella övergrepp*) that for the first time acknowledged that rape victims often withdrew their complaints due to unease regarding the court process and a fear of having to face the perpetrator again. The 1982 inquiry was the result of a dramatic reconceptualisation of sexual violence following the release of the heavily criticised previous inquiry (SOU 1976:9), combined with the inroads taken by feminist advocates for change in the late 1970s and early 1980s (moreover, the 1976 inquiry committee consisted of seven men and one woman while the 1982 inquiry had a majority of women experts).

Though this type of official acknowledging is important, not least in terms of policy changes that can better address the particular and often comprehensive needs of victims<sup>233</sup>, what I term ‘the victimalization of deviance’ as a concept refers to the increasingly strong influence on popular discourse of The Crime Victim, whose stories conveyed in media often follow stereotypical and idealized paths. This is problematic not least to those who do not follow the idealized script of how victims are thought to act, think, react and behave. The victimalization of deviance is also closely linked to the emotionalization of deviance, and the two in conjunction can drown out more detached but experienced voices in the debate (such as criminologists and other experts, who are at times viewed with suspicion in popular media not least because of the assumption that until one has experienced sexual violence firsthand, one cannot know ‘how it feels’ and therefore not be qualified to speak of what victims need).

## **Summary of findings**

This chapter has found that there are six distinguishing features to the crime politics operating in the field of deviance and dangerousness in Australian and Swedish sex offender regulation.

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<sup>233</sup> The 1982 inquiry also noted that support afforded to victims tended to be limited to medical and health-care matters and overlooked psychological, social and legal needs on the part of the victim (SOU 2007:6, p.104). At the same time a report commissioned as part of the inquiry (Bilaga 2, SOU 1982:61) demonstrated the effects of early and supportive intervention both in terms of improving the psychological health of the victim and increase their ability to proceed with the legal process.

## **The scientization of deviance**

Risk assessments and a reliance on public health professionals who regard deviance as illness and offenders as sick in ‘objective’ terms has led to the ‘treatment’ of sex offenders to be a political, not merely medical, question. It is a political decision to determine which health professionals are deemed to possess the expertise to determine dangerousness to be present, but once the appointment has been done it is up to the health professionals to make the right decisions. When an offender escapes and reoffends, the blame is directed to the failures of the system that was inadequate in predicting this – as if it were possible to determine events ahead of time with absolute certainty. In Sweden, when a dangerous offender escaped from a forensic hospital in May, 2015, media focus was heavily on the failures by hospital staff as well as the local police.

Dangerousness has been codified in Australian legislation but not yet to the same degree in Swedish politics, though as mentioned above the 2002:3 SOU by Psykansvarskommittén does include a lengthy discussion on the matter. In popular terms, however, there are no degrees of dangerousness when outraged readers take to social media. Dangerousness is the new *toujours-déjà* in crime policy.

## **The moralization of deviance**

‘Law, in particular criminal law, occupies a special place as regards the morality of a society.’ (Boutellier 2000:11) This has always been true, in particular in those eras when religion was inseparable from the law. In recent years, however, crime has become a moral problem (Boutellier 2000:41), something simultaneously inevitable and intolerable. In increasingly secular societies, the yearning for moral certainty has a contemporary counterpart in the regulation of ‘dangerous’ sex offenders, where wrongdoing is discovered, punished and leads to a return to a balanced status quo. This is a secular, issues-driven morality where deviance is ‘wrong’ on moral, not philosophical or social order grounds (unlike Becker’s (1963) outsiders and drug users who were thought to pose a threat to social order itself, sex offenders are seen as morally dysfunctional and failed individuals who have a moral obligation to reform). The shift here is small but significant: if paedophiles threaten the moral fabric of their community by their mere existence, reintegration and rehabilitation becomes a moral

imperative. Should this fail, continued detention beyond their serving their full prison term serves a moral purpose: the offender's obligation to comply and cooperate to hinder recidivism in order to protect the children and women of their community now rests on the offender's own shoulders.

### **The medialization of deviance**

Media has emerged as a moral medium (Holdaway and Rock 1998a) and now not only reports on, but actively defines deviance through its reporting. By positing sex offenders as dangerous through the use of emotive words (such as 'sex fiend', 'sex monster' and so forth), traditional mass media has carved out a place as moral and political guardians of the issue of deviance. Print and online media are instrumental in the creation and persistence of moral panics and determine whether deviance becomes funny, pathetic, threatening or pitiful. Words in headlines and pieces of journalism act as signifiers and by electing to use emotive and threatening language to describe paedophiles and convicted sex offenders, media discourse has a direct impact on community sentiments. On the other hand, a thoughtful and sensitively written piece on the adversarial consequences of sex offender registers and overly punitive sanctions can moderate or even sway public opinion towards more sympathetic attitudes towards deviants.

### **The politicalization of deviance**

Criminalization is an inherently political act (Persak 2007:5) and must therefore 'pass through the filter of politics' (Ost 2009:83). Behaviour that is harmful in a physical sense more easily passes through this filter than that which is only emotional, or relies on fantasy; the basis for the criminalization of pseudo-imagery of children such as cartoons or manga is not harm but assumptions that it may be used in grooming (Ost 2009:88).

The politicalization of deviance at times uses criminological understandings of deviance but couples them with individual explanations for offending. The politicalization of deviance operates as a function of social order. Legislation that infantilizes under the guise of effectiveness and 'control' (ritual control or symbolic control such as curfews, alcohol bans or requirements of travel plan notifications for

convicted sex offenders) leads to a system of managing and controlling deviance, rather than banning it outright. Deviance is politically regulated, medically treated and socially contested.

### **The emotionalization of deviance**

Emotive and subjective language explains crime policy, using processes of Othering and ‘stampedes’ around contemporary contentious issues. The scientization of deviance may be thought to operate in tension with the emotionalization of it, and to some degree this is true. However, the two are flip sides of the same conceptual coin. The role of emotions in the regulation of sexual offending is understudied but it is clear that sexual violence has historically often been described in emotive terms, in particular when it comes to the harm it poses to children. Few areas of criminal policy evoke such intense emotion as sex offending and regulatory responses to it, and in many ways the sex offender has come to represent all offenders – in particular the menacing, threatening stranger described in emotive language such as ‘monster’, ‘fiend’ or ‘creep’. Disgust is a commonly felt emotion when sexual violence is discussed and disgust operates as a strong driver for other emotions. Hatred is a moral emotion (McGinn 2011:5), and disgust can similarly be a source of pride (McGinn 2011). To hate or loathe sex offenders is learnt behaviour but which has become so commonplace that it has become almost expected; to express sympathy or empathy towards the offender can on the other hand be met with scorn or disbelief, even anger.

### **The victimalization of deviance**

When victims are given a voice in shaping media and community responses to sexual offending, it is recognition of the profound and injurious effects of sexual violence. The victimalization of deviance, however, is a conceptually different paradigm, whereby it becomes the task of the victims to define deviance and influence public policy (as was the case when the mother of Megan Kanka was influential in the creation of Megan’s Law). In the US, the parents of Jacob Wetterling lobbied for legislation enacted in their son’s memory while in Australia the families of Sofia Rodriguez-Urrutia-Shu in Western Australia and Daniel Morcombe in Queensland have become champions in the campaign for publicly accessible Sex Offender Registers. This conscious focus on the direct and indirect victims of deviance and



crime is a new political phenomenon (Boutellier 2000) and can be seen as a form of responsabilization of the suffering community.

To say that crime is imagined (Young 1996) or socially constructed is not to deny the very real and lasting harm sexual crime does to victims, and it may be both right and fitting that victims should be heard, acknowledged and given a voice in policy formation. However, the conscious process of victimalization is different in that victims become the bearers of morality when crime issues are discussed, and are expected to suffer in particular, stereotypical ways, as if they have a moral obligation to suffer from the wrong imposed on them (Boutellier 2000:15-18). This suffering is one-dimensional, lacking nuance and reflection. The fragmented nature of 'the victimological twist' (Boutellier 2000:47) and their increased position in criminal justice policy formation (such as when the mothers of abducted and murdered little girls are seen as experts in suffering and referred to both in media and official policy documents) is a heritage of second-wave feminism (Boutellier 2000:50) but has been hijacked into political agendas and used for political goals. Suffering is not lamentable per se, but a stage in a process of regulatory reform. But this is only true for ideal victims, who did not contribute in any way to their own misfortune. Girls abducted from the family home generate more sympathy than runaways, 'good girls' more than prostitutes and young children more than grown women. The process of Othering operates here also: it is easier to identify with those who resemble us and our loved ones. Relational distance – that is it is more difficult to feel sympathy for children who look different from our own, who live in cultures different from ours and whose circumstances one knows little about – may in part explain why some sexual behaviour leads to community concern while other acts remain out of the realm of media and societal interest.

When the rights of offenders and victims (real and potential) become placed at odds with one another, they appear to be incompatible. The 2002:3 SOU by Psykansvarskommittén alleges – in language eerily similar to political rhetoric from Australia – that 'protecting possible new victims of serious violent or sexual crimes weighs...more heavily than the individual right to freedom' (2002:269, personal translation, italics added). When rights become a win-lose situation – as if one must take precedence over another, and that there is not room for both – this begins to chip away at their status as inalienable and universal.

## **Conclusions: Panics and politics in the criminalization of sex**

Jürgen Habermas (1996) has described the legislative optimism that sees social interaction becoming increasingly regulated by formal norms ‘colonizing the life world’. What used to form part of the private sphere (such as marital rape and the physical discipline of one’s children) is now criminalized and a matter for the courts. It brings with it an increasing reliance on the regulatory system to provide ‘solutions’ and reasserts the power and relevance of the state in shifting postmodern societies. Alongside this, the rise of the ‘crime as politics’ discourse has had profound effects on how crime is regulated. The politicalization of crime policy shifts the knowledge basis for policy from politicians and experts to media and the community (Andersson 2002:130). It becomes a goal *per se* to adjust crime policy to ‘current values’ in society (Parliamentary Proposition 1984/85:100, p. 18), and for criminalization to be paired with actual praxis in courts to maintain its ‘credibility’ (Prop. 1984/1985:100, p.27). Society is thought of in this ideological framework as a mutually beneficial arrangement, whereby the state (through the legislative process) takes responsibility for its relationship with its citizens, and the citizens in turn take responsibility for their own actions and their own property (Andersson 2002:131).

For instance, violence against women becomes a matter of responsibility and changed moral mores, and the internalization of legal norms is the successful result of a socialization process beginning as early as in the preschool years and the joint responsibility of parents, teachers and others entrusted with the education of the younger generation (Prop. 1985/86:100, p.14). Foucault’s (1977/1987) idea of the disciplination process as ultimately resulting in self-discipline undoubtedly springs to mind here. Nevertheless the ‘solutions’ to the problem of violence against women are decidedly individual (such as prison time, fines or prohibition orders against the violent offender in question; Andersson 2002).

Michael Tonry (2004) posits that cultural sensibilities change slowly and that regulatory expressions of a nation are firmly rooted in its greater socio-political system – but also that the greater proximity of a shrinking global community will lead to more rapid impact of foreign-born regulatory initiatives than in traditional

conceptions of nation-states and their cultural particularities.<sup>234</sup> There has been a politicalization of crime.

Crime has become the ‘always already’ (*toujours-déjà*) of contemporary Western states struggling to define themselves in times of change; phrases like ‘law and order’, ‘justice’, ‘criminal’ and ‘sex offender’ operate as stop signs in debates when they are taken for granted to have one, unequivocal meaning. Purposeful or accidental slippage between words confuse: Robert Scholes (1987:218) makes a distinction between ‘as’ and ‘like’ that exemplifies this. To speak *as* a rape victim is fundamentally different from speaking *like* a rape victim when demanding reforms in sex offender legislation. And even the rape victim has no hegemonic right to interpret what victims need, or a presumption to speak on behalf of all victims. As the prominence of victims’ and relatives’ voices in law and order issues grows, the intuitive appeal of listening to those affected over distant experts must be tempered by recalling this fundamental difference in similes and perspectives. There has been a victimalization of crime.

Ritualized speech forms part of what Levinas (1981) thought of as an act of signification (Young 2000:58) and which Habermas referred to in his theory of communicative democracy as ‘grounded in everyday communicative ethics’ (Young 2000:59; Habermas 1990). Political speech, then, can be ritualized rhetoric, with proponents and opponents of change playing out a predetermined script, a narrative to ‘win over’ voters rather than arriving at the best solution (Bartelson 1995:248). Simplicity, catchphrases and media-friendly sound bites ensure that the message gets through.<sup>235</sup> There has been a medialization of crime.

Unlike Australian State and Territory policies in criminal justice matters, Swedish crime policy has rarely changed dramatically as the result of single events such as a horrific murder or the sexual victimization of a child. Rather, it has been a process of

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<sup>234</sup> Contemporary US statesmen may engage from time to time in various wars, such as the war on drugs or the war against crime. But the latter is nothing new: an 1889 book uses a similar title to convey the idea of a society in crisis that is left with no choice but to take up arms against the enemy within (Baker 1889). Mitchell described the situation thus in 1911: ‘In the constant state of warfare between the lawmaker and the lawbreaker...every new invention or practical application of scientific discovery has supplied each side with new weapons frequently of much greater precision.’ (Mitchell 1911:1)

<sup>235</sup> Just what does it mean to declare ‘war’ on drugs, terrorism, teenage pregnancies, school truancy or domestic violence? Goleman (1995:318) likens this ‘war’ to a crisis response, similar to calling for an ambulance instead of running immunisation campaigns.

*gradual differentiation* that sprung in part out of a regression in the status of experts and the increased prominence of ‘common-sense’ and the ‘public’s sense of justice’ in political rhetoric, part as an attempt for the state to reassert its role on an arena increasingly fragmented and diverse with new actors complementing the traditional state-provided security (Andersson 2002). Paradoxically, in both countries the 1990s saw both the decline of expert knowledge and the increase of it – the latter predominantly practitioners who found a niche in conducting risk assessment and developing strategic management approaches to regulating offenders of violent crime. Society *believes* in objectivity: ‘Science has...taken over the function of religion in so far as it pertains to the development of society.’ (Boutellier 2000:8) There has been a scientization of crime.

It is those with power who assign roles to the powerless and infuse those roles with meaning. Since our world ‘is socially produced in that the meanings are fabricated through the process of social interaction’ (Blumer 1969:69) – English words such as ‘prostitute’ or ‘human trafficking’ carry no meaning whatsoever to a toddler or a non-English speaker – ‘different groups come to develop different worlds’ (Blumer 1969:199). ‘Paedophile’ means something different to a clinical psychiatrist than to an editor of the Daily Telegraph. The discourse around how we make sense of our experiences and internalize collective experience: ‘(I read somewhere that) sex offenders always reoffend’ to form part of our own discourse: ‘I don’t like sex offenders because (I believe) they always reoffend’. But when psychiatric labels thrown into tabloid reporting, we have ‘discourse out of place’ (Douglas 1966:35): it doesn’t belong there but it looks as if it does. To paraphrase Sartre, what we cannot measure disappears, and what we cannot name disappears too.

## CHAPTER 7: CONCLUSION

### Power, the state, and the regulation of sex

‘Criminal law is not the civilising cement which holds society together and prevents the anti-social unleashing of egoism and plunder that “human nature” would otherwise dictate....it is only one of many factors that affect the values we have and the way we behave. There are other forms and sites of regulation, in addition to criminal law, including the family, formal education, religion, the media, trade unions, cultural and sporting associations, social mores and, increasingly, the market, where people are regulated as consumers.’

(Brown *et al.* 2011:22)

This thesis has touched upon the complex issue that is the relationship between politics and the law. Regulating sexual offending is a set of processes ranging from psychology to legislation to criminal justice approaches. No one measure fits all approach is possible due to the complex socio-legal landscape that is the topic area and regulatory responses therefore also need to combine societal, systemic efforts from medical, criminal justice and political fields. In the new regulatory state where the state is ‘the anchor of collective security provision’ (Loader and Walker 2006), access to justice depends on a functioning justice, law and order sector. What kinds of security can the state guarantee that will satisfy community needs and yet balance the needs and rights of convicted offenders?

Sexual offending is a crime of the powerful against the powerless. It is the offender’s power over the victim (immediately, in the act, and psychologically for sometimes years or decades later), but it is also the state’s power to declare some acts deviant and others normal. The political underpinnings between declaring adult pornography to be ‘normal’ – or at least not deviant enough to merit criminalization – and so-called child pornography to be deviant, is a symbolic power on the part of the lawmaker. Sex offenders make for good symbols in crime politics because they are key linguistic signifiers whose plight rarely is cause for concern.

There are many forms of governance which are never written down, and yet influence our lives more decidedly and with precise detail than the rules on the statute books.

State monopoly on power, including the power to determine and sanction deviance, stands against regulatory pluralism, and ‘law in the books’ fights it out with ‘law in action’. In a *Rechtsstaat*, the existence of law is a beginning, not the end to illegal or deviant behaviour. It may influence some (mostly already) law-abiding citizens to continue to abide by the law. It may assist in the process of retribution, restoration and reparation after a crime has been committed. But it will never succeed in completely stamping out violent crime such as rapes or other crimes against humanity. Yet we believe in the law, in its power to change. Crime politics is an ideology-generating mechanism in the Marxian sense of the term: the victim ideology and the moral ideology rely on emotional affect that at times act in considerable tension with evidence-based policy (Freiberg and Carson 2010).

Single instances of crime may be so-called ‘black swans’ (Taleb 2007) – unpredictable events that shape the course of history, and result in major policy changes due to single events. This is apparent in Australian sex offender policy as well as in American and British policy. Sweden has been more reluctant to change policy direction as a direct result of single events – in part no doubt because of the lengthy and deliberative process that a legal reform entails – but it does occur. When not-for-profit organisation ECPAT ran a campaign in August 2014 that highlighted the fact that certain crimes relating to sexual assaults of children can result in only monetary fines, then-Minister for Justice Beatrice Ask swiftly penned an open letter to the newspaper *Expressen*. There she argued that an oversight of the penalty scales for sexual offences involving children was ‘of the highest priority’ and that it was ‘unreasonable’ that these types of offences could lead to only monetary fines. In other words, the campaign which focused on a symbolic and semantic issue – that sexual offences involving children could incur a penalty scale similar to the offence of throwing rubbish in the street – and which encouraged readers to ‘show that they were on the children’s side’ ([www.sopigstraffskala.se](http://www.sopigstraffskala.se)) by ‘taking a stand’ and sharing the site on their preferred social media site, led to politicians of all the major political parties and members of the Government feeling obliged to get involved in the debate and enthusiastically declare their support for tougher penalties.<sup>236</sup>

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<sup>236</sup> See [www.sopigstraffskala.se](http://www.sopigstraffskala.se) for these declarations and for more information on the campaign.

Symbolic legislation, Nils Jareborg argues, in reality does little other than reassure a worried public, making people believe that something is being done to combat crime, or legitimise state authority (Jareborg 2001:69). This is a symptom of reassurance politics: creating a problem and then ‘fixing’ it so politicians are seen to be ‘doing’ something is much like orchestrating and conducting public fear like a concert (Edelman 1988). The ‘problem’ of deviant sex offending is in part a symbolic problem, not in the sense that the offending is not real – far from it – but because its proposed solutions lie in punitive regulatory stampeding where alternatives are rarely considered.<sup>237</sup>

Convicted sex offenders, in particular those who have sexually offended against children, are among the most loathed and despised members of a society (Craissati 2004; La Fond 2005; Mullins 2009; Svensson 2012). This is not without good reason. It is increasingly recognized that sexual violation of a child has profound and long-lasting effects on the child (SOU 2009:99; SOU 2011:9; PACE Rec.1934 (2010)). The physical body can be permanently injured, so that among other things a raped girl may be unable to have children. The emotional injury of the degradation and humiliation of sexual abuse can last a lifetime. The trauma of sexual violation in childhood can affect a person for years to come, and affect the victim/survivor’s physical, mental, emotional, financial and social health (SOU 2011:9: 133; SOU 2009:99; for an account in English see *Residential Institutions Redress Act 2002 (Ireland)*).

This is what paedophilic sexual violation does, to be sure. And so it is with uneasiness that society increasingly recognizes that sexual violence directed at children is not limited to a small group of deviant predators. In the governmental inquiry entitled ‘The children society betrayed: actions due to abuse and serious neglect in societal care’ (SOU 2011:9, personal translation), the Swedish inquiry into foster care found that 61% of the women interviewed, and 42% of the men, were victims of sexual violence as children whilst in state-operated residential homes or family-based foster care in the years between 1950 and 1980. Similar governmental inquiries in Australia, Canada, Ireland, Iceland, Norway and the UK have found similarly that sexual abuse of children are not isolated events but prevalent and occurring on systemic levels

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<sup>237</sup> Encouragingly, Gromet & Darley (2009) found that the public consciousness was entirely capable of demanding multiple criminal justice goals at the same time, and that people saw no contradiction between punitive and restorative penal responses. The apparent conflict between restorative justice and retributive justice can be successfully reconciled. See also Jerre and Tham 2010.

(SOU 2011:9). The Council of Europe (CE) estimates that one in five European children is the victim of some form of sexual violence, with 70-85% of these offences committed by someone the child knows and trusts (2010).

To want to shield and protect one's loved ones from danger is a strong, immediate human instinct, and so to fear and loathe those who sexually prey on children is not an irrational over-reaction but a natural response to a threat. The uncomfortable truth here is that those who offend are statistically also likely to be persons known to and loved by the child: the children's father, stepfather, grandparent or someone else in the child's family circle or immediate vicinity. Clifford Shearing (1998:18) has suggested that it is not *crime* that is central to criminology, but the issue of *security*: security in a wider sense: the right to feel safe and secure. This 'rendezvous' point (Holdaway and Rock 1998b) is where this thesis fuses sex offending – the criminal act – with the unease that deviance makes us feel, and the symbolic gestures – legislative and others – that reassure. Security is not 'out there' – it is 'in here'. It is perhaps by focusing on those perceived to present a danger to our way of being, to our illusory feelings of safety and to the happiness of those we love, that we can re-establish a sense of predictability and order into our world. Therein, perhaps, lies the appeal on the last decade's extensive and intensive focus on the regulation of convicted sex offenders. The idea that sex offenders are 'test pilots' for state control, to see what the state can get away with in terms of repressive measures and control, is not so far-fetched then (Rutherford 1997).

Governments 'governing through sex' promote 'good' sex and denounce 'bad' forms of sex, through the narration of sex, for instance through the healthy sex paradigm in offender treatment. Narratives of sexuality include 'rape as power', 'rape as violence', 'rape as sex gone wrong' and 'rape as sex' (so that under *sharia* law, if 'rape' cannot be proven, it is still sex and the victim can be convicted of adultery or fornication). Discourses sometimes contradict, other times they overlap or merely travel along parallel paths. For instance, in the prostitution/sex worker debate, those in favour of the 'legal sex worker' discourse rely on arguments of civil liberty – which may well be true. Those against rely on an ethic of protection (that the 'worker' or 'seller' is hurt, whether or not they know or admit to it themselves) – which may also very well be true. So the arguments to support for/against are incomparable – they are not opposing truths so much as parallel truths or unrelated truths.



## **The significance of this research for the sociology of law**

My thesis has shown that social mores, exemplified by sexual mores, are slowly but steadily converging across the Western world towards a liberal and individualistic, pro-women's view on sexual behaviour. This convergence questions and challenges male sexual hegemony and forms part of a redefining process of normalcy and deviance. The crucial exception to this convergence is the issue of homosexuality which continues to be a contested arena of values. The field of homosexual sexual rights has seen fierce clashes between a multitude of actors with different agendas, linking gayhood to family values, human rights, morality, degeneration, race, nationalism and fascism, to name a few. The justifications for the demonization of the homosexual and their lifestyle stem from their perceived threat to stability and predictability, not only in their own immediate family and surrounds but to the nation they live in as a whole.

Social mores are a crucial focus of sociological studies, and are significant in the sociology of law. Socio-legal mores depend on a successful integration of human behaviour in the face of law, and an understanding of what the law 'means' to people in their daily lives. As law is increasingly uncoupled from religion in increasingly secular Western civilizations, morality and ethics are redefined away from 'sinful' behaviour that affronts a deity or the church, towards secular considerations of what is right and wrong in terms of societal and interpersonal consequences. Law has become a bearer of morality, as a beacon that shines light on what the state, society and communities accept and judge to be 'right' and 'wrong'.

It is therefore not altogether surprising that media and social commentators look to the law, in particular criminal law, to guide assertions of 'normal' versus 'deviant' behaviour, or that issues of crime and justice are increasingly debated both in popular traditional and social media and in political debate. The symbolism of the criminal legal system as a community unifier hinges on its apolitical appearance: that it rests on timeless principles that remain untouched by more petty political embarkations towards populism or vote-scrambling.

The sexual behaviour of others has been an endless source of human fascination since time immemorial. Sex has a close relationship to marriage and to procreation, and its ability to evoke strong emotions (from passionate love to insuppressible rage, from joy to guilt) may well go some way in explaining its pervasive importance in societal, religious, legal and moral matters in virtually every society and community on earth.

This thesis has focused on the regulation of sexual offending as a site where so many of these different variables come together. Some sexual crimes are universally and constantly condemned as some of the most abhorrent human action possible, while other acts criminalized as 'sex crimes' are by no means as unequivocally or uniformly condemned. The umbrella term of 'sexual offending' is by no means a clear signifier, as it holds so many diverse acts. Nevertheless, symbolic gestures of condemnation of 'sex offenders' rely on the tainting by association of individuals convicted by one, or some, of these offences by semantically and emotionally coupling them with others. Moreover, some sexual mores are sensitive to political and legislative changes while others remain remarkably consistent over time and across space.

### **Global norms, local crimes: International perspectives on sex offending**

Sex offending has always been a locally committed crime, but in recent years a global dimension has been added. There is an emerging 'glocal' level of organized crime (Hobbs and Dunnighan 1998), where human trafficking for sexual purposes cross national borders and requires multinational responses as well as the assistance of both local and national police. The dimensions of the local point are negotiated inside global paradigms (Latour 1993), with each specific act pinning down the international to a place on the map. An example of this is the distribution of child pornography, which is a crime that has global dimensions but where the initial creation of the pornographic material took place in a geospatial jurisdiction and where each actual download occurs in a physical computer in a particular jurisdiction. The internet and other modes of electronic communication mean that a sexual assault can occur in one jurisdiction but be viewed in many others, as photos and films of abuse are sold or traded. What is more, a perpetrator can 'place an order' for a film containing an assault of a particular kind, and thus instigate crimes that in fact take place in a different state or country in real time. These innovations place a strain on legal and

prosecutorial resources, as one single photo or film may be sold to thousands of buyers across the world.

In May 2015 a convicted sex offender escaped from closed forensic care in Sundsvall, Sweden. The man was described by staff at the institution as a 'sadistic paedophile' who would be at high risk of reoffending. While on the run he contacted young girls in an effort to procure child pornographic imagery. A month later he was apprehended in Turkey, following an international arrest order. The plan was allegedly to continue on to Vietnam to abuse children there. The case shows that as sex offenders cross borders and operate in multiple jurisdictions, so the response also needs to be international, cooperative and synchronised.

The new global dimension crosses jurisdictional boundaries and has required law reforms that transgress established legal principles as a consequence. This includes offences such as having sexual intercourse with minors (aimed at bringing paedophiles committing sexual offences overseas to justice) and offences relating to child pornography offences. This places high demands on the relevant legislation being transparent, logical and of an internationally accepted standard, which in turn has an effect on the criminalization of sexual offending in Australia's states and territories.

We live in an era of instant messaging, where trivialization of news has become commonplace and where it is possible to form judgment on social issues by reading a tweet or a status update in a social forum. Traditional media has to speed up to keep up, and so news becomes sensationalized in tantalizing menus of disgust and curiosity. As media sources in the Western world are converging, emanating increasingly from global providers of information and entertainment, it is impossible to escape the influx of crime news from other countries. This in turn affects public understandings of the legal system, of justice, of right and wrong, and of what punishment is and should be. Moreover, jurors, law students and judges are by no means immune to the creeping changes to the societal legal consciousness, nor are their opinions developed in a vacuum.

As the Australian and Swedish experiences illustrate, the regulation of sexual offending follows this global trend towards convergence, and clearly exemplifies how

social mores – in this case, sexual mores – are increasingly secular, detached from greater considerations of morality or philosophy, and astonishingly similar across countries and jurisdictions. Two such diverse countries as Australia – a federation that rests on common law foundations, with a colonial heritage with British overtones – and Sweden, an ethnically homogeneous Lutheran agrarian society turned socially progressive – that are so very different in so many respects yet have remarkably similar regulatory schema. When so many other social issues are wildly contested and regulated so differently between the two countries – abortion, same-sex marriage, education, healthcare, parental leave schemes, and so forth – why is it that the same values should nevertheless underpin the regulation of sexual offending and sexual offenders?

It is not by reference to each country's political system, for they vary greatly, nor by its law-making structures which share few common traits. The police forces are administered very differently, as are the criminal justice system and the prison and criminal care systems.

There are two possible, alternative explanations. The first is that sexual offending is such a universally recognized abhorrence that the condemnation and punishment of it in different jurisdictions follow the same logical path. There simply are no alternatives to imprisoning wrongdoers who have committed sexual atrocities, and defining these atrocities is easy as sexual crimes are self-explanatory. Whether by intuition, moral or divine guidance or by education or reflection, each person in society will come to the same conclusion as to which these horrid crimes are and how they should be punished. Opinions about crime are simultaneously deeply personal and glaringly collective.

The second possibility is that what society considers to be a sexual offence is by no means a given, and that our understanding of sexual mores is a blend of attitudes towards sexuality and gender, personal experience, fantasy and ideology, where understanding sexual offending can only be done by teasing it out from both private and collective understandings of sexuality itself. In this view, sexual offending regulation is a constantly shifting landscape where scientific research, community events, media reporting, developing technologies and increased awareness of global streams of legal consciousness all form parts of the road that each jurisdiction takes. Why, for instance, is the purchase of sexual services permitted (though regulated) in

several Australian jurisdictions, but prohibited in Sweden? Why, on the other hand, is same-sex marriage permitted in Sweden but still a contentious issue in Australian politics? I argue that in the case of the former, there is a strong Australian tradition of individual liberalism that justifies both male sexual entitlement and the (mostly) female ‘right’ to sell sexual services and that, drawing on a centuries-old tradition of tolerating prostitution is consistent with a heteronormative paradigm of controlling ‘whoring’ as long as it is kept out of sight. Sweden, on the other hand, has seen social democratic traditions of protection of the weak join up with activist feminist ideals in order to advance freedom from the sexual patriarchy (it was the Social Democratic party’s women’s chapter that first advanced the proposal to criminalize the purchase of sexual services). Even so, we are moving towards a global regulation of sexual deviance that unites more than it divides.

In the case of same-sex marriage, it is noteworthy that in Sweden, one of the most secularised countries in the world according to the World Values Survey, the Swedish Church has in the last two decades emerged as a champion of minority rights and activism for refugees, the homeless, migrants and other marginalised groups. It is therefore consistent with their heritage of Protestant ideals of individualism and personal ethics that gay marriage should be interpreted as an expression of love rather than sin.<sup>238</sup>

In Australia, defined as having a Protestant heritage in the World Values Survey and which rates as ‘moderate’ on the Survey’s secular-rational scale (whereas 25% of Australians defined themselves as Catholic in the 2011 Census on Population and Housing and 17% as Anglican, 22% defined themselves as having ‘no religion’<sup>239</sup>), secularism is written into the Constitution (Section 116).<sup>240</sup> Christian values underpin

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<sup>238</sup> Not all Swedish Christian leaders agree, however, on this. In April 2015 a group of representatives for the Pentecostal Church of Sweden (*Pingstkyrkan*) reiterated their stand that ‘practising’ homosexuality is a sin and that a person who lives a homosexual life is destined to go to hell (*‘Bibeln tydlig om homosexualitet’*, Dagen 9 April 2015, available on <http://www.dagen.se/debatt/bibeln-tydlig-om-homosexualitet-1.349464> (accessed 2015-04-15)). One of the authors, Mr. Tommy Dahlman, unsuccessfully ran for Member of Parliament for the Christian Democratic Party in the 2014 national elections. The Pentecostal Church of Sweden does not permit its ordained pastors to perform same-sex marriage ceremonies.

<sup>239</sup> See <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0Main+Features30Nov+2013> (accessed 2015-04-15).

<sup>240</sup> Both Australia and Sweden have, on the other hand, experienced a rise in fundamentalist Islamic teachings from clerics who take issue with feminism and universal human rights extending to women’s rights and those of sexual minorities. Moreover, so-called honour killings of women and men who have

political life to a higher degree than in Sweden. Prime Minister Tony Abbott, a practising conservative Catholic has made his objection to gay marriage known repeatedly and his government in 2013 challenged the newly enacted ACT same-sex marriage bill as unconstitutional.<sup>241</sup> Although Mr. Abbott regularly makes references to his personal views as based on religious and moral grounds, the rhetoric in the same-sex marriage debate has become more legal; Mr. Abbott was at pains to explain that while he himself is ‘a traditionalist’, the challenge to the ACT Act was ‘a question of adhering to the constitution’ (Griffiths 2013). As a Prime Minister and a politician, a hard-earned lesson in gaining credibility is no doubt learning to appear objective in contentious matters rather than openly bringing one’s personal views into the debate.

### **Individual and collective responses to deviance in society**

The body and its movements have gone from the public to the private sphere, and then more recently from the private to the public sphere again. This has had an impact on how sex is viewed, and consequently also sexual offending. Posting sex videos on the Internet or sharing sexually explicit stories on social media is in a sense a return to medieval mores around sex and a stark difference from the social mores around privacy and appropriate behaviour that dominated only fifty years ago. The work by Norbert Elias (1939/2000), on the development of sexual manners as a marker of civilisation, can be meaningfully applied to this development. The main thesis of Elias’ study of Western Europe normative ideas around chivalry was that as a society progressed, its citizens would become increasingly secretive around, and protective of, its bodies and their functions. This was evident in the way that ideas of modesty and hygiene travelled from the higher echelons of society down to the lower classes and over time, modesty in all matters that involved the body – from urination to washing to nudity and sexual habits – were increasingly closeted. There began the process of internal normative self-disciplination picked up by Michel Foucault, whose work links practices of discipline with body functions and sexual expression.

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been seen to ‘dishonour’ their families through, for instance, having extramarital relationships, is indicative of strict rules around sexuality clashing with Western liberal ideas.

<sup>241</sup> The *Marriage Equality (Same Sex) Act 2013 (ACT)* came into operation on 7 November 2013 but was struck down by the High Court about a month later on the grounds that it was inconsistent with the *Federal Marriage Act 1961 (Commonwealth)* and therefore had no effect.

My theoretical underpinning to the comparison of regulatory reforms in the field of sexual offending in Australia and Sweden – two in many respects very different countries across the globe from one another which nevertheless share a striking similarity in this regard – have therefore incorporated Elias’ thesis that sexuality is becoming increasingly regulated, regimented and problematized in legal terms, as well as Foucault’s radical view on the body as a centre of state regulation and the focus of intense scrutiny.

The thesis has problematised sexual offending in terms of age, geographical location, the presence or absence of physical violence, the relationship between offender and victim, and a number of other external, or objective, parameters. But the shift in legislation from seeing rape as ‘taking sex by force’ to ‘having intercourse with someone against their will’ or ‘without their consent’ is indicative of a larger problematisation of normative expressions of sexual boundaries and behaviours in a globalised postmodern society.

Nor are the responses to such events always predictable. Where one community is outraged, another is mournful. When news broke in April, 2014, of a 21-year-old man who had sexually abused children at a preschool where he interned in Högsby, Sweden, a multitude of emotions were reported in national news in the following weeks. Interestingly, those interviewed who knew the man and the children in question in the local community tended to express sadness rather than anger, while more distant readers and social media commentators, who had not been affected personally, reacted more angrily. For instance, an article in *Metro* on April 28, 2014, described the community sentiments as ‘a collective grief’ but also notes that ‘The anger has come from elsewhere, on social media, where we have seen phrases such as “put a bullet in him” and similar.’ (Leif Norrgård, quoted in *Metro* article ‘Here it affects us all’, April 28, 2014).

The events in Högsby are certainly atypical in terms of sexual offending against children; it is extremely rare that such young children are sexually assaulted in preschool. The reactions in social media and the voices heard in national media are more easily recognized: demands for vengeance, public shaming are as predictable as they are common (see, for instance, the debate on ‘Kriminellt’, a website dedicated to ‘expose paedophiles and sex offenders’ where the identity of the 21-year-old is

debated and demands for harsh or violent forms of punishment against him are discussed). Those who personally knew the offender expressed more nuanced and inclusive sentiments towards him and his crimes, whereas strangers were more one-dimensional in their outrage. Here, a complex form of altruism mixed with fear combine to promote efforts towards ‘exposing’ the particular offender – something unnecessary both because by this stage the offender was already in custody and unable to further offend, and because the local community already knew of his identity.

### **Idealized Men and ideal victims: the construction of the blameworthy and those worthy of protection**

Idealized Man has particular properties in sexual offending legislation, derived from assumptions around sexual expression. These socially constructed ideas around male vs. female sexuality – that Man drives, initiates and pushes for sex while Woman subjects, is lured into, is exploited into sex – rests on ancient ideas around sexual expression as give-and-take, with ‘winners’ and ‘losers’ (Woman ‘loses’ her virginity while Man ‘conquers’). Gender roles are created and defined through social mores and values and remnants of traditional gender roles remain in legal discourse today. Contemporary sexual offender legislation reflects these gendered roles that assumes sex to be ‘initiated’ by one person ‘against’ another, and they in turn affect and strengthen the ideals in society despite their supposed neutral wording. In the legislation of both countries, gender difference is emphasized, supported by the protection ethic that claims that children, adolescents, sex workers and other ‘vulnerable groups’ cannot make sensible and ethical sexual decisions for themselves. Society punishes the construct of Man and those whose sexuality deviates from the norm.

The law is not isolated from society. The law affects people. Sexual offending legislation affects who ends up in the legal system, it affects how people are treated in the system and ‘treated’ (rehabilitated) at the order of the system and it affects how the criminal justice system, police, jurists, courts, treatment program providers and others involved in handling sexual offending interpret and respond to human behaviour. The law offers care, treatment and programs to fix male sexuality and problematizes female sexuality in terms of exploitation, vulnerability and exposure to negative influences, be it drugs, alcohol, traffickers, pimps, older boyfriends, porn or



groomers – all of which Girl and Woman need protection from, and cure for. This adversarial, gender-based approach to sexuality has consequences for society in a wider sense, not least in terms of the self-expression, human rights and rights to body autonomy that is stripped away from Woman and Child.

Meanwhile, rape myths continue to prevail and permeate society, even courtrooms. A man accused of rape declared that he believed the woman crying ‘no’ was part of the sexual game, and that he ‘recognized this sort of light, weak no’s from other women’.<sup>242</sup> The defendant in question was acquitted partly on the basis of the alleged victim’s behaviour – she did not act like a stereotypical rape victim. While some hailed the court decision as a recognition of women’s rights to engage in, and enjoy, kinky or deviant sexual practices such as domination games, the most interesting part of the transcript might be the discourse that states that this man had every reason to believe, in his own mind, that women (there had been others, before) tend to cry no in ‘light’ ways that he could safely believe actually meant yes – and a court that not once questioned where this habit of overriding particular forms of ‘no’ came from or warn that this habit could pose a problem in the future. The rape myth that women secretly long to be seduced while pretending to resist in order to guard their virtue undoubtedly springs to mind here.

The law is a blunt instrument, and though it is essentially a hammer approach to many different forms and shapes of nails, it is nevertheless a proven method of dishing out blame and send a message about the severity of different kinds of wrongdoing. It can be reconceptualised, even reformed, to be sure, though in this endeavour Edney and Bagaric propose that improvements to the system must ‘ignore public opinion’:

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<sup>242</sup> Case file B 5865-13, Lund tingsrätt, 2014-01-10.

‘Sentencing is a purposive social endeavour, which must be guided by rational inquiry, not raw impulse....Guidance on sentencing matters should be sought from experts in the field, not the uninformed. Seeking public views on sentencing is analogous to doctors basing treatment decisions on what the community thinks or engineers building cars, not in accordance with the rules of physics, but on the basis of what lay members of the community ‘reckon’ seems about right. It is legal commentators, practitioners, and other experts...who should be educating the public about how to frame a sentencing system – not the other way around.’

(Edney and Bagaric 2007:378)

Similarly, Zimring, Hawkins and Kamin (2001) argue that sentencing reforms that impose penal sanctions on offenders should be placed in the hands of detached legal professionals rather than stem from public passions. There is such a thing as ‘too much democracy’ when the community rallies around populist initiatives in criminal law reform (exemplified by the authors by California’s ‘three strikes and you’re out’ legislation that imposes mandatory 25-year-to life sentences on repeat offenders<sup>243</sup>). In a Tocquevillian vein, Zimring and colleagues view judicial experts as a buffer against populism, a moderating factor against excessive yet ineffective reforms.

However, to maintain legitimacy the state cannot afford to outright ‘dismiss the important role of the community, especially victims of crime, in determining sentencing outcomes...victims need to be listened to because they provide us with the best information regarding one part of the proportionality formula: the impact that criminal behaviour has on well-being’ (Edney and Bagaric 2007:379). Fair and just criminal policy requires balance, but it needs more than that. It needs to be based on evidence-based, empirically sound research that emanates from detached deliberation and a principled desire to do good. It needs to have a heart but not think from the heart. It needs to take into consideration the emotions of victims and the community without forgetting the emotions of the less likeable on the other side of the courtroom: the unsavoury criminal who nevertheless has a claim to continued legitimacy as a human being, without being reduced to a one-dimensional caricature of humanity.

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<sup>243</sup> The Three-Strikes Law (TSL) was introduced in the aftermath of the abduction and murder of 12-year-old Polly Klaas by a previously convicted offender. Contrary to popular belief, the TSL legislation was not a result of Citizen Initiative Proposition 184 but had already been enacted in March 1994 in the immediate aftermath of Klaas’ murder. The TSL legislation was drafted by the father of a murder victim, a photographer named Mike Reynolds, whose version of the legislation was made into law by the California state legislature (LaFree 2002).

To achieve this, society needs to do more than legislate in the best interests of the few, or even the many. It needs to self-sanitize the way experts and their opinions are portrayed in traditional and social media, so that difficult or unsavoury opinions do not necessarily lead to ridicule or character attacks. Debaters need to develop the ability to hold two competing thoughts in their minds simultaneously: their own, and the opposite one, in order to assess their respective merits.

‘While it “feels” good to severely punish wrongdoers, satisfying our emotions does not provide a justification for deliberately inflicting hardships on other members of our community....The level of civilisation of a society roughly correlates with the extent to which it suppresses its feelings in relation to its law making process.’

(Edney and Bagaric 2007:379)

The era of grand ideas is over. Authors such as Anthony Giddens have pointed to the fragmented morality of secular postmodernity such as it is played out in the United Kingdom, Scandinavia, Australia and New Zealand, and how establishing one’s identity in cosmopolitan liberal democracies comes down to creating active identities that are moulded and shaped by current events. In the midst of this fragmented secularity, the individual body has become the postmodern regulatory battleground, and actions are sanctioned or punished based on whether they offend the individual dignity, not collective entities such as ‘society’ or ‘the church’.

This is a trend that holds true for many liberal democracies. But there is also an opposite trend, of nationalism that goes hand in hand with restrictions on individual sexual liberties. Right-wing nationalism has become ideologically coupled with a decreased tolerance for homosexuality in Russia, Uganda, Malawi and Eastern Europe, where gay and lesbian activism is denounced as ‘anti-nationalist propaganda’ or ‘foreign terrorism’ and where active homosexuals risk persecution, being victimised in hate violence or imprisoned for ‘recruiting’ youth by seducing them with information about homosexuality. A resurgence of the procreation prerogative has led to limitations in the right to abortions in Spain, Poland, and across Eastern Europe, and in Sweden the right-wing party the Sweden Democrats have similarly advocated a restriction on the rights to abortions. Homosexual men and women have become a

much-needed ‘enemy within’, and drumming up support to eradicate ‘foreign influence’ on the sexual lives of citizens is a time-tried political classic.

There are, in other words, two competing strands of development in the sexual offending legislation globally: the increasing tolerance for individual rights (for women, sex workers, sexual behaviour such as sodomy and oral sex) that goes hand in hand with more punitive criminalization of deviant, harmful or violent sexual violence (against children, women and, increasingly, men) on the one hand, and a decreasing tolerance that is marred by nationalist sentiments of self-preservation and protection from ‘foreign’ deviance expressed by liberalism and cosmopolitanism. Gay marriage, the adoption of children by homosexual parents and access to abortions become symbolic arenas for the playing out of discourses of threat, conflict and change.

### **Implications for the future: what can we expect?**

The widening of sexual offending legislation that has occurred in both Australia and Sweden in the last three decades, with its shift away from the violence in sexual violence and a corresponding increase in the focus on sexual dignity, shares some similarities but also differ in key respects.

In Australia, this has come about through an introduction of consent in rape legislation in most states and territories, while in Sweden the legal definition of rape has been redefined to more and more inclusive definitions that focus on the victim’s integrity and sexual autonomy.

Moreover, the move towards a normative protection of personal sexual dignity is evident in the changes in the regulation of the purchase of sexual services. Though regulated differently in Australia and Sweden, the two countries share an ideological shift from the woman/prostitute as the punishable criminal, while male sexual entitlement was taken for granted, to one where women’s right to make sexual choices (including selling sex) has been de-stigmatized and awarded legal protection.

On the other hand, in the case of child pornography the move is clearly in favour of more punitive legislation for those producing, distributing and consuming prohibited

material in both countries. Similarly, child sexual abuse (intra- and extrafamilial) has, partly as a result of the discovery of its pervasiveness in foster homes, the church and state institutions, been given a great deal of media attention and led to both governments and courts acknowledging the severe and long-ranging effects of child sexual abuse.

There are certainly a great many differences between Australia and Sweden, ranging from constitutional setup to values and attitudes. Swedes exhibit a much higher degree of trust in government and their politicians<sup>244</sup>; politicians work and present their work very differently in the two countries (although Swedish politicians are showing signs of slowly becoming more populist and individualistic in their approach to affecting change); Sweden has a long tradition of viewing politics and lawmaking as a collaborative effort whereas Australian politicians have more to gain from gaining media and public attention and to be seen to be doing something about matters such as crime; media reporting in Sweden is generally done in a more responsible and sensitive way than Australian media (in part perhaps due to the subscriber system of newspaper sales, where there is less need for catchy headlines); and Lutheran values of forgiveness, tolerance (even towards the deviant) and second chances have influenced Swedish penal law for centuries as a result of the historical close ties between church and state.

Australian values include a strong work ethic, taking personal responsibility and taking matters into one's own hands rather than expecting the state to resolve conflict; but also a strong loyalty to the local community (which, historically, has mattered a great deal more to the Australian consciousness than the state), a development of adversarial political systems that continue on from the Commonwealth tradition; a more independent role for the judiciary in punishing wrongdoing and handing out blame (again, in part a result of the vast geographical distance of the Australian continent that meant that from the settler era onwards, rural governors, magistrates and other figures of authority had to settle matters independently of what city jurists might think); a tradition of courts and magistrates infusing convictions with moral blame and extensive reasoning as to the nature of the wrongdoing, the presence or lack thereof of remorse and the effects of the wrongdoing on the individual victim and

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<sup>244</sup> For a detailed account of the differences in trust in government and civil society, see the World Value Surveys website: <http://www.worldvaluessurvey.org/WVSContents.jsp> (accessed 1 July 2014)

the wider community (quite different from Swedish convictions that retain a detached, at times almost clinical tone in their assessment of whether the behaviour had broken the law and whether sanctions should be imposed as a result); and a criminal justice system that by its very names – Australian ‘corrections’ systems, Swedish ‘criminal care’ systems – imply what view is to be taken of the criminal and their behaviour.

Swedish legislation is often normative and symbolic. This is particularly clear in the sexual services purchase prohibition, where the law was initially launched as having above all a clear symbolic purpose – to send a message. This has changed in recent years, and the prohibition is now considered to be instrumental along with the other regulations of sexual offending in Chapter 6 of *brottsbalken*.

This legal shift towards more punitive responses to sexual offending goes hand in hand with an individualisation of deviance, where individual rights and responsibilities are paramount in establishing guilt and innocence. Put differently, individuals are given both the responsibility to avoid becoming victims of sexual violence and the responsibility to avoid committing such offences. When a person does offend, causes and blame is placed squarely on the individual’s shoulders, and explanations sought in terms of individual psychopathology, dangerousness and evil rather than in socio-economic, class or other macro-social factors.

There are also other stark similarities. Both countries have undergone an increased cultural heterogeneity along with economic stratification that has permanently changed previous conceptualisations of class, religious unity and geography as markers for community. There are no longer simple universal truths about Us and Them based on origin, residence or shared backgrounds in multicultural communities. Combined with anxieties around the global economic change, rising unemployment and increased immigration, this creates a need for an ideology to hold on to. Converging around an imagined enemy – a folk devil, who represents the lurking danger out there – provides a safety valve to channel fear, hatred and disgust. The sex offender has again risen to be a symbol of community anxiety in both Australia and Sweden, and provides the perfect target due to its ecumenical, apolitical, universally despised status. Facebook groups such as ‘*Nätverket Stoppa Pedofilerna*’ (the Network Stop the Paedophiles) now has more than 51,000 followers who openly discuss the execution of convicted sex offenders. The Facebook site exposes convicted

offenders with their names, photos and details of their offending, and advocates ‘introducing hunting season on paedophiles’ along with reintroduction of the death penalty for sex offenders.

What will happen in the future? I predict that Australia and Sweden, like most of Western Europe, will take one of two possible paths: if secular ‘leftist’ ideas of democracy and independence continue to dominate, the legislation will continue to mirror the protection ethic whereby residents are given both the right and the responsibility to check up colleagues, teachers, babysitters and neighbours through publicly accessible sex offender registers – the idea is too politically salient to ignore. Sex offender registers rely on traditional left-of-centre ideas of the importance of protecting the collective even if at the expense of the individual, though incongruously their implementation follows right-wing ‘tough on crime’ rhetoric.

If right-wing nationalism makes a resurgence, issues of crime and law-and-order will dominate the agenda and sentimental ‘returns’ to the ‘good old days when life was simpler’ rhetoric could see a renewed focus on security matters, investing more heavily in the police and other security providers, and a backlash for women’s rights in a more masculine and militarised society. Countries such as Belgium, the Netherlands, Poland and France have seen right-wing governments in the last decades consciously problematizing the immigrant (in particular Africans or Muslims) as a threat to the national majority, and as a criminal-in-the-making. Minorities’ rights tend to not receive a great deal of positive attention in the political agendas of right-wing parties, and women’s and children’s rights tend to be usurped by the protection ethic that favours restrictions on their rights to self-expression (‘for their own good’) on religious, moral or nationalist grounds. Should right-wing politics continue to dominate the political landscapes of Australia and Sweden, respectively, there is good reason to believe that sexual offenders will be increasingly harshly punished, since stronger and longer punishment has always and always will be a key feature of right-wing politics, with resources for treatment and rehabilitation de-prioritised.

The Sweden Democrats again launched the idea of public ‘paedophile registers’ in June 2015, seemingly impervious to the criticism this had drawn in the past. The concerns raised by jurists and journalists certainly hold true and for the time being dampens public enthusiasm. But as water chips away at rock, these initiatives will

continue to happen and slowly permeating public consciousness. The question, then, is not if Sweden will eventually introduce sex offender registers, but when.

Moreover, religious fundamentalism may also become a uniting factor that offers a fragmented community an invigorated identity independently of nationalism. With increased migration across borders and the loss of state religions dominating the countries of the Western world, moral issues that have become secularised in Australia and Sweden may again be up for grabs by different religious groups demanding reforms to bring legislation closer in line with their values. The next great clash may not be between civilisations but between religions competing for dominance both morally, socially and politically. Sexual tolerance rarely fares well in conservative religious campaigns, as it provides a far too fertile ground for moral outrage to ignore. Rights taken for granted – gay marriage, abortion or even the right to medical treatment for those who self-identify as sexual deviants (in Sweden offered, among others, by the telephone helpline *Preventell*) – can disappear when societies take the punitive turn. Alternatives to harsher punishments and increased restrictions seem not only farfetched but politically implausible in Australia and the signs that Sweden is heading down the same path look less than promising.

### **Concluding thoughts**

This thesis has mapped how sexual offending is codified into legislation in jurisdictions in two countries; how the language ‘nails down’ deviance and crime; and how this can differ between countries. Ultimately, it has tried to get at what legal language ‘means’ – how ‘messy’ human emotions and irrational human behaviour can be locked down into ‘clean’ language. The law, by definition, is – and has to be – written, formal, clinical, clean, exact, replicable and predictable. But human action is rarely exact, clinical and predictable – least of all when it comes to sexual matters. So how can ‘good’ legislation transform irrational behaviour into precise guidelines and formulae for regulation? Or, put differently, how can precise, exact legislation actually regulate that which is not precise and predictable?

In this thesis I have deliberately chosen a wide approach towards the consequences of socially constructing ideas around normalcy and deviance in sexual mores.



Nevertheless, I see sexual offending not as an issue distinctly separate from ‘normal’ or ‘good’ sex, nor as the points at the end of a scale from ‘normal’ to ‘deviant behaviour’ to ‘extremely deviant, criminal behaviour’. Rather, acts of sexual offending forms part of the sexual landscape, like dots on a road map – they cannot be easily singled out by formulaic definitions of right and wrong, good or bad. Sex offenders are not by definition very different from the rest of ‘us’, though it would certainly make many lives easier if it were so.

Each person’s *credo* is the result of a unique combination of a multitude of social, cultural, cognitive, ethical and historical – to name a few – experiences. But even though we may disagree about the peripherals, in order to function as a society we must come together in some basic understanding of what is normal, what is deviant, and what is criminal, and how seriously breaches should be considered. Codifying this scale of seriousness permits us to live their lives safe in the knowledge of what we can and cannot do, and trust that serious wrongdoers will be dealt with while harmless deviants can be tolerated. The scale is never static; extraordinary events (a horrific abduction and murder of a child, or a much-publicized gang rape) determine how the road twists and turns.

Fair and just regulatory systems that both value and maintain the integrity and dignity of the victim, and keeps in mind the three-dimensional complexity of the human being that is the offender, need to be based on ethical foundations. To forge a path into an ethical criminal system, a society could take note of (Kluckhohn and Murray 1948) assertion that every person is in certain respects

- Like every other person
- Like some other people
- Like no other person.

Thinking is both individual *and* a result of the processes around us. Thinking ethically around non-controversial topics is easy. Thinking ethically around the sex offender, seeing the offender as a human being, as Levinas’ (1981) moral obligation would have it, is harder. Embracing evidence-based policy and discarding popular simple quick-fixes is an ethical choice for governments that would need to stand strong in the storm that is public resentment and fear.

This thesis has attempted to show the timeless, profound human tendency to Other based on emotive or cognitively distorted thinking. Disliking criminals, sexual deviants and those different from oneself may be easy. But the costs can be high – whether counted in terms of human rights, of equality, fairness and justice, or because belittling others' value as human beings belittles ourselves. Hatred of difference is a slippery slope: it may turn into a *carte blanche* for indiscriminate hatred, and in the end threaten our very existence as not only human but also humane relational beings.

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