Comparative Criminal Justice Systems

Marko Nikolić

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COMPARATIVE CRIMINAL JUSTICE SYSTEMS

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Preface

Comparative Criminal Justice investigates and evaluates a national system of justice in terms of other countries and cultures. Several authors pointed to the lack of serious recent work on comparative methodology. Many researchers therefore avoid comparative research. Therefore, the initial part deals with new and fresh approach that avoids the risk to be drowned in theoretical discussions, this Chapter is offering practical solution. The so-called 'SPOCs & survey'-method consists of nominating a SPOC (short for a single point of contact) for the countries to be included in the comparative analysis and asking them to fill out a multiple choice based survey, complemented with free text fields and the option to request documents to be attached. The question arises which evidence should be used to support policy decisions. Criminal policy making is not solely based on evidence related to national experiences. The problems that the researcher encounters are language barriers, limited accessibility of up to date information and the risk of misinterpreting information due to an inadequate understanding of the specificities of the foreign criminal justice system. Comparative Criminal Justice takes a descriptive, historical, or political approach. The functions of a criminal justice system are broadly categorized into policing, adjudication and corrections. Comparativists are trying to find the best solutions by observing international practice through space and time. They research solutions taken in other systems, searching for the best options for domestic law to evolve. In other words, they are trying to find out the causes and reasons of why some solutions are working in one environment and not in other. Interaction of national systems always lead to progress, which can be seen from the examples of Judgment of the European Court of Human Rights in the second, third and fourth Chapter, which is increasingly gaining in importance. But the countries does not need a supranational authority so that they would accept acknowledged, positive solutions from other countries. Perception of others will always be colored to some extent by our own cultural starting points – even when the researcher says that he is trying to learn the good examples. The field of comparative science is incredibly wide. One of the reasons is the fact that Comparative Criminal Law is trying to enable us to avoid mistakes of humanity from the past.

Therefore the legal traditions are so important for comparative legal science. Legal theories are important and numerous. Comparative legal sciences can bring much good if they are interpreted objectively and by using right methodology. The fifth Chapter brings out the basis of the legal systems that both designed the law of western hemisphere. After (Chapter 6) follows a scientific review from one of the countries whose law is based on the tradition of Civil law. It has been shown that decentralized peer-punishment can produce the second-order public good but often at a net cost for the group. These findings prompted scholars to invoke more organized forms of enforcement to explain cooperation, leaving the strategic nature of the punishment situation underexplored. They took a step back and showed that dissecting the second-order public good problem can reveal some interesting and hitherto understudied mechanisms of second-order public good provision. The Czech Tool for Assessment of Offenders is described in Chapter 7. Another important aspect is certainly the punishment, finding the right way to preserve the real values and return to them, but to meet society's sense of justice, victims and their families, their suffered damage and injuries. From prison statistics we can learn a lot although many may find it superfluous, to be seen as giving attention to those who have caused damage to the society and individuals. But we need to know the reasons that push individuals to come to that point, but also the path to reintegrate those who are incarcerated to the society. One of the focal points of this science are prison systems and organizations. Chapters 8,9,10 are watching New South Wales, Tasmania and Australia prison systems. These countries apply for quiet and isolated, and therefore are always interesting for observation. Because they have fewer contacts with law and crime in neighboring countries and over border crime, so we can quickly recognize the causes and consequences. Then in the Chapter 11 we jump to the USA to take a note of a current global problem, prison overcrowding. Given that this is a burning issue in the United States the best data is comming from there. This is a theme, especially the private prison systems, which require the head of the separated book. So we give you just the basics. Because comparative teachings deal with the problems in the whole world, South America deserves its representative also. We give you a Systematic review of time trends, prevalence rates and risk factors in Brazil in Chapter 12, and the Impact of Crime on Public Trust in Central American Justice System in Chapter 13. While in the Chapter 14 we will observe a practical question with the regard of Islamic law, another big and complex topic to which we owe reverence in one book such as this. Is violent crime increasing or decreasing? This is the first question criminal researcher is asking himself, so we do so also in Chapter 15. This is a finding of an investigation using the Crime Survey for England and Wales, 1994–2014, and an improved methodology to include the experiences of high-frequency victims. Ties between poverty and crime are described as a pre bases for studying the connection among economy and criminal in Chapter 16, which is another area of comparative law. Supporters are increasingly merging theories on crime and economic sciences and theories. Does poor living conditions actually produce "bad" people? Comparative legal tradition endures for long in the efforts to abolish the death penalty. To establish a humane and dignified punitive measures that will really lead to results, Chapter 17 is mentioning this subject as a moral issue. Chapter 18 is dealing with researching in other countries generally. Legal provisions that would be able to function permanently and whose results are seen in life and not just on paper and in media. So it is essential to study both good and bad practices. Therefore it is necessary to set a good base, anticipate risks and evaluate the situation. Then we can take a solution from another legal system, where the same causes and other factors exist, or work on our existing punitive measures, and solve our countries problems by smart legal policy. Or, even better, anticipate the negative trend and nip it in the bud. Chapter 19. goes further on the prison subject and asks: is locking people in cages for victimless Crimes devastating to the Economy?

Final part (Chapter 20) is about the impact of gun control on crime. Again, USA is the example because it has liberal laws in this matter and grave impact of the availability of weapons on the crime rates.

I hope that this book will interest someone to enter deeper into the world of comparative studies and see for himself all the benefits which in practice can be given by them.

Editor
Marko Nikolić

CHAPTER 1

SPOCS & SURVEYS: A NOVEL WAY OF CONDUCTING COMPARATIVE RESEARCH INTO CRIMINAL JUSTICE SYSTEMS

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ABSTRACT

Background

Criminal justice researchers are increasingly confronted with research questions that require them to use 'foreign information' in their analyses. Though it is generally accepted that working with foreign information is challenging, several authors pointed to the lack of serious recent work on comparative methodology. Many researchers therefore avoid comparative research.

Method

Based on a literature review and practical experience, the challenges of comparative criminal justice research are uncovered, the strenghts and weaknesses of existing methods identified and a novel method developped.

Result

The so-called 'SPOCs & survey'-method consists of nominating a SPOC (short for a single point of contact) for the countries to be included in the comparative analysis and asking them to fill out a multiple choice based survey, complemented with free text fields and the option to request documents to be attached. To assess the merit of the method, the paper elaborates (1) on the different degrees to which the method can be integrated in various types of research and (2) the extent to which the method is better tailored than existing methods to successfully overcome the challenges of comparative research referred to in literature.

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Conclusion

Though the method depends on the access to knowledgeable SPOCs, the weakness is counterbalanced by the strengths of its swiftness, reliability and validity.

INTRODUCTION: EVIDENCE BASED POLICY MAKING

Evidence based policy making has been a buzz word for quite some time now and it has been argued elsewhere that the increased importance of evidence based policy making should be applauded (De Bondt, 2014). It is generally accepted that policy decisions based on systematically gathered and analysed evidence are more likely to produce better outcomes when compared to policy decisions based on the heat of the moment (Sutcliffe & Court,2005). Putting the best available evidence at the very heart of policy development helps policy makers in making well informed decisions (Davies, Nutley, & Smith, 2000; Lee, 2004; Welsh & Farrington, 2007).

In light thereof, the question arises which evidence should be used to support policy decisions. In today's reality, it makes sense that criminal policy making is not solely based on evidence related to national experiences with preventing and fighting crime. Rather, criminal policy making should also take account of evidence related to foreign experiences with preventing and fighting crime. Fortunately, policy makers are showing an increased interest in foreign experiences (Örücü, 2007, p. 45) both at national and international level[a]. This interest is mirrored in criminal justice research. Hence, criminal justice researchers are increasingly confronted with research questions requiring the use of 'foreign information' in their analyses. That foreign information can relate to technical legal provisions, to case law or to empirical data gathered in the context of an analysis conducted from the perspective of another country. A first possible situation where foreign information will need to be used, is research looking into cross-border crime phenomena. In those kinds of research it is almost self-evident that a criminal justice researcher has to take account of legislation, case law, information on the allocation of resources and/or crime related statistical information. However, the need to look into foreign information can also arise in research looking into mere national crime phenomena. Even in those kinds of research, knowledge of foreign systems has a merit in provoking and supporting criticism and from that improvement of the own system (Örücü, 2007, p. 46). In addition to this, in recent years, criminal justice researchers are increasingly solicited to conduct research called for by international cooperation structures and organizations such as the Benelux, the European Union, the Council of Europe and the United Nations. Those international criminal policy makers too recognise the need for evidence based policy making. Their underlying goals can vary from striving to unify certain parts of the national legislation and practices (Delmas-Marty, 2004, p. 253) to facilitating and supporting cooperation. Reference can be made to calls for research to evaluate the extent to which they have been successful in their attempt to harmonise national legislation, to align practices or to support and facilitate the fight against crime.

It is generally accepted that working with foreign information is challenging for most researchers. The top-three challenges referred to in literature are language barriers, limited accessibility of up to date information and the risk of misinterpreting information due to an inadequate understanding of the specificities of the foreign criminal justice system (Lomio et al., 2011, p. 58; Monateri, 2012, p. 9; Nelken, 2007, p. 139; Örücü, 2007, p. 49; Rabel, 1947; von Bar, 2004, p. 132). Before including foreign information into their analyses, researchers need to have a comprehensive and in depth understanding of the criminal justice system the information relates to (Cotterrell,2007). Only in doing so, they will be able to correctly interpret the available criminal justice data.

The growing academic interest in comparative research is said to be apparent from the rise of new journals on comparative research (Örücü, 2007, p. 44) and the seemingly renewed debate on methodology in comparative research more generally (Neergaard, Nielsen, & Roseberry, 2011, p. 7). However, in spite of that growing academic interest, the critiques formulated regarding the insufficient attention for the methodology of doing comparative research (Howard et al., 2000, p. 142) are still valid. It was and can still be argued that though much has been written on the outcome of comparative research, only little has been written on the way of doing it. The founders of comparative research were more pragmatically than methodologically interested (Gordley 2012, p. 107). Most substantive comparative works do not make their methodological choices sufficiently clear (Adams & Bomhoff,2012, p. 1). In light thereof, several authors pointed to the lack of serious recent work on comparative methodology (Samuel, 2004, p. 35), regretting that true questions of methodology hardly ever rise (von Bar, 2004, p. 130) and complaining that attempts to develop even a moderately sophisticated method of comparison is exceedingly rare in comparative studies. Many projects are said to adopt an anything goes attitude of methodological questions (Adams & Bomhoff, 2012, p. 1). Therefore, the role and method of comparative research remain controversial (Andenas & Fairgrieve, 2012, p. 28).

Because there is still significant uncertainty about the best way to conduct comparative research, this paper will detail a novel way to conduct comparative research into criminal justice systems. Based on a literature review and experience with the method in the past, the strengths and weaknesses will be elaborated on. First, the main characteristics of the method will be briefly introduced and compared to existing methods. Second, the merit of the method will be elaborated on in light of the degree to which it can be integrated into research and in light of the extent to which it is tailored to overcome the main difficulties of doing comparative research identified in literature.

THE METHOD IN BRIEF: SPOCS & MC-SURVEYS

SPOCs is short for Single Points of Contact and MC-Surveys is short for Multiple Choice based surveys. This section will briefly elaborate on the main characteristics of the method. In sum, the method consists of working with a single point of contact in each of the countries included into the comparative analysis. The SPOC is asked to ensure that the multiple choice based survey is duly filled out, either by him or herself or with the team he/she has decided to compose. It can already be added here that the surveys are not exclusively composed of multiple choice questions. It will be elaborated on below that the surveys are only predominantly multiple choice based and therefore the surveys also contain a number of free text fields and can even include the requirement to upload or attach documents (e.g. original or translated versions of legislation).

The method of working with SPOCs and MC-Surveys is designed to be a simple hands-on method to get what is called 'a targeted descriptive and informative picture of the current situation in another state' (Westmarland, 2011, p. 51). That factual picture will allow the researcher to collect information and/or to assess which information is available, where to find it and the extent to which it can be used to create an evidence base in relation to a specific research question.

SPOCs: Single Points of Contact – The Next Step in the Evolution

The first element to the method is the use of Single Points of Contact in the countries included into the comparative analysis. Before going into the criteria and best practices for the selection of the Single Points of Contact, the novelty of working with Single Points of Contact will be contextualised in light of the currently most common ways of conducting comparative analyses, being the 'individual & desk top'-method and the 'team & report'-method.

The 'individual & desk top'-method is the method most commonly used for comparative research. Traditionally (mirroring any other type of legal research) comparative research into criminal justice systems is done individually. An individual researcher looks into foreign criminal justice systems and foreign information sources attempting to gain a sufficiently in depth understanding of the foreign legal system to the extent needed for the analysis. Based on its main characteristics, this method will be referred to as the 'individual & desk top'-method.

The emergence of the 'team & report'-method symbolises a first step in the evolution from individual research to team efforts. Others too have argued that, despite the fact that it may be contrary to traditional individual work, team work is highly recommended if not necessary. In light thereof von Bar has argued that we are living in a transitional period and the attitude as if research needs to be individual work, needs to be changed (2004, p. 132). As Watson puts it "an understanding of a foreign legal system cannot be obtained simply by heaping up nuggets of information. […] Even an exceptionally skilled comparatist can make mistakes" (2010, p. 209). The by far most reliable way to gain a comprehensive and in depth understanding of a foreign criminal justice system is by calling upon a foreign colleague. The shift from individual towards team work has resulted in a more modern way of conducting comparative research. Today, much of the academic comparative work is based on country reports drawn up by the members of a comparative research group. Having agreed on the chapter build-up, a group of academics draft individual country reports, summarising the main lines of their criminal justice system in relation to a specific topic. Those country reports form the basis for the comparative work. Based on its main characteristics, this method will be referred to as the 'team & report'-method.

The innovative 'SPOCs & survey'-method elaborated on in this paper aims to take a next step in this evolution. It is a plea to use team efforts more often. Though it is used in general legal comparative research, it is not often used in policy driven criminal justice research. Additionally, it is a plea to be more flexible and open minded when approaching and selecting foreign colleagues. That flexibility and open mindedness is reflected in two novel criteria to select SPOCs: (1) consider academics, practitioners and policy makers and (2) compose a multi-disciplinary team.

First, whereas comparative research teams are usually composed of academics only, there is no need to require the foreign colleague to be an academic. Depending on the topic of the research and the particularities of the questions asked, a practitioner may be better placed to ensure that the difference between the law in the books and the law in practice is duly taken into account[b]. Along the same line of argumentation, it may very well be that a policy maker is best placed to answer the questions. Therefore, a first novelty of the method relates to the use of academics, practitioners and policy makers.

Second, it does not need to be a problem that the profiles of the SPOCs contributing to a specific comparative research study vary. Given that the method is used to obtain 'a targeted descriptive and informative picture of the current situation in another state' (supra), a SPOC will inform the researcher of the facts of its criminal justice system[c]. That information will be exactly the same, regardless of who provides the information. A SPOC is not so much a 'respondent' sharing his/her opinion with the researcher, but more an 'informant' (Brinkman, 2000, p. 28).Therefore, there is nothing to argue against the profile of the SPOC varying between countries. Not the profile but the knowledgeability of the SPOC ought to be decisive[d]. Therefore, a second novelty of the method relates to the use of a multi-disciplinary SPOC-network.

Furthermore, two best practices can be deduced from past experience with the method: (1) nominate a SPOCs per subsystem and (2) use existing networks to identify possible SPOCs.

First, depending on the topic of the research, it may be needed to have multiple SPOCs per country included into the research. Especially for criminal justice research, it is not uncommon for information to differ according to regions within one country. Reference can be made to e.g. the differences between England and Wales on the one hand and Scotland on the other hand (Westmarland 2011, p. 59). As a result, it will often not be possible to provide one single answer for the entirety of the United Kingdom. To avoid complexities both for filling out as well as for analysing the survey, it is best to anticipate to the differences and nominate one SPOC for England and Wales and one SPOC for Scotland. Not all researchers will have sufficient prior knowledge of the foreign criminal justice systems to anticipate to this. It is therefore advised to explicitly ask each of the SPOCs approached to assess the need to differentiate between subsystems in light of the specificities of their criminal justice system.

Second, the possibility to work with this method is dependent on access to a suitable SPOC. Most research institutes have their own networks. In addition thereto, various official networks exist. Depending on the research topic, networks such as (1) the European Criminal Law Academic Network (ECLAN)[e], (2) the Eurojust national members[f], (3) the Europol Liaison Officers (ELOs)[g], (4) the Genocide Network[h], (5) the European Judges and Prosecutors Association (EJPA)[i], (6) the European Criminal Bar Association[j], (7) the European Lawyer Database[k]or (8) the European Organisation of Prison and Correctional Services (EuroPris)[l] could be used as a starting point. To ensure the participation of sufficiently knowledgeable SPOCs, it is advised to remunerate the work of the SPOC via an expert fee.

Surveys: predominantly multiple choice based

The second element to the method is the use of surveys. In general, surveys are said to become increasingly popular, because of their efficiency (Bachman & Schutt, 2012, p. 164) both in filling out and in processing and generating results. In spite of their popularity, surveys are rarely used in comparative research. Comparative research is predominantly conducted using either the 'individual & desk top'-method or the 'team & report'-method mentioned above. When questionnaires are used, they are mainly based on open questions requiring to provide a summary overview of their criminal justice system in the form of an essay type country report.

The innovative 'SPOCs & survey'-method works with (1) multiple choice based surveys, (2) validated by a pilot group and (3) complemented with a free text fields (and possibly upload modules) to acquire targeted country specific input.

Type of questions and answering categories

The 'SPOCs & survey'-method is designed to be a way to swiftly obtain 'a targeted descriptive and informative picture of the current situation in another state'. That objective is reflected in the type of questions and answering categories included in the survey.

Questions are either formulated to be yes/no questions or a question is followed by a list of predefined answering categories for the SPOC to choose from. An example of a simple yes/no question could be:

Was a change in legislation required to implement Art. X from EU Directive Y?

- ○ Yes
- ○ No

An example of a question with a limited number of answering categories could be:

How long can a person be arrested in your country?

(i.e. without being apprehended by a judge)

- ○ A: 12 h
- ○ B: 24 h
- ○ C: 36 h
- ○ D: 48 h
- ○ E: 60 h
- ○ F: 72 h
- ○ G: other [please insert duration]

This last type of questions illustrates that a large number of answering categories can be provided. Including an 'other'-category anticipates to the possibility that the legislation of a country provides for yet another duration. Even though an 'other'-category is an effective fall back option if the correct situation is not reflected in any of the answering categories, it is still advised to provide all plausible options drawn from prior knowledge. For quick processing of the answers it is best to try and avoid that SPOCs need to use the 'other'-category. Moreover, it could also be a valuable finding that one or more answering categories do not exist in any of the countries included in the comparative analysis.

These kinds of simple and targeted multiple choice questions are preferred over open questions. Answering open questions is demanding for the SPOC, who needs to consider which aspects of his/her criminal justice system would be appropriate to elaborate on and draft his/her answer in a comprehensible way. Additionally, from a mere academic perspective, there is little intellectually challenging about giving a summary account of the specificity of one's own criminal justice system. Ticking a number of boxes in a survey comprised of closed questions is less time-consuming. Especially given the so-called questionnaire fatigue (Semmens, 2011, p. 63) that can be noticed amongst a lot of potential SPOCs, being able to state that the survey will have an easy multiple choice based character, may increase the willingness to participate.

Even though the method is essentially designed to swiftly obtain factual information about other criminal justice systems, questions aimed to obtain the personal opinion of the person filling out the survey could also be included. In that case, the SPOC-informant becomes a SPOC-respondent. When including questions aimed to obtain a personal opinion, it should be kept in mind, that the individual opinion of the single respondent is not representative for the opinion of academics/practitioners/… of that country, unless of course the SPOC-respondent is an official representative of a governmental actor or professional organisation requested to indicate what the official position would be. From that perspective questions looking into e.g. the necessity of taking legislative action in relation to a specific problem, could also be included in the survey.

Validate questions in a pilot group

Depending on the nature and complexity of the questions and answering categories, it may be advised to test and where necessary revise the questions (Bachman & Schutt, 2012, p. 167; Wilson & Sapsford, 2006, p. 103) before sending out the surveys to all SPOCs. When seeking to validate the questions, it is advised to set up a small pilot group amongst the SPOCs. The question arises how to compose the pilot group. Based on a literature review and practical experience, it is advised to aim for a multi-family and where possible a multi-disciplinary group.

First, multi-family refers to the legal families in which the criminal justice systems are divided. Traditionally, criminal justice systems are divided into families based on their common roots and (presumed) similarity (Monateri, 2012, p. 9). Distinction is made between the Romanistic legal family (France, Benelux Italy, Spain and Portugal), the German legal family (Germany, Austria, Croatia, Switzerland, Greece), the Anglo American legal family (England & Whales, Northern Ireland, Scotland) and the Nordic legal family (Denmark, Finland, Iceland, Norway, Sweden) (Lomio et al., 2011, p. 32). The division of the criminal justice systems into legal families is not free from critique. It is argued in literature that because of the legal transplants and the softening of the once sharp differences between common law and civil law (Monateri, 2012, p. 9), the division in legal families has somewhat lost its merit (Devroe,2010, p. 46). That is why the division into legal families is sometimes even referred to as the legal family 'trap'(Glenn, 2006, p. 437) rather than a helpful legal family 'tool'. Though concurring with the argument that it is becoming increasingly difficult to rely on the division into legal families, practical experience comes to testify that it can still be beneficial to include SPOCs of countries (that were once) a member of different families into the pilot group, even if it is only for political/policy reasons.

Second, multi-disciplinary refers to the possible diversity in the background of the SPOCs included in the study. SPOCs with an academic, practical or policy background review the draft survey from a different perspective. Practical experience comes to testify that this diversity can be enriching when reviewing the formulation of either the questions or the answer categories and can even lead to the inclusion of additional questions and/or answering categories.

Though validating the questions is an important step in the preparation of the survey, it should be kept in mind that the formulation of questions and/or answering categories can never fully grasp all specificities of the different legal systems. If the pilot phase would be able to have that result, sending out the survey to be completed by all SPOCs would not be necessary anymore. Additionally, the account of the diversity in the criminal justice systems of countries included in the comparative analysis should only be as detailed as needed in light of the underlying research question(s). Some of the obscure differences or specificities are not relevant for the research question. Furthermore, the remaining relevant specificities of the criminal justice systems included in the analysis, will surface via the free text fields included (infra).

Free text fields and attached documents

Working with a multiple choice based questionnaire is intended to speed up the filling out of the questionnaire, improve the cross-country comparability of the results and facilitate the processing of the input. However, for some questions, it will not be possible to fully grasp all the specificities of the different criminal justice systems into the answering categories. In literature this is described as the most important risk of multiple choice based surveys (Bachman & Schutt, 2012, p. 171; Brinkman, 2000, p. 68). Indisputably, the main and important down side of working with multiple choice based surveys is the loss of the fundamental benefit of an open question that allows the respondent to freely and unlimitedly elaborate on each specificity of its criminal justice system and go into every exception.

To accommodate this limitation inherent to multiple choice-based surveys, free text fields are added to every answering category, allowing the SPOC, where necessary, to further elaborate on its specific national situation. In doing so, the open part of the question is kept to a minimum and the input from the SPOCs will be very targeted and contain exactly what is needed to understand the specificity of their system. The combination of response categories and free text fields has proven to be an incentive for SPOCs to either elaborate on a specificity of a national criminal justice system or refine the response category to fit in perfectly with the national criminal justice system.

Depending on the specific needs of the research, the surveys can also be complemented with a requirement to where relevant or necessary attach full text documents containing e.g. legislation, case law, statistical data or policy documents. In doing so, the researcher has easy access to up-to-date original source material, a selection of which can be identified as requiring translation. This approach will avoid unnecessary translation costs of outdated or irrelevant documents.

THE MERIT OF THE METHOD

To assess the merit of the 'SPOCs & survey'-method (in light of the 'individual & desk top'- and 'team & report'-methods), the following paragraphs will elaborate (1) on the different degrees to which the method can be implemented into research and (2) the extent to which the method is better tailored than existing methods to successfully overcome the difficulties of comparative research referred to in literature.

Degree of implementation into research

The method can be implemented into research in different ways. It can be used (1) somewhat reservedly solely to support methodological choices, (2) to obtain detailed and up-to-date factual information or (3) more extensively to collect not only factual information but also personal opinions from the respondents. The examples elaborated on below are merely indicative and are not intended to be exhaustive. Because experience with the method is predominantly linked to EU studies, the examples relate to comparative analyses covering the 28 EU Member States. However, the method may just as well be used to include other countries into the comparison.

Supporting methodological choices: identifying relevant countries

A study aimed at preparing the revision of the position of the victim in the national criminal procedure would benefit from a comparative legal analysis of the position of victims in other criminal justice systems. A such analysis would reveal differences, foreign experiences and best practices. The selection of countries that are relevant and interesting to include in the comparative analysis is challenging. It requires basic prior knowledge of other criminal justice systems which the researcher may not have. In this situation, the 'SPOCs & survey'-method can be used solely to identify the relevant countries to be included in a comparative analysis that will be conducted in a later stage using the researcher's method of choice.

To be able to select the relevant countries, knowledge is required about the current position of the victim in other criminal justice systems. Based on a literature review the researcher should be able to draw up a list of options regardless of which options feature in which criminal justice system. Whether the options (still) exist in any country and to what extent the options appear in a combined form, is not relevant when building a first draft questionnaire. The review conducted by the pilot group elaborated on above will help identify whether the researcher has missed possible options. The result of that combined effort will lead to a survey that will look similar to the following example:

To what extent can a victim start criminal proceedings? (more options are possible)

- A victim can bring a case immediately to court to be tried by a court judge
- A victim can start a compulsory investigation which will lead to the case being tried by a court judge if the national criteria are met (e.g. sufficient indications of guild) and which excludes the possibility to drop the case, e.g. for policy reasons
- A victim can file a complaint and appeal if no investigation is started
- A victim can file a complaint and appeal if after an investigation the case is dropped, e.g. for policy reasons
- A victim can only file a complaint and has no other role to play in the criminal procedure
- A victim has another way to (influence the) start of criminal proceedings

A such survey is an effective and efficient way of mapping what the position of a victim looks like in other countries. Further details e.g. on who qualifies as a victim, how options are combined, whether all options are available to all victims of all crimes, what the rationale behind the choice is can either be subject to similar multiple choice questions, to open questions with free text fields or to follow-up comparative 'individual & desk top'-research.

When specifically interested in changes in legislation in the countries included in the comparative analysis, the survey can be made more informative through a simple change in the way the question and answer categories are presented. Instead of using single tick boxes linked to each of the answering categories, a distinction can be made between:

- never had this option and it has never been considered
- this option has been considered but was never adopted
- this option has been adopted after in depth consideration
- this option existed in the past, but was abolished
- this option exists and has never been subject to thorough debate

In doing so, this simple add-on will result in more detail in the results and can be of importance to select which countries should be included in a more in depth comparative analysis.

This example is based on a recent study into the hurdles in the Belgian criminal procedure with a view to drafting a new criminal procedural code[m]. As part of the study, it was agreed with the contracting authority to include a limited comparative analysis. The selection of the countries to be included in that comparative analysis was based on a multiple choice based survey sent to academics and legal practitioners in all other 27 EU Member States. The design of the survey was not identical but similar to what was described above. Used in this way, the method is a tool to support the methodological choice of the countries to be included in a comparative legal analysis.

Obtaining factual information: gap analysis and policy evaluation

Building on the evidence based policy idea, the European Parliament and the Council of the European Union need comparable information from all 28 EU Member States to support their legal and policy decisions and to conduct a posteriori policy evaluations. In light thereof it is valid to look into the extent to which comparable information is available. The lack thereof would point to a gap in the policy line of the European institutions.

Reference can be made to a study aimed at assessing the extent to which statistical information on crime trends of different EU countries can be compared. Possible problems with the cross-country comparability of crime statistical information are linked to differences in the national criminal justice systems. Reference is made to differences in the recording practices (Carr-Hill, 1979), differences in the counting units (Aebi, 2008) and not in the least differences in the scope of the underlying offences (Harrendorf, 2012; Jehle, 2012). As a result, collecting comparable data is continuously considered to be an almost impossible task (Collmann, 1973; Kommer 1995; Gratia, 1995; Farrington et al.,2004; Vettori, 2006; Robert, 2009; Savona et al., 2005). Aimed at demonstrating the short coming of the EU institutions as legislators and criminal policy makers for not ensuring the availability of the statistical information needed to provide the evidence base for (the evaluation of) their own legislating and criminal policy making, problems related to any of the listed differences would suffice.

The 'SPOCs & survey'-method is perfect to conduct the necessary comparative analysis. The national statistical authorities can act as SPOCs and the questions can be presented in a simple multiple choice based survey. With a view to demonstrating problems relating to the scope of the underlying offences, the SPOCs can be asked to indicate whether or not their national information architecture would allow the production of the required statistical information. A distinction can even be made between:

- A: **are** producing statistics related to this part of the offence;
- B: are currently not producing statistics related to this part of the offence, but **could** produce statistics in the future, without having to change the national information architecture; and
- C: are currently not producing statistics related to this part of the offence, and **could not** produce statistics in the future without having to change the national information architecture.

This example is based on a study into the availability of comparable crime statistical information for the 10 EU priority offences. It was argued that the EU as a legislator and policy maker is responsible to ensure that statistical information is available to be used as an evidence base for future legal and policy initiatives. The inability to provide comparable statistical information that was apparent from the study, points to an important gap in the EU criminal policy line and thus a short coming of the EU legislator and criminal policy maker (De Bondt, 2014).

Obtaining factual information and opinions: needs and feasibility studies

The 'SPOCs & survey'-method can be used in a more extensive way. As described above, mere informative questions aimed at attaining 'a targeted descriptive and informative picture of the current situation in another state', can be combined with questions seeking the opinion of the individual filling out the survey. That opinion can be formulated either in his/her personal capacity or as an official representative of a governmental actor or professional organisation. In doing so, the method can be used to conduct needs and feasibility studies.

Both at the level of the Council of Europe as well as at the level of the European Union, legal instruments exist governing the transfer of prisoners from one country to another. For long, the need is felt to complement the physical transfer of prisoners with the exchange of more detailed information about that prisoner. It is unclear however what information is exactly needed and whether exchange of information is feasible in light of practical and legal obstacles. Recently, the discussion gained momentum in light of the implementation of a new EU instrument. Because the new EU instrument links transfer to 'furthering social rehabilitation of prisoners', the question arises whether this requirement has an impact on the prisons' information need. In essence, the research combines two questions: (1) what information is available for exchange with other prisons (factual information) and (2) what information needs to be exchanged with other prisons to be able to comply with the requirement to further the social rehabilitation of the transferred person (opinion). The second set of information types does not (necessarily) match the first set of information types because available information may not be needed or vice-versa needed information may not be available.

A basic use of the method to obtain only factual information would entail the compilation of a list of information categories for which the SPOC is to indicate whether or not the information is available to be exchanged with other prisons. Based on that selection, the researcher can make his/her own assessment – based on his/her own conceptualisation of what social rehabilitation should entail – of whether the information needed to comply with the requirement to 'further the social rehabilitation of the transferred person' is available for transfer.

When using the method in a more extensive way, the survey could also be used to validate the researchers own conceptualisation of what social rehabilitation should entail and test to what extent the researchers views match the views of the respondents. To that end the SPOCs would also be asked to indicate which information categories they consider 'needed in the context of social rehabilitation' based on the practice in their own prison environment. The outcome of the analysis of that question is not representative of the opinions in each of the 28 Member States, but has the value of 28 individual practitioners views.

This example is based on an ongoing study into the need to complement the 2008 EU Framework Decision on the mutual recognition of custodial sentences with a mechanism to exchange information on the prisoners involved. The method was used to collect information and opinions from prison directors within the 28 EU Member States. The national central prison authorities were used as SPOCs acting as a gateway between the research team and different types of prisons in the Member States[n]. Results of the study will be published by the end of 2015.

Overcoming difficulties

A second way to evaluate the merit of the 'SPOCs & survey'-method, is by assessing the extent to which it is able to overcome the hurdles of comparative research identified and elaborated on in literature. Comparative methodology has developed mainly via trial and error (Devroe, 2010, p. 38) and is anything but inviting or encouraging. Comparative methodology is presented as an accumulation of almost undoable tasks (Lomio, Spang-Hanssen, & Wilson, 2011, p. 36). The main difficulties identified relate to (1) language, (2) access to up to date information, (3) correct interpretation and contextualization of foreign information, (4) comparability of information on foreign systems and (5) the time consuming nature of collecting and processing information. To assess the merit of the method, it will be compared to traditional 'individual & desk top'-method and the more modern 'team & report'-method.

Language

The language hurdle is generally considered to be the biggest hurdle to take in comparative research (Nelken,2007, p. 139; von Bar, 2004, p. 132). The evolution from traditional individual research to team work is a significant step to overcome this hurdle. Even though it could be possible to have the necessary information on a foreign criminal justice system translated into a language known to the researcher, it is often argued that comparative research should as much as possible rely on original primary source information (Devroe, 2010, p. 48). The members of a team of comparative researchers producing country reports or the members of the SPOC network in the method evaluated would not have a problem with the language of the source material. From that perspective, there is no difference between the more modern 'team & report'-method and the innovative 'SPOCs & survey'-method.

However, it should be underlined, that language should continue to receive special attention. Relying on colleagues mastering the language of the source material, does not do away with the fact that there will always be conceptual differences, i.e. differences in meaning even if similar labels are used. In light thereof Howard et al. have referred to the "endemic problem confronting comparative criminology", being the enormous diversity in the way different cultures and nation-states define crime, justice and other relevant concepts (2000, p. 166). Comparatists repeatedly put out warning signs about homonyms and faux amis (Devroe, 2010, p. 51; Van Hoecke, 2004, p. 174). Examples are legio and reference can for example be made to the ongoing discussion on the conceptualisation of organised crime[o] and the resulting difficulties in cross-nationally comparing data about that phenomenon (Calderoni, 2008; Symeanidou-Kastanidou, 2008; van Dijck, 2007).

The innovative 'SPOCs & survey'-method has two built-in ways to further accommodate possible language problems. First, inherent to the multiple choice based character of the survey, is the detailed formulation of questions and answering categories. The review of the draft survey by the members of the pilot group, is a first way of picking up possible language problems. Consulting SPOCs active in criminal justice systems from different 'legal families' is a way to detect problems in an early stage. Second, respondents can be encouraged or even required to use the free text fields complementing the answering categories to provide a definition of a concept used in either the question or the answer. In doing so, possible differences will become clear.

In doing so, researchers and respondents are constantly triggered to be very attentive to possible language issues. Language issues are likely to be dealt with in a more consciously fashion using the 'SPOCs & survey'-method compared to the 'team & report'-method even though there too, language issues may surface during the preparatory discussions.

Access to up to date information

The more traditional technique of comparative legal methodology consisting of individual comparative desk top research requires a researcher to find applicable and up to date source material. The accessibility of up to date information is listed as a second major hurdle to comparative research (Örücü, 2007, p. 49). Recognising the need to support researchers conducting comparative legal analyses, a large number of handbooks have been written with overviews of how to find up to date foreign sources of law (Lomio et al., 2011, p. 58). Though recognising the merit of those overviews, the ease of having a foreign colleague to help find the relevant source material can never be matched by even the most elaborate handbook. From that perspective comparative methods that actively involve foreign colleagues are equally good in overcoming this hurdle. There is no difference between the modern 'team & report'-method and the innovative 'SPOCs & survey'-method.

Correct interpretation and contextualisation

The challenge to correctly interpret and contextualise information on foreign criminal justice systems is widely commented on in literature. It is repeatedly argued that one cannot properly grasp how rules function without situating them into their legal, economic and cultural context; it is argued that there is little use of comparing paper institutions, or rules and doctrines merely as they appear in books (Rabel, 1947; Van Hoecke, 2004, p. 167; Westmarland, 2011, p. 59). Whereas traditional comparative research is said to have failed because it focussed too much on a 'law as rules'-approach, and gave insufficient attention to the context (Örücü, 2007, p. 45), more recently culture and diversity have become a central concern of comparative research (Monateri, 2012, p. 9). Here too, comparative methods that actively involve the participation of foreign colleagues are equally good in overcoming this hurdle. There is no difference between the modern 'team & report'-method and the innovative 'SPOCs & survey'-method.

Comparability of information

With respect to the comparability of information however, there is a clear added value of using the innovative 'SPOCs & survey'-method, when compared to the 'team & report'-method.

Working with open questions with a view to drawing up a country report has the benefit that respondents both have the liberty and are challenged to formulate their own reply (Brinkman, 2000, p. 68). Respondents will use their discretion to provide a summary of their own criminal justice system detailing a selected number of specificities. In methodological literature it is emphasised that particularly for research that intends to identify a personal opinion of a respondent, without steering the person into the one or the other direction, working with open questions is the best choice. However, when conducting comparative research looking into the differences of the criminal justice systems, a researcher is not looking for personal opinions, but looking for a similar and detailed factual account of the situation in each of the countries included in the study. From experience, it becomes clear that open questions and essay responses have significant down sides. Having an open question such as "What is the position of a victim in your criminal justice system?" will result in a detailed account thereof for each of the consulted countries. However, chances are high that each of the SPOCs will have selected those aspects from the criminal justice system he/she deemed most interesting or relevant. As a result, it is not guaranteed that based on their input the researcher will have sufficient information for all consulted countries to be able to conduct a proper comparison. Some SPOCs may have focussed on the specificities of 'who qualifies as a victim', other SPOCs may have focussed on the specificities of the legal position of the victim and the 'participation during the criminal proceedings', whereas yet other SPOCs may have focussed on the specificities of 'the support a victim can benefit from', either or not including financial support and compensation. Colleagues working with open question based-templates to draft country reports indicate that keeping all national experts in line is the most challenging part of the project. The validity and comparability of the efforts of all SPOCs are not fully guaranteed. This problem is accommodated in the 'SPOCs & survey'-method. By their very nature, closed questions leave no doubt as to the specific topics intended to be addressed. Closed questions are more targeted which reduces the ambiguity in relation to the objective of the survey and the information to be included (Bachman & Schutt, 2012, p. 168).

It should however be recalled that the surveys in this innovative method are only 'predominantly' multiple choice based and include free text fields in which respondents are able, encouraged or even required to elaborate on the specificities of their own criminal justice system. In doing so, one of the hurdles identified in literature is retained in the method. However, the significance of the hurdle is reduced in two ways. First, the extent to which the researcher is confronted with input via free text fields is significantly reduced. Second, the content of the free text fields is more targeted focussing on a small aspect of the criminal justice system. In doing so, the likeliness of the information included in the free text field being relevant to the researcher is significantly increased. The added value of (if not the need for) allowing the respondents to elaborate on the specificities of their criminal justice systems clearly outweighs the benefit of banning free text fields altogether.

Collecting and processing information

The time needed to collect and process information in the context of a comparative analysis is listed as a hurdle. Though drafting a survey can be relatively time consuming, especially taking the pilot phase into account, this way of working is still far less time consuming than conducting the in depth comparative analysis as an individual researcher. More importantly, collecting and processing information through a multiple choice based survey is less time consuming when compared to collecting and processing information through country reports. Completing a country report is generally more time consuming than completing a multiple choice based survey (Wilson & Sapsford, 2006, p. 101). Processing the information of a country report and producing a comparative analysis is far more time consuming than processing the information included in a multiple choice based surveys. Processing surveys completed in an electronic format can be even largely automated.

Finally, the question arises whether multiple choice based surveys should best be web based or distributed in an offline electronic format. Web based surveys are becoming more and more popular (Bachman & Schutt, 2012, p. 184; Wilson & Sapsford, 2006, p. 93). Notwithstanding the increasing popularity, own experiences with web based surveys have shown that SPOCs are not so keen on working online[p]. The need for internet access (which is e.g. not self-evident for law enforcement authorities in some Member States), the struggle with the use of login and password information (especially when the SPOC invites more people to contribute), the relative complexity of continuing the survey at a later time (e.g. when some details of the criminal justice system need to be checked or internally discussed before being able to tick the right box) and the difficulty in having an own copy of the replies are the most common arguments raised against the use of web based surveys. Based on that experience, the choice was made to no longer use web based surveys when targeting that specific audience. In recent studies pdf surveys that can be emailed back and forth between the researchers and the SPOCs have been used[q]. Surveys can be easily circulated amongst colleagues, accessed without login information, printed from the very start (with a view to filling it out offline first) to the very end (with a view to keeping a personal copy), and surveys are easily saved and reopened to continue working on it[r].

CONCLUSION

Whereas a lot of methodological thinking is criticized for remaining merely theoretical, omitting any sustained testing in practice (Adams & Bomhoff, 2012, p. 1), the 'SPOCs & survey'-method detailed in this paper has been successfully used in past research projects. The method consists of working with a single point of contact in each of the countries included in the comparative analysis. SPOCs are asked to fill out a predominantly multiple choice based survey, complemented with free text fields and where relevant the request to attach documents. Some of the SPOCs will be invited to become a member of the pilot group to review the survey before it is send out to all participating SPOCs. The SPOCs either work alone or compose a team around them.

The main weakness of the method is the need for participation. The method is dependent on identifying the right SPOCs and convincing them to cooperate and provide the information needed. The reliability of the comparison is dependent on the accurateness of the information provided and thus the knowledgeability of the SPOC. To avoid significant problems it is advised that SPOCs are being paid, which can make the method costly.

That weakness is counterbalanced by the strengths of the method: (1) swiftness, (2) reliability and (3) validity. First, once a network is build, identification and nomination of a SPOC can go relatively fast. Furthermore, using a survey is a very swift way of gathering information. Notwithstanding the fact that the drafting of the survey takes a lot of work, including an intensive literature review and pilot phase, the amount of time that needs to be invested does not compare to the amount of time that would need to be invested in individual research into the criminal justice systems for each of the countries involved. Furthermore, the actual collecting and processing of the information is less time consuming compared to other methods used. Second, because information is provided by SPOCs who are knowledgeable about their own criminal justice system and the specificities of the topic subject to analysis, the reliability of the information is considerably higher when compared to the reliability of the information compiled by a researcher that is unfamiliar with the foreign criminal justice system. The method entails a number of guarantees to overcome language barriers and is an effective way to guarantee that up to date information is correctly interpreted and contextualised. Third, the validity of the outcome of the research based on the 'SPOCs & survey'-method is higher compared to the outcome of research based on the 'individual & desk top'-method or the 'team & report'-method. That benefit is largely due to the specificity of the questions and answer categories in the multiple choice survey and the targeted character of the information provided via the free text fields and attached documents. Problems with incompleteness or incomparability of the information the 'team & report'-method suffers from, are successfully overcome.

Provided the researcher has access to knowledgeable SPOCs, the 'SPOCs & survey'-method is an easy way to obtain 'a targeted descriptive and informative picture of the current situation in another state'. It was successfully used in various degrees from somewhat reservedly solely to support methodological choices over obtaining detailed and up-to-date factual information to more extensively collect also personal opinions from the respondents.

FURTHER READING

M. Adams & J. Bomhoff (2012), Practice and Theory in Comparative Law. Cambridge Cambridge University Press.

Too often, explicit methodological discussions in comparative law remain limited to the level of pure theory, neglecting to test out critiques and recommendations on concrete issues. This book bridges this gap between theory and practice in comparative legal studies. Essays by both established and younger comparative lawyers reflect on the methodological challenges arising in their own work and in work in their area. Taken together, they offer clear recommendations for, and critical reflection on, a wide range of innovative comparative research projects.

P. G. Monateri (2012), Methods of Comparative Law. Cheltenham: Edward Elgar Publishing Limited

Monateri goes into the development of the method of doing comparative research. He brought together a wide range of authors who provide contributions exploring theoretical and empirical issues in comparative law.

M. Reimann & R. Zimmermann (2008), The Oxford Handbook of Comparative Law. Oxford: Oxford University Press.

The Oxford Handbook of Comparative Law summarizes and evaluates comparative law as an upcoming discipline. Especially Section II on the major approaches to comparative law - its methods, goals, and its relationship with other fields, such as legal history, economics, and linguistics and the comparative criminal law chapter in Section III are particularly interesting.

Endnotes

- Criminal policy making is no longer exclusively situated at national level. As a result of cooperation initiatives such as the Benelux cooperation, the European Union and the Council of Europe, criminal policy is also made at 'international' level. The need to have an evidence base for criminal policy making was first recognised at national level. Today, that need is also recognised at international level.
- In the 2011 study on the material detention conditions in the Member States the SPOC network was made up of practitioners (Vermeulen et al., 2011). The aim of the study was to get an overview of the practical situation regarding the detention conditions in each of the member state. Because of the importance to get a practitioners' view, all SPOCs were practitioners.
- In the 2010 study on the future of judicial cooperation in criminal matters in the EU a mix of academics, policy makers and practitioners were used as SPOCs (Vermeulen, De Bondt, & Ryckman, 2012b). The aim of the study was to get input regarding both legal, practical and policy issues that would arise in relation to a set of future policy options prepared by the researchers. To ensure the inclusion of reflections from all actors, the choice was made to include 'representatives' of all actors in the SPOC network and in doing so in the pilot discussions on the drafting of the survey.
- Knowledgeability can refer to the own knowledge to complete the survey, or the knowledge and access to another person to complete the survey.
- http://www.eclan.eu/Default.aspx.
- http://eurojust.europa.eu/about/structure/college/Pages/national-members.aspx. In the 2009 study on the laws of evidence in the Member States, the Eurojust college was used, composed of the Eurojust national members as a starting point (Vermeulen, De Bondt, & Van Damme, 2010).
- https://www.europol.europa.eu/content/page/our-people-19.
- European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes was set up by Council Decisions 2002/494/JHA of 13 June 2002 and 2003/335/JHA of 8 May 2003 (Genocide Network). http://www.eurojust.europa.eu/Practitioners/networks-and-fora/Pages/genocide-network.aspx.
- http://www.amue-ejpa.org/.
- http://www.ecba.org/content/.
- http://www.ccbe.eu/index.php?id=140&L=0.
- http://www.europris.org/.
- The result of that study will be published as Traest, P., Vermeulen G. et al., (2015). Een praktijkgericht onderzoek naar de knelpunten in de huidige Belgische strafprocedure met het oog op het schrijven van een nieuwe strafprocedure, Antwerp-Apeldoorn-Portland: Maklu.
- Not all Member States have one single information system used by their prisons. In most Member States, different 'types' of prisons can be identified, when using the information system as a variable. The SPOCs (i.e. Central Prison Authorities) were used to identify the prisons needed to gather the necessary information for the study. The selection of the prisons was done using – amongst others – that variable.
- E.g. organized crime is sometimes used to mean the offences of 'participating in a criminal organization' whereas at other occasions it is meant to refer to the modus operandi of offences, be it or not a limited number of 'serious' offences.
- In the 2010 study on the future of judicial cooperation in criminal matters in the EU, web based surveys were used (Vermeulen, De Bondt, et al., 2012b).
- In the 2012 study mapping the diversity in the criminal liability for legal persons in the EU, as well as in the 2012 study on mapping the diversity in disqualifications as sanction measures in the EU, emailed pdf based surveys were used (Vermeulen, De Bondt, & Ryckman, 2012a; Vermeulen, De Bondt, Ryckman, & Persak, 2012).
- In practice it is important to take due account of the fact that some respondents may be working with older software versions requiring some adjustments in the compatibility settings (e.g. when using Adobe Professional X or up, simply saving the document in an extensive format, enabling the extra options will allow also users with older Adobe Reader versions to complete the survey).

DECLARATIONS

Competing interests

The author declares that she has no competing interests

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CHAPTER 2

STRASBOURG JURISPRUDENCE, LAW REFORM AND COMPARATIVE LAW: A TALE OF THE RIGHT TO CUSTODIAL LEGAL ASSISTANCE IN FIVE COUNTRIES

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ABSTRACT

This article traces the path from the decision of the European Court of Human Rights (ECtHR) in *Salduz v Turkey* to custodial legal assistance reforms in France, Scotland, Belgium and the Netherlands, and to the recent decision of the Irish Supreme Court in *DPP v Gormley*. The article attempts to flush out the central role of the ECtHR in effecting national criminal justice reform, while paying attention to considerable variations in national responses. It discusses the thesis that when the ECtHR articulates its rules clearly, as it has arguably done in the *Salduz* line of cases, it can lead contracting parties to accept its position, even where this might require a significant readjustment of national law and practice. The article also brings into focus the Irish Supreme Court's strong demonstration of common law comparativism, which influenced the outcome in *Gormley* at least as significantly as Strasbourg jurisprudence itself. This remarkable cosmopolitan vision is contrasted with the Supreme Court's simultaneous unawareness of other *Salduz*-generated reforms in Europe. The article concludes that comparative law should have an important role to play in shaping national responses to Strasbourg jurisprudence and facilitating its acceptance by contracting parties.

INTRODUCTION

In *DPP v Gormley and DPP v White*, the Irish Supreme Court recognized 'a right to early access to a lawyer after arrest' and a 'right not to be interrogated without having had an opportunity to obtain [legal] advice'.[1] *Gormley* is the latest link in the chain of radical Strasbourg-inspired reforms of the right to custodial legal assistance in Europe. The seminal unanimous decision of the Grand Chamber of the European Court of Human Rights (ECtHR or 'the Court') in *Salduz v Turkey*,[2] which was a major influence for *Gormley*, had already led to, or set in motion at least, reforms of custodial legal assistance in France, Belgium, Scotland and the Netherlands. Like Ireland, these countries had long resisted giving full effect to the right of access to a lawyer in police interrogations. Scotland and Belgium were going so far as denying suspects the right to consult with a lawyer before interrogation, while suspects in France and the Netherlands were entitled to a brief consultation with a lawyer *prior to*, but not *during*, questioning.[3] Irish jurisprudence was recognizing access to a lawyer as a constitutional right,[4] but did not 'require that advice from a requested solicitor actually be made available to the relevant suspect prior to questioning'[5] and rejected the possibility of having a lawyer present during questioning.[6]

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In undertaking a contextual study of reforms of custodial legal assistance in Europe, this article will offer evidence of the central role of the ECtHR in effecting change in national jurisdictions. At the same time, it will highlight considerable variations in national responses to *Salduz*, and will argue that these illustrate that cosmopolitan influences for reform are mediated by competing judicial and legislative agendas, local resistance and a variety of other political, institutional and economic factors. The article will use these observations as a platform to discuss, and then propose qualifications to, the thesis that when the ECtHR articulates its rules clearly, it can lead contracting parties to accept its position. Reflecting on the Irish Supreme Court's striking demonstration of common law comparativism in *Gormley*, the article will also offer some thoughts on the role that comparative law should play in shaping national responses to Strasbourg jurisprudence.

STRASBOURG JURISPRUDENCE AND NATIONAL REFORMS OF THE RIGHT TO CUSTODIAL LEGAL ASSISTANCE

To explore Strasbourg's role in reforms of the right of access to a lawyer in Europe, I will provide a sketch of the state of custodial legal assistance before and after *Salduz* in the five European countries that will be compared in this article. It will first be necessary to offer a brief account of *Salduz* and its progeny, and a more detailed analysis of the most recent demonstration of their effect, namely the Irish Supreme Court's decision in *Gormley*.

A. *Salduz* and its Progeny

Salduz represents a major re-evaluation of the ECtHR's position on the importance of 'the investigation stage for the preparation of the criminal proceedings'.[7] The suspect in *Salduz* was a minor of 17-years-of-age who had been interrogated at an anti-terrorism branch of the Turkish police in the absence of a lawyer, making several admissions about his involvement in the suspected offences. The case was first examined by a Chamber of the ECtHR, which found no violation of the right to fair trial, mainly on the basis that the applicant had had legal representation during the trial and appeal proceedings, his statement was not the sole basis for conviction and he had had the opportunity of challenging the prosecution's allegations. The fairness of the trial had, therefore, not been prejudiced by the lack of custodial legal assistance.[8] This finding was in line with the pre-*Salduz* approach of assessing fairness with regard to the entirety of the proceedings.[9] The Grand Chamber's decision in *Salduz* departed from this approach altogether, holding that Article 6(1) of the European Convention on Human Rights[10] (ECHR or 'the Convention') requires that 'as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police'[11] and that '[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.'[12] The Court rejected the argument that the assistance provided subsequently by a lawyer or the adversarial nature of the ensuing proceedings could cure the defects occurring during police custody.[13]

The ECtHR provided quick confirmation of this new approach in a series of Chamber judgments. In *Panovits v Cyprus*,[14] it reiterated that 'Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation',[15] and then considerably extended the scope of the application of the right to legal assistance in *Dayanan v Turkey*, which mandated that a suspect should be assisted by a lawyer 'as soon as he or she is taken into custody… and not only while being questioned', and that he should be able to 'obtain the whole range of services specifically associated with legal assistance'.[16] The right of access to a lawyer was seen as extending beyond the right to legal *advice*, to include a wider notion of legal *assistance* that applies during the entire interrogation phase and not simply prior to, or during, the questioning of the suspect.[17] The Court likewise found a breach of the right to fair trial in *Pishchalnikov v Russia*, where the suspect had been questioned in the absence of a lawyer in the first two days of interrogation, though he had specifically asked to be assisted by a lawyer.[18] The Court held that the authorities should have offered the suspect the opportunity to retain a counsel even if the one originally requested by him was unavailable.[19] The Court concluded that the lack of legal assistance had irretrievably affected the right to a fair trial,[20] and that an accused 'who had expressed his desire to participate in investigative steps only through counsel, should not be subject to further interrogation by the authorities until counsel has been made available to him'.[21] Finally, in *Brusco v France,* the ECtHR removed any doubts about the lawyer's presence at questioning, by holding that the defendant has the right to be assisted by a lawyer from the beginning of his detention *as well as during questioning*.[22]

The *Salduz* line of jurisprudence continues to evolve at a very fast pace[23] and to exert considerable influence in European countries. *Gormley* is the last of radical developments in this area. After presenting the case, I will demonstrate that it reflects a trend of breathing new life into the right to custodial legal assistance in those European jurisdictions that had long failed to recognize a role for lawyers at the police station.

B. *Salduz* Strikes Again: *DPP v Gormley*

The appellant in *Gormley* had requested a solicitor shortly after being arrested and being notified of his rights, and had provided the police with the names of two solicitors. The gardaí (officers of the Irish national police) made efforts to locate either one of the two solicitors. One of them contacted the Garda station less than an hour later, to confirm he would soon arrive at the station. But the gardaí did not wait for the solicitor and started the interview immediately after he made contact with them.[24] It is in the course of this interview that the suspect made a number of inculpatory admissions which were deemed admissible in trial. The Supreme Court was thereupon faced with the question whether commencement of the questioning should be postponed to enable the solicitor to attend at the Garda station or whether simply contacting the solicitor vindicates the suspect's right to legal assistance.

Until *Gormley* was decided, the right of access to legal assistance was being narrowly interpreted as a right to *reasonable* access only[25] and was therefore of 'limited practical effect'.[26] The gardaí's '*bona fide* attempts to comply with [the suspect's] request [for legal assistance]' seemed to satisfy this requirement, unless it could be demonstrated that the gardaí had made a conscious and deliberate attempt to deprive the suspect of the services of his solicitor.[27] But the Irish Supreme Court said in *Gormley* that the Constitution's mandate that a person should not be tried save 'in due course of law'[28] encompassed 'the right not to be interrogated without having had an opportunity to obtain such advice'.[29] This specifically derived from the right against self-incrimination[30] and was 'an important constitutional entitlement of high legal value'.[31] *Gormley* now provides 'an entitlement not to be interrogated after a request for a lawyer has been made and before that lawyer has become available to tender the requested advice'.[32] The Court emphasized that, '[a]t a minimum', the right of access to a lawyer while in custody 'would be significantly diluted if questioning could continue prior to the arrival of the relevant lawyer'.[33] The Court also recognized that 'there are many issues of detail which surround the precise extent of such a right'[34] and that the right is 'potentially subject to exceptions',[35] but it then went on to explain that these would be 'extreme exceptions where the lawyer just does not arrive within any reasonable timeframe',[36] and added that this would be 'a matter to be debated if and when a case with those facts actually comes before the Court'.[37]

Salduz played a key role in the Irish Supreme Court's transition from the 'reasonable access' test to mandating that questioning could not commence or continue before the arrival of a lawyer. The Court took as its point of departure the 'general principles' established in *Salduz*, citing extensively from the decision of the Grand Chamber,[38] the ECtHR's decisions which later reiterated and further developed these principles,[39] as well as *Cadder v HM Advocate*, in which the UK Supreme Court substituted the *Salduz* line of jurisprudence for the pre-existing regime of police interrogation in Scotland.[40] The first question that the Irish Supreme Court asked in *Gormley* was whether the entitlement to a trial in due course of law also encompassed an entitlement to access legal advice before interrogation. Establishing that this was the position taken by ECtHR jurisprudence, the Court responded in the affirmative.[41] This opened the way to examine the question central to *Gormley* of whether this entitlement also carried with it 'an entitlement not to be interrogated after such access is requested and before access to such a lawyer is obtained'.[42] Noting that this was indeed the 'consistent international position',[43] which the ECtHR had also adopted, the Court took the radical step of prohibiting the continuation of questioning before legal advice being obtained.[44] This was required, the Court concluded, to compensate for the particular vulnerability of the suspect after arrest, which was the core reasoning behind *Salduz*.[45]

Strasbourg's key influence in *Gormley* also becomes evident when contrasted with the conclusion in the linked appeal of *DPP v White*. The Court explained there that, according to ECtHR case law, the taking of forensic samples without the benefit of legal advice did not amount to a breach of the right to a fair trial.[46] This meant that a distinction could be drawn between recognizing the right to prior legal advice in cases of police interrogation—which derived directly from Strasbourg jurisprudence—and rejecting the right in cases of forensic testing, in view of the fact that such an extended application of the right to legal assistance could not be supported by the ECHR.[47]

C. Before *Salduz* in France, Scotland, Belgium, the Netherlands and Ireland

Resistance to recognition of the right to custodial legal assistance in France is a well-documented fact.[48] I have sketched elsewhere how systemic opposition to providing suspects with access to legal advice has spanned the French legal landscape for the last 20 years at least,[49] and have pinpointed important similarities with historic resistance to the right to legal advice in Scotland.[50] Here it suffices to note that despite the many attempts at legislative reform,[51] suspects in France were until the enactment of the Law of 14 April 2011 not entitled to have a lawyer present when questioned by the police.[52] Similarly, in Scotland, it was only in 2010 that the UK Supreme Court forced, with *Cadder v HM Advocate*,[53] a break with a 30-year history of legislation[54] and authoritative line of jurisprudence[55] approving the fact that a suspect, detained for six hours in police custody, but not charged, did not have the right to legal assistance during that period and, although the police had the right to put questions to the detainee, he had no right to legal advice, including advice about whether or not he should answer such questions.[56] Lord Rodger's historic analysis in *Cadder* brings to the fore the main reasons underpinning this quite idiosyncratic position,[57] which was 'intended to give the police—and therefore the prosecution—an enhanced possibility of obtaining incriminating admissions from the suspect which [could] then be deployed in evidence at his trial'.[58]

In Belgium, prior to *Salduz*, legislation provided for legal assistance only after interrogation by the investigating judge.[59] This meant that suspects were deprived of any access to a lawyer for the whole 24-hour period of interrogation by the police or even on the most solemn occasion of examination by the investigating judge preceding the issuance of an arrest warrant.[60] This practice of entirely isolating the suspect when at the police station appears to have been so embedded in the Belgian legal culture that even the *Cour de cassation*, the highest court in the land, originally went so far as to consider that it was compatible with the *Salduz* jurisprudence, by adopting the 'overall fairness of the proceedings' argumentation that had been explicitly rejected by *Salduz* itself.[61] In choosing an arguably more resourceful defence of the national legal practice, the *Cour d'assises* (mixed criminal tribunal) in Liège reached the same conclusion, by pointing out that Belgian law provided the suspect with alternative procedural guarantees that compensated for the absence of a lawyer during custodial interrogation.[62] The decision mirrors the opinion of the Scottish High Court of Justiciary in *HM Advocate v McLean*, where the practice of providing the suspect with no access to a lawyer for a period of up to six hours was strongly defended by the highest jurisdiction in Scotland on the premise of guarantees otherwise available to secure a fair trial.[63] This defence of the status quo was eventually seen as flawed in both jurisdictions,[64] yet still clearly demonstrates how, until *Salduz*, no one seemed to think that questioning the suspect without access to legal assistance could actually be in breach of the right to fair trial. From this viewpoint, Lord Hope's observation in *Cadder* that it was 'remarkable that, until quite recently, nobody [in Scotland had] thought that there [had been] anything wrong with this procedure'[65] applies *a fortiori* to Belgium, which prior to *Salduz* endorsed possibly the most restrictive interpretation of the right to legal assistance in Europe.

By contrast, the Dutch Code of Criminal Procedure provided for assistance by a lawyer of the suspect's choice[66] and entitled the suspect to be assisted by a lawyer when questioned by the investigating judge.[67] But Dutch jurisprudence had generally interpreted these provisions to mean no right to legal assistance prior to, or during, police interrogation.[68] Police interrogation was also preceded by a 'temporary arrest' phase, lasting a maximum of six hours, during which the Code of Criminal Procedure provided for no intervention of a lawyer.[69] In an analysis of the response of the Netherlands to *Salduz*, Brants exposed Dutch hostility towards legal assistance as firmly rooted in the inquisitorial understanding of the suspect as 'primarily a source of information' and the prosecution service as the institution 'in charge of the police' that 'can be trusted to also take the suspect's pretrial interests into account'.[70] If the 'inquisitorial resistance' explanation is right (and similar experiences in France and Belgium offer comparative support to such a finding),[71] then it must also provide a significant explanation for the Netherlands' historic neglect of the need for greater protections for the suspect in this field. Brants provides an account of resistance and complacency in the face of miscarriages of justice, while underlining the dearth of criticism from indigenous academic and professional sources.[72] Despite all this, at the time of *Salduz*, the Netherlands was, perhaps surprisingly, taking its first steps towards greater recognition of suspects' rights at the police station, notably by putting in place a trial project whereby, exceptionally, suspects could be assisted by a lawyer in interrogations for unlawful killings.[73]

The pre-*Gormley* limitations of the Irish position on 'reasonable access' to a lawyer have already been sketched above. Here it can be added that a 'reasonableness' standard also applied to the duration or number of consultations permitted, once a solicitor's presence at the police station has been secured, exacerbating the uncertainty surrounding the exercise of the right to legal assistance in practice.[74] The analysis of Justice Hardiman in the separate concurring judgment in *Gormley* brings to the surface similar concerns, such as in relation to the overwhelming conditions of police custody that undermine the suspect's resolution to see a solicitor or the proliferation of non-specialist solicitors giving advice on complex areas of criminal law.[75] All this must also be seen against the backdrop of the statutory power to draw adverse inferences from 'silence' in custodial interrogations in Ireland, which further highlights the flaws inherent in the pre-*Gormley* position there.[76] More importantly, like all of the countries mentioned above, Ireland had long deprived suspects of the right to have a lawyer present during questioning.[77] *Gormley* deferred judgment on this matter, but opened the way for the reform of this crucial aspect of custodial legal assistance.

D. After *Salduz*

Salduz caused legal earthquakes in all of the countries examined above, even if some were less powerful than others. The Scottish government was the first to react. Following the Supreme Court's strict application of *Salduz* in *Cadder*, it rushed legislation through the Scottish Parliament that recognized suspects' right to have a private consultation with a solicitor before any questioning begins and at any other time during such questioning, but did not specifically prescribe a right to have a lawyer present when questioned by the police.[78] The police *may* afford the suspect access to a lawyer during interrogation, but there is nothing in the relevant Act that prescribes a duty to do so.[79] The legislation was enacted in October 2010,[80] leading to considerable criticism and debate coming especially from Scottish scholarly circles, protesting an inappropriate interference by the Supreme Court with unique domestic elements of the Scottish criminal justice system and pinpointing the collateral risk of a diminution of other rights of the suspect.[81] Since then, the Scottish government has appointed Lord Carloway to undertake a review of key elements of criminal law and practice,[82] and has introduced a Bill into the Scottish Parliament that takes forward and develops Lord Carloway's recommendations.[83] The Bill provides for a 'right to have a solicitor present while being interviewed'.[84]

France followed suit only a few months later, with the Law of 14 April 2011, which, for the first time, afforded suspects the right to be assisted by a lawyer when questioned by the police.[85] Passing this legislation was the final act of a long reform process that the government had initiated much earlier—half-heartedly, it must be said—and that only found momentum as a result of French courts' enthusiastic reception of *Salduz* and the cases that followed it. In fact, the French government had originally settled for solutions that were going much less far than those embraced by Strasbourg,[86] and it is fair to argue that it was only under the burden of pivotal decisions applying *Salduz*—first by the *Conseil constitutionnel* (Constitutional Council),[87] then the *Cour de cassation* (the French 'supreme court')[88]—that the government was forced to change direction.[89]

The Belgian Law of 13 August 2011[90] mirrors the legislation enacted in France, providing the suspect with the right to consult confidentially with a lawyer from the beginning of the interrogation and before the first questioning by the police[91] as well as the right to be assisted by a lawyer during questioning.[92] *Salduz* 'served as the detonator' for this radical development, observed the *Collège des procureurs généraux* (the body that represents prosecuting officials in Belgium).[93] The *Collège* sought to fill in the gap in the existing legislation by issuing provisional guidance that was going some way towards providing the suspect with the right to legal assistance.[94] The *Association des juges d'instruction* (association of investigating judges) and the *Conseil d'État* (Council of State) likewise put pressure on the government to rectify the situation, though they adopted narrow interpretations of *Salduz* and the solutions deriving therefrom.[95] The effect of *Salduz* was more immediately reflected in some lower courts' responses, as they refused to base convictions on confessions obtained in the absence of a lawyer from custodial interrogation[96] (and this despite the fact that the *Cour de cassation* had found Belgian legislation allowing this to be compatible with Article 6 of the ECHR),[97] as well as in the initiatives undertaken by Bar Associations across the country to provide legal assistance wherever local judicial authorities so permitted.[98] In this climate, legislative reform was inevitable, and though the government had originally attempted to avoid giving full effect to the *Salduz* jurisprudence (first by proposing that legal assistance should only be provided after eight hours of interrogation had elapsed,[99] then by insisting that, in a first phase of the reform, there should be no right to the presence of a lawyer during questioning),[100] in the end it 'conceded' both rights. The fact that the legislation of August 2011 has come to be widely known as '*loi Salduz*' ('Salduz legislation')[101] speaks for itself about the influence of the ECtHR in effecting a 'fundamental' and 'revolutionary' criminal justice reform in Belgium, to borrow the words of the Minister of Justice who introduced the relevant Bill in the Belgian Parliament.[102]

The Netherlands offers an illustration of a more moderate, though still not finalized, response to *Salduz*. In contrast to Scotland, France and Belgium, the Dutch government has still today—nearly seven years after *Salduz*—not enacted legislation giving effect to the latter. A new Bill, drafted following publication of the European Union (EU) Directive on the right of access to a lawyer,[103] is currently pending before the Lower House (House of Representatives) for approval, but there is still a lot of uncertainty as to when the parliamentary process will be concluded.[104] The Dutch Supreme Court's approval of the pre-*Salduz* status quo provides an explanation for the Netherlands' continued reluctance to give effect to the right to legal assistance. In a much-awaited decision handed down in June 2009, the Court recognized that *Salduz* implied a right to prior consultation, to be informed of that right and 'to be able within reasonable limits to exercise it', but not a right to be assisted by a lawyer during interrogation, save for the interrogation of juveniles.[105] The Supreme Court explained that it had to defer to the government the design of specific rules on legal assistance, and that, 'in expectation of new legislation, it could [only] rule on the minimum standard apparently required'.[106] The legal vacuum left by the government's reluctance to legislate and the Supreme Court's adoption of a restrictive interpretation of the *Salduz* jurisprudence (to the extent that this had evolved by 2009) was filled, to some degree, by binding instructions issued by the prosecution service.[107] However, these not only did not provide for the presence of a lawyer during interrogation, but also qualified consultation rights according to the seriousness of the offence in question and the age of the suspect. Similar qualifications were made to receiving legal aid, being notified of the right to legal assistance and having the ability to waive the right.[108] A Bill introduced in the Dutch Parliament in April 2011 was going further than that, providing *inter alia* for the presence of a lawyer during interrogation regarding offences punishable by a maximum of no less than six years imprisonment, but the Bill was abandoned.[109] In recent, more dramatic developments, first the Attorney-General gave legal advice to the Supreme Court approving the presence of the lawyer during questioning, then the Supreme Court opined that the right to legal assistance must be regulated by law and that, if no legislation is forthcoming, it might have to rule differently in future cases, giving recognition to the right.[110] The EU Directive seems to have finally brought the Netherlands closer to extending the scope of the right to legal assistance to include the presence of the lawyer during questioning, though it must be stressed that the Bill that will give it effect comes with many strings attached, subjecting the exercise of the right to various exceptions.[111]

Finally, in Ireland, as already discussed, *Salduz* and other international jurisprudence eventually drove the Supreme Court to strike the vague 'reasonable access' test into oblivion and prohibit any questioning prior to the arrival of the lawyer. Even more dramatic was the shift to allowing suspects to have a lawyer present during questioning. Since the issue had not arisen on the facts of *Gormley*, the Supreme Court refrained from deciding it, intimating, however, that the solicitor's presence was integral to the right to legal assistance.[112] Then, only two months after *Gormley*, the Director of Public Prosecutions issued a directive to the Garda Siochána—and the Department of Justice informed the Law Society accordingly— to the effect that if suspects ask for the assistance of a lawyer during questioning the gardaí should accede to their request. The most significant change of Irish criminal procedure in the past 30 years had *Salduz* and ECtHR jurisprudence written all over it.[113]

VARIATIONS IN NATIONAL RESPONSES

These modern transformations of custodial legal assistance in Europe provide ample demonstration of the ECtHR's drastic influence on national legal systems,[114] and confirm academic analyses of Strasbourg's power to effect reform in areas where the balance of local powers—political, professional or institutional—may have long deprived the national legal system of the capacity to venture forward in imaginative, bold ways.[115] All five countries analysed above have, under Strasbourg's undeniable influence, come out of a protracted period of isolationism in the field of suspects' rights to introduce—or, at least, take important steps towards—reform long seen as providing no fit with the national legal culture. This is a good point of departure when assessing the ECtHR's role in the construction of a new landscape of procedural rights in Europe. But important variations in the national responses can also be located, and these lend themselves to a deeper analysis of the diverse ways in which the Convention's influence may manifest itself in different European countries.

A first point worthy of consideration relates to the urgency with which the five legal systems discussed above have responded to *Salduz*. Scotland, France and Belgium have all shown reasonably quick reflexes to the ECtHR's jurisprudence, introducing legislation with a difference of only a few months between them. An immediate legislative response was seen in all of them as the direct and inevitable outcome of the Court's jurisprudence. The Scottish government resorted to 'emergency' legislation,[116] despite the profound impact that this was likely to have on thousands of cases that were ongoing, awaiting trial or held in the system pending the hearing of an appeal.[117] The Belgian Minister of Justice spoke with similar urgency and conviction in the Belgian Parliament, accepting that 'the *Salduz* jurisprudence [was] a given and imposed on [Belgium]'.[118] *Salduz* was perceived in exactly the same way in parliamentary discussions in France, all the more so after the ECtHR found a breach of Article 6 of the ECHR in *Brusco v France*.[119] The impact of the reform in both Belgium and France was anticipated with the same level of concern that existed in Scotland, particularly due to the number of cases that would be put in peril and the complications arising from having to set up an effective system of legal assistance within very strict deadlines.[120] The Netherlands, on the other hand, has still not legislated the right to have a lawyer present during custodial interrogation, though, paradoxically, it was the only one of the above legal systems which had experimented with application of this right prior to *Salduz*. The fact that a Bill is only now being examined in the Dutch House of Representatives means that the country's delayed response to *Salduz* was second only to that of Ireland. Before *Gormley*, the effect of *Salduz* had been virtually invisible there, while the government has still today not introduced a Bill dealing with these matters. These temporal variations may, of course, be due to coincidence—for example, an appropriate case reaching the national 'supreme court'—but they may also reveal the different understandings that may exist in different legal systems as to giving the Convention immediate effect in practice.

Asking 'to what extent'—and not just 'when'—the national legal system gives effect to Convention jurisprudence can offer a far more revealing illustration of the diverse ways in which the latter exercises its influence in national legal systems. The preceding analyses on the right to have a lawyer present *during* questioning provide evidence of such divergence. Even where suspects are given access to a lawyer during questioning, important variations exist as to the lawyers' role there. Thus, while French and Belgian legislation, and now the Bill pending before the Dutch House of Representatives, rigorously restrict lawyers to a passive, non-adversarial role during questioning (specifically enumerating actions that can be undertaken by them while prohibiting others),[121] in Scotland it was felt that the role of the lawyer in providing advice did not need to be set in legislation.[122] In theory, this allows for the adoption of a more adversarial attitude during interrogation, but, possibly, also gives the police *carte blanche* to restrict the lawyers' ability to actively represent their clients in interview. Scotland also differs from France, Belgium and the Netherlands in that it does not regulate the duration and frequency of private consultations with a lawyer (consultation lasts a maximum of 30 minutes in the three Continental systems).[123] On the other hand, consultations in Scotland seem to invariably take place *via* telephone, as documented by an important recent empirical study.[124]

Moreover, in France, Belgium and the Netherlands, the police are obliged to delay the questioning of the suspect *only for a period of two hours* from the moment contact has been made with the lawyer.[125] The Bill currently examined by the Dutch House of Representatives goes as far as to give the police the power to question the suspect immediately after arrest in the absence of counsel or to decide not to admit the lawyer into the interrogation room in exigent circumstances.[126] In Scotland, there is no fixed rule on how long the police must wait before they can question the suspect, but the Carloway Review considered that 'one hour' in urban areas and 'two hours' in rural areas would be acceptable.[127] In Ireland, on the other hand, *Gormley*'s effect is that there can be no questioning until the solicitor arrives at the police station. No time limit applies there.[128]

To take another example of variations in national responses, in France, despite the significant advances achieved with the April 2011 legislation, the lawyer can still be excluded from interrogation for 48 hours in relation to organized crime offences, and a whole 72 hours in investigations relating to terrorism and drug trafficking.[129] Similar exceptions are not encountered in the other countries examined in this article. Of even more concern is the fast-growing practice of affording no legal assistance to suspects voluntarily attending the police station. This is now the position in France in relation to both voluntary attenders and persons who are not yet suspected of the commission of an offence, and this with the blessing of the *Conseil constitutionnel*.[130] In Belgium, depriving suspects not detained by the police of legal assistance—or of mere consultation rights, in less serious offences[131]—was seen as a compromise needed for the right to legal assistance to be indeed recognized in cases where the suspect *is* detained by the police. Allegedly this was needed to avoid organizational and budgetary complications that would otherwise arise.[132] Even more curious is the fact that, in the Netherlands, voluntary attenders are actually presumed to have consulted a lawyer before attending the police station and are therefore afforded no further right to consultation.[133] Scotland, on the other hand, provides voluntary attenders with the same right to have access to a solicitor as those who are detained at the police station.[134] Such divergence cannot be taken lightly, as possible police over-reliance on 'voluntary attendance' could undermine the effect of *Salduz* rights reserved for later stages of the process.[135] It must be noted here that, though *Salduz* itself may have not directly addressed the issue of voluntary attenders' right to legal assistance, post-*Salduz* jurisprudence has accepted that the right may be activated even before arrest or the first interrogation, even outside the police station,[136] and even where the police may have examined the suspect as a witness.[137] The rule devised by Strasbourg may not be as clear in relation to consultation rights or the right to have a lawyer present during interrogation (a proper case has not reached the Court yet), still one might have reasonably expected to find fewer variations here; the Court takes as its main premise that a person interrogated at the investigation stage finds himself in a vulnerable position, and that, in most cases, only the assistance of a lawyer can properly compensate for it.[138] This is all the more so where the person concerned is questioned at the police station, and there is much to say about 'voluntarily' attending the police station and having the 'freedom' to leave, in the context of such questioning.[139]

The above shows that despite the unquestionable influence of the *Salduz* stream of cases on national jurisdictions, *Salduz* rights have been given effect to different degrees there. For the most part, this reflects national resistance to fully adopting these rights, and this despite Strasbourg pronouncing itself with sufficient clarity in this area. This becomes even more obvious when one looks at post-*Salduz* organization of legal assistance in practice, such as in relation to the provision—and remuneration levels—of legal aid, the efficient functioning of duty lawyer schemes, the operation of police station training schemes for lawyers and police officers alike or the physical organization of police consultations in a manner that would guarantee their confidentiality.[140] These variations make *Salduz* an interesting case study of the acceptance of Strasbourg jurisprudence in national jurisdictions.

SALDUZ AS A PARADIGM OF ACCEPTANCE OF STRASBOURG JURISPRUDENCE IN CONTRACTING PARTIES?

In a recent *Criminal Law Review* article, Jackson and Summers used *Salduz* as a paradigm drawing support for the thesis that 'when the ECtHR articulates clear rules and a coherent rationale for its approach, it can win acceptance for its position even when this may have far-reaching consequences for national law'.[141] The article contrasted Strasbourg's success in gaining acceptance for its position on custodial legal assistance in the United Kingdom and Switzerland (the two comparative points of reference in the article)—as a direct result of *Salduz* setting clear rules and having a coherent rationale—with Strasbourg's failure to advance its thesis on confrontation (in the same legal systems), precisely because the relevant jurisprudence lacked a coherent rationale and was not providing national courts with clear rules.[142] Though not applicable to confrontation evidence, the analysis in the preceding sections offers a useful opportunity to scrutinize the *Salduz* part of Jackson's and Summers' argument. At an empirical level, developments in the five systems examined here conform with Jackson's and Summers' observations about the effect of *Salduz*. In these European systems, Strasbourg has *in principle* gained acceptance for its position on custodial legal assistance. There is also evidence that where this was not immediately so, it was specifically grey areas of *Salduz* that may have fuelled resistance or given rise to a more reluctant approach.[143] But here it is as well to draw attention to the variations in the national responses sketched above. These considerably influence the application of *Salduz* rights in practice, to a degree that variations cannot be dismissed as routine or insignificant. Seen from this angle, the argument that clarity gains acceptability may need to be qualified. Variations in national responses signify variable degrees of acceptance. Despite its clear rationale, *Salduz* was not adopted with the same urgency or enthusiasm across different European countries, and there remain important differences as to the extent to which the right to have a lawyer present during questioning in particular has been written into national legislation. Divergent attitudes also come to the fore when one distinguishes between the responses of national courts and those ultimately provided by national legislation. As previously discussed, the Belgian *Cour de cassation* originally considered that national legislation, which was not even recognizing a right to consultation, was *Salduz*-compliant,[144] the Dutch Supreme Court has still today not given full effect to *Salduz*,[145] while the *Conseil constitutionnel* substantially delayed making the *Salduz* rights applicable in France.[146] Similarly, before *Cadder*, the High Court of Justiciary in Scotland held, post-*Salduz*, that Scottish law was not in breach of the Convention.[147] Finally, shortly before *Gormley*, the High Court of Ireland confirmed the Supreme Court precedent that there was no right to have a lawyer present during questioning, and this despite first considering ECtHR jurisprudence on the matter.[148] In other words, irrespective of its alleged clear rules and rationale, *Salduz* failed, on these occasions, to gain judicial acceptance in the way eventually achieved through legislation or subsequent judicial extrapolations on the matter. The variable adoption of *Salduz* in these European countries does not necessarily agree with the observation that clear rules and a coherent rationale will gain ECtHR jurisprudence acceptance in contracting parties.

The above observations take nothing away from the specific comparative analysis undertaken by Jackson and Summers, which has shown important commonalities in the responses of the UK and Switzerland to ECtHR jurisprudence in conforming to *Salduz* and resisting Strasbourg's rulings on confrontation. But they do highlight the need, and opportunity, to situate such analysis in a wider context of the diverse factors that determine national responses to Strasbourg jurisprudence. Jackson and Summers allude to this need by noting how the desire to defend legal tradition has been the main source of resistance to Strasbourg's approach on confrontation.[149] The argument that when Strasbourg articulates clear rules and a coherent rationale for its approach, it can enhance adherence to Convention jurisprudence, is surely convincing. For one thing, it appeals to intuition, for another, it finds support in much of the comparative analysis undertaken here. But, by the same token, it is difficult to see how such a *Court-centred explanation* of acceptance of ECtHR jurisprudence could possibly stand alone, in isolation from *contracting party-centred explanations* of acceptance of (or resistance to) such jurisprudence. By Court-centred explanations I mean those that may offer an account of acceptance mainly by reference to the actions of the Court, such as in its bringing precision and coherence to its jurisprudence or in its pursuing a more active dialogue with national supreme courts and national judges. Contracting party-centred explanations may focus, on the other hand, on indigenous forces shaping national responses to the Court's jurisprudence. These contracting party-centred explanations may, for instance, locate acceptance primarily in the national jurisdiction's cosmopolitan attitudes or, conversely, link resistance with the perceived need to defend the national legal tradition against external influences.[150] They may reveal a pragmatic approach to the relationship with Strasbourg[151] or bring to the surface simple logistical considerations relating to the ability of the contracting party to accommodate the European jurisprudence in practice.[152] Seen from this angle, Jackson's and Summers' analysis can help the Court be more vigilant in elaborating precise rules and a coherent rationale for its approach—and perhaps even incorporating a reflection on the type of practical measures needed to ensure their effective implementation in practice—precisely when it hands down innovative judgments on controversial areas of criminal justice, where a common European position may have not yet fully crystallized and where national resistance may thus be likely to slow down, if not seriously obstruct, acceptance of the Court's positions.[153] Of course, while such an approach will be welcome by those wishing to see higher levels of harmonization of European criminal procedures, it will no doubt cause further alarm to those who already perceive the Court's recent jurisprudence in this area as an indication of its willingness to 'aggrandise' its jurisdiction and impose uniform rules across contracting parties.[154]

Pausing for a moment of reflection on the above, it must be stressed that reception of Strasbourg jurisprudence relating to Article 6 of the ECHR must also now be seen in conjunction with developments at the EU legislation level, notably in relation to efforts undertaken towards establishing common procedural standards for the rights of the defence in EU Member States. The recent adoption of the Directive on the right of access to a lawyer in criminal proceedings[155]—a development that was substantially accelerated by *Salduz* and that aims to solidify the effect of the latter in national law[156]—speaks volumes about the emerging synergies between ECtHR jurisprudence and EU legislation.[157] One can only speculate here, but the EU's embryonic engagement with procedural rights might lead the ECtHR to be more prescriptive in laying down procedural rules in the future. The Court might see the fast-developing interaction with the EU as an opportunity to accelerate reception of its judgments in the EU members of the Council of Europe; the clearer and more coherent the rules that its jurisprudence articulates, the more effectively they could inform national implementation of relevant directives.

Conversely, there is significant scope for these directives to influence further development of Strasbourg jurisprudence in this area.[158] The EU's new emphasis on procedural rights might also create a well-meaning competition with Strasbourg for the 'most effective system' for the protection of procedural rights. The Court might look at the example of the Netherlands, where a perceived lack of clarity in the *Salduz* jurisprudence has permitted the country to sit on the fence until the Directive on the right of access to a lawyer finally left no room to manoeuvre away from legislating the right to have a lawyer present during questioning. A ECtHR in potential 'competition' with the Court of Justice of the EU might be influenced by relevant directives to become much more prescriptive when handing down judgments in this area in the future in order to reduce the variability of national interpretations and increase the level of adherence to its jurisprudence. Jackson's and Summers' inquiries as to how the Court can gain acceptance for its positions become even more timely when examined against the backdrop of these developments.

At this point, we can broaden the angle of vision even further, beyond the EU Directive, to also give consideration to the relationship between ECtHR jurisprudence and comparative law. We need to go back to *Gormley* for that purpose.

COMMON LAW COMPARATIVISM AND STRASBOURG JURISPRUDENCE

Even more noteworthy than the wide reading of the right to legal assistance in *Gormley* is the Supreme Court's strong demonstration of legal cosmopolitanism in this case. In considering the proper approach to the Irish Constitution, the Court reviewed not just the case law of the ECtHR, but 'also the constitutional jurisprudence of the superior courts of other jurisdictions which have a similar constitutional regime to [Ireland]',[159] more specifically that of the 'supreme courts' of the United States, Canada, Australia and New Zealand. This makes *Gormley* an exceptional case study of the effect of common law comparativism on the constitutional interpretation of the right to legal assistance, and offers a demonstration of the usefulness of this comparative methodological tool in getting legal experts 'to grips with the dynamic, multi-level, cosmopolitan legal environments which constitute today's reality'.[160] In *Gormley*, the Irish Supreme Court first established the ECHR baseline requirements for the respect of the right to legal assistance, notably access to a lawyer before and during questioning.[161] But to determine the more specific issues raised by Gormley's appeal—in particular whether, granted the right to early access to a lawyer, the police also had to postpone questioning to enable the lawyer to arrive at the police station—the Court extended its analysis beyond a simple examination of relevant Strasbourg jurisprudence. Particular attention was thus paid to the US Supreme Court's historic decision in *Miranda v Arizona*, which held, among other things, that 'the interrogation must cease immediately if it has already commenced and can not [sic] resume until the suspect has had an opportunity to consult with a lawyer'.[162] Emphasis was also placed on the Canadian Supreme Court's decision in *R v Sinclair*, which read into the constitutional right to retain and instruct counsel without delay[163] 'a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult counsel',[164] as well as on the existence in New Zealand of a similar 'duty to refrain from taking any positive or deliberate step to elicit evidence from the detainee until he or she has had a reasonable opportunity to consult with counsel'.[165] Note was also taken of a similar practice in Australia despite noting slight variations between different states and even though in theory there is no right to have a lawyer attend at a police station there.[166] A 'clear international view' was then derived from this jurisprudence, and this was 'consistent with the jurisprudence of the ECtHR'.[167] It was precisely on this combined view emerging from Strasbourg and comparative common law that the Irish Supreme Court based its conclusion that the defendant in this case did not have a trial in due course of law by reason of the fact that a material element of the evidence on foot of which he was convicted was evidence obtained during questioning which occurred after he had requested legal advice and before that legal advice had been obtained.[168] Such cosmopolitan legal thinking provides a fine illustration of the potential for imaginative legal interpretation inherent in the symbiosis of Strasbourg jurisprudence with that of superior courts in other jurisdictions, in Europe and beyond.

Equally remarkable is the fact that the Supreme Court's cosmopolitan logic in interpreting the Constitution in *Gormley* went hand in hand with a powerful rhetoric for the adoption of a proactive internationalist approach to legal reform. The issue in question was 'not one which could reasonably be said to have taken the authorities by surprise',[169] noted Justice Clarke, delivering the opinion of the Court. 'The likelihood that the State would be required' to legislate the right to legal assistance could 'hardly come as a surprise', he repeated;[170] reform had 'been on the agenda for a sufficient period of time',[171] stemming from national constitutional jurisprudence,[172] 'the well established jurisprudence of the ECtHR'[173] as well as 'the jurisprudence of courts, whose judgments on like issues the Irish courts frequently regard as persuasive, for quite some time'.[174] With specific regard to *Salduz*, Justice Clarke noted that the decision had been 'delivered in 2009 [sic] and the possibility that such a view might be taken … must have been clear for some time before that'.[175] He concluded from all this that if reform had not happened yet, it was the State which should accept responsibility. One could hardly imagine a more urgent call to the Irish government to now introduce legislation conforming with *Gormley*. One could, more generally, hardly imagine a more dynamic approach to interpreting national constitutions in accordance with international law, or a stronger commitment to the comparative method. *Gormley* also sheds light on Jackson's and Summers' thesis on the acceptance of ECtHR jurisprudence in contracting parties. Perhaps where Strasbourg judgments lack the clear rules and coherent rationale that Jackson and Summers aspire to, comparative law could afford contracting parties an effective methodological tool to tackle areas of complexity. This would not benefit contracting parties only, but also the Court itself, as the dialogue between them would be enriched, and potentially facilitated, by reflection on examples from foreign legal cultures.

For all its exceptional attention to foreign and international law, *Gormley* is, however, unduly restricted in the comparative law angle that it adopts. There is no doubting the logic of the Supreme Court in looking into the practice of constitutional courts with roots in the same legal culture as it, but it still is surprising that the various *Salduz*-inspired European reforms discussed in this article were completely under its radar. In reality, what this means is that while attempting to interpret *Salduz* and its progeny, the Irish Supreme Court has been oblivious to, or perhaps unwilling to take into consideration, recent or even simultaneous European attempts to apply the same jurisprudence. The same could be said with reference to the EU Directive on the right of access to a lawyer, which the Court has also neglected (or wilfully ignored). One could argue here that it might be unreasonable to expect the Supreme Court of Ireland to be aware of legal reform in, for instance, Belgium or the Netherlands, and that the force of the linguistic and cultural (civil law) barriers to common law understandings of constitutional interpretation should not be underestimated,[176] but this *de facto* agnosticism argument surely diminishes in force when viewed against the backdrop of European Union developments in which Ireland actively participates. Ironically enough, it was the Irish Presidency of the Council of the EU that secured agreement with the European Parliament on the Directive.[177] These observations are a useful reminder of the complex ways in which legal cosmopolitanism manifests itself in the emerging global landscape. The Irish Supreme Court took into account the pronouncements of Australian courts, where there is not even a right to legal assistance at the police station, but showed no awareness of the extensive reform of custodial legal assistance currently under way in the common law system of Scotland, the much-discussed—including in English academic scholarship—recent reforms in the continental system of France or a bold Directive aiming to strengthen defence rights across the EU. Even in the event that this was only due to coincidence, and even if *Gormley* generally showcases a remarkably internationalist approach to legal interpretation that is in line with observations about 'the growing importance of comparative legal method in an era of cosmopolitan legality',[178] the preceding analysis is also revealing of the idiosyncrasies of modern legal systems' cosmopolitan attitudes.

CONCLUDING THOUGHTS

Strasbourg jurisprudence had a striking impact on those European countries that, prior to *Salduz*, were still not recognizing the right of access to a lawyer in custodial interrogation. Belgium, France, Scotland, the Netherlands and now Ireland have all given effect to the right to legal assistance—or taken significant steps in this direction—under the compelling influence of the *Salduz* jurisprudence. However, important variations can also be identified in the acceptance of *Salduz* in these countries. Such variations adversely affect the application of *Salduz* rights in practice and offer a demonstration of variable degrees of acceptance of ECtHR jurisprudence in Europe. We must also consider *Salduz*'s quite unequivocal message, which provides a useful prism for further exploration of the thesis that when ECtHR case law rests on a coherent rationale and provides contracting parties with clear rules, it can lead them to accept its position. Jackson and Summers made this claim *inter alia* by treating *Salduz* as a paradigm of acceptance of ECtHR jurisprudence. But here it was shown that, despite *Salduz*'s clear rules and rationale, this seminal jurisprudence has not been accommodated everywhere with the same level of urgency or commitment to giving the newly recognized rights full effect. This is not to doubt the intuitive force in Jackson's and Summers' argument, or the empirical evidence that they offer, but rather to highlight how their analysis presents an important opportunity to view the Court-centred explanation of acceptance that they provide in combination with other, contracting party-centred explanations of acceptance. Viewed from this wider angle, the issue of the accommodation of Strasbourg jurisprudence in national jurisdictions becomes one that calls into question as much the actions of the ECtHR as it does those of the Member States. This naturally points to the need for a more cosmopolitan approach to applying the ECHR. Contracting parties must strive to obtain a better understanding of the reasons that underpin the development of particular jurisprudential influences coming from Strasbourg. By articulating clear rules and a coherent rationale, the Court will accelerate this process, and so will the contracting parties' own ability to look sideways to other countries' reception of such influences. Conversely, the Court needs to develop a deeper understanding of the local factors that may be hindering (or, by contrast, accelerating) the harmonic reception of its jurisprudence in contracting parties.[179]

An excellent manifestation of such cosmopolitan legal thinking applied in practice is the Irish Supreme Court's decision in *Gormley*. The decision put forward an interpretation of the national constitution that was simultaneously the product of Strasbourg jurisprudence and common law comparativism, while also promoting a robust internationalist approach to legal interpretation and law reform. In relying on this internationalist approach to strengthen suspects' rights, and in exhibiting a deep understanding of the realities of custodial interrogation, the decision shows the way forward in what will no doubt be a long process of establishing common procedural safeguards for the rights of the defence in Europe. When called to give effect to Strasbourg jurisprudence or the Directive on the right of access to a lawyer, Member States now have a unique range of national and international experiences to draw upon.[180] The Irish Supreme Court performed this exercise to a very high standard as far as ECtHR jurisprudence and the experience of important common law jurisdictions is concerned. Its curious omission of *Salduz*-inspired reforms in other European countries only serves as a reminder of the idiosyncrasies and inherent challenges of cosmopolitan legal thinking.

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FOOTNOTES

1. [2014] IESC 17 at para 9.13. This article will discuss the appeal of Raymond Gormley. Only sporadic reference will be made to the separate but linked appeal of Craig White, where the police obtained bodily samples for forensic testing after the suspect had requested the presence of a solicitor but before the solicitor concerned arrived. Contrary to Gormley's appeal, where the

Supreme Court found that a suspect is entitled to prior legal advice in cases of interrogation, in relation to White's appeal the Court held that there is no such entitlement in cases of forensic testing. Though the case of *White* merits attention, it is the case of *Gormley* that is of particular comparative interest for the analysis of similar jurisprudence and ensuing legal reforms in the other European legal systems discussed in this article.

2. Application No 36391/02, Merits and Just Satisfaction, 27 November 2008.
3. See generally Brants, 'The Reluctant Dutch Response to *Salduz*' (2011) 15 *Edinburgh Law Review* 298; Spencer, 'Strasbourg and Defendants' Rights in Criminal Procedure' (2011) 70 *Cambridge Law Journal* 14; Questiaux, 'Much Ado About Justice' (2011) 15 *Edinburgh Law Review* 432; Committee against Torture, Follow-up replies from the Government of Belgium to the Concluding Observations of the Committee against Torture, 28 March 2011, CAT/C/BEL/CO/2/Add.1, at para 74; Dorange and Field, 'Reforming Defence Rights in French Police Custody: A Coming Together in Europe?' (2012) 16 *International Journal of Evidence and Proof* 153; Verhoeven and Stevens, 'The Lawyer in the Dutch Interrogation Room: Influence on Police and Suspect' (2012) 9 *Journal of Investigative Psychology and Offender Profiling* 69; Giannoulopoulos, '"North of the Border and Across the Channel": Custodial Legal Assistance Reforms in Scotland and France' [2013] *Criminal Law Review* 369.
4. See *DPP v Healy* [1990] 2 IR 73.
5. *Gormley*, supra n 1 at para 5.7.
6. See *Lavery v Member in Charge*, *Carrickmacross Garda Station* [1999] 2 IR 390; and *JM v Member in Charge of Coolock Garda Station* [2013] IEHC 251.
7. *Salduz*, supra n 2 at para 54. But see Ashworth, who notes that '[i]n one sense, the judgment can be seen as a continuation of a development [by the ECtHR] of the right to access to legal advice': Ashworth, 'Case Comment – Salduz v Turkey: Human Rights – Article 6 – right to fair trial' [2010] *Criminal Law Review* 419 at 420.
8. *Salduz v Turkey* Application No 36391/02, Merits and Just Satisfaction, 26 April 2007, at paras 23–24.
9. See *Salduz*, supra n 2 at para 48.
10. Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.
11. *Salduz*, supra n 2 at para 55.
12. Ibid.
13. Ibid. at para 58.
14. Application No 4268/04, Merits and Just Satisfaction, 11 December 2008.
15. Ibid. at para 66.
16. Application No 7377/ 03, Merits and Just Satisfaction, 13 October 2009, at para 32.
17. For a discussion of the distinction between the right to legal advice and the right to legal assistance, see Leverick, 'The Right to Legal Assistance During Detention' (2011) 15 *Edinburgh Law Review* 352 at 354.
18. Application No 7025/04, Merits and Just Satisfaction, 24 September 2009.
19. Ibid. at para 74.
20. Ibid. at para 91.
21. Ibid. at para 79.
22. Application No 1466/07, Merits and Just Satisfaction, 14 October 2010, at para 45. See also *Boz v Turkey* Application No 2039/04, Merits and Just Satisfaction, 9 February 2010; and *Adamkiewicz v Poland* Application No 54729/00, Merits and Just Satisfaction, 2 March 2010. In *Navone and Others v Monaco* Applications Nos 62880/11, 62892/11 and 62899/11, Merits and Just Satisfaction, 24 October 2013, at para 79, the ECtHR observed that it had on many occasions specified that the right to legal assistance during police detention should be particularly understood as assistance 'during questioning', citing the examples of *Karabil v Turkey* Application No 5256/02, Merits and Just Satisfaction, 16 June 2009, at para 44; *Ümit Aydin v Turkey* Application No 33735/02, Merits and Just Satisfaction, 5 January 2010, at para 47; and *Boz v Turkey* Application No 2039/04, Merits and Just Satisfaction, 9 February 2010 at para 34.
23. See generally Choo, *The Privilege against Self-Incrimination and Criminal Justice* (2013) at 84–6.
24. The appellant made the request for a solicitor at 2.15 p.m., and the solicitor contacted the Garda station at 3.06 p.m. to inform them he would attend the station 'shortly after' 4 p.m. or 'as soon as possible after' 4 p.m. The appellant's interview started at 3.10 p.m. The solicitor arrived at the station at 4.48 p.m.: *Gormley*, supra n 1 at paras 3.1–3.2.
25. See Section 5 Criminal Justice Act 1984; and *DPP v Madden* [1977] IR 336.
26. Campbell, 'The Constitutional Right to Legal Advice after Arrest', 7 March 2014, available at: humanrights.ie/civil-liberties/the-constitutional-right-to-legal-advice-after-arrest/ [last accessed 24 August 2015]. Heffernan notes that the practice was 'extremely restrictive', as there was no duty to inform the suspect of the right to legal assistance and 'there could be no meaningful enjoyment of the right unless the suspect was independently aware of his entitlement and expressly invoked it'. After *DPP v Healy*, supra n 4, the duty to notify the suspect was no longer in doubt, which meant that the Irish position became 'considerably more protective', but there were still important concerns over 'the additional steps, if any, that the gardaí [had to] take to facilitate access': Heffernan, 'The Right to Legal Advice, Reasonable Access and the Remedy of Excluding Evidence' (2011) 1 *Criminal Law and Procedure Review* 111 at 113.
27. *DPP v Buck* [2002] 2 IR 268 at 269–70. See also *DPP v Conroy* [1986] IR 460.
28. Article 38.1 Republic of Ireland Constitution.
29. *Gormley*, supra n 1 at para 9.13.
30. Ibid.
31. Ibid. at para 9.14.
32. Ibid. at para 9.2.
33. Ibid.

34. Ibid.
35. Ibid.
36. Ibid. at para 9.10.
37. Ibid.
38. Ibid. at paras 6.1–6.3, citing *Salduz*, supra n 2 at paras 50–55 and 62.
39. Ibid. at paras 6.4–6.5, citing notably *Dayanan v Turkey*, supra n 16 at para 32; and *Panovits v Cyprus*, supra n 14 at paras 72–73.
40. Ibid. at para 6.6, citing *Cadder v HM Advocate* [2010] UKSC 43.
41. Ibid. at paras 8.1–8.8.
42. Ibid. at para 9.1.
43. Ibid.
44. Ibid. at para 9.2.
45. Ibid. at para 9.9.
46. See notably *Saunders v United Kingdom* Application No 19187/91, Merits and Just Satisfaction, 17 December 1996; and *Boyce v Ireland* Application No 8428/09, Admissibility, 27 November 2012.
47. *Gormley*, supra n 1 at paras 10.1–10.13.
48. Hodgson's work is testament to this. See generally Hodgson, 'Constructing the Pre-Trial Role of the Defence in French Criminal Procedure: An Adversarial Outsider in an Inquisitorial Process?' (2002) 6 *International Journal of Evidence and Proof* 1; 'Codified Criminal Procedure and Human Rights: Some Observations on the French Experience' [2003] *Criminal Law Review* 165 at 173; *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (2005) at 39; and 'Making Custodial Legal Advice More Effective in France' (2013) 92 *Criminal Justice Matters* 14. See also Field and West, 'Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process' (2003) 14 *Criminal Law Forum* 261 at 284; and Vogler, 'Reform Trends in Criminal Justice: Spain, France and England & Wales' (2005) 4 *Washington University Global Studies Law Review* 631 at 634.
49. Giannoulopoulos, 'Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance' (2013) 24 *Criminal Law Forum* 291 at 297–302.
50. Giannoulopoulos, supra n 3 at 371–2.
51. See, for example, Loi n° 93-1013 du 24 août 1993 modifiant la loi n° 93-2 du 4 janvier 1993 portant réforme de la procédure pénale; and Loi n° 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes (Law of 15 June 2000 reinforcing the presumption of innocence and victims› rights).
52. Loi n° 2011-392 du 14 avril 2011 relative à la garde à vue (Law of 14 April 2011 on the *garde à vue*).
53. Supra n 40.
54. See Section 3 Criminal Justice (Scotland) Act 1980, consolidated by Section 15 Criminal Procedure (Scotland) Act 1995.
55. See, for example, *Paton v Ritchie* [2000] JC 271, [2000] SLT 239; *Dickson v HM Advocate* [2001] JC 203, [2001] SLT 674; and *HM Advocate v McLean* [2009] HCJAC 97, [2010] SLT 73.
56. McCluskey, 'Supreme Error' (2011) 15 *Edinburgh Law Review* 276 at 276.
57. *Cadder v HM Advocate*, supra n 40 at paras 74–92.
58. Ibid. at para 92. For an informative summary of the Scottish position pre-*Cadder*, see Blackstock, 'The Right to Legal Assistance in Scotland' (2013) 92 *Criminal Justice Matters* 12. The idiosyncratic character of the Scottish position becomes even more evident when one contrasts it with developments south of the border, where the right to legal consultation and right to have a lawyer present during questioning were implemented nearly 25 years prior to them being enacted into Scottish law: see Giannoulopoulos, supra n 3 at 383.
59. Article 20 Loi du 20 juillet 1990 relative à la détention préventive (Law of 20 July 1990 on pre-trial detention).
60. 'The man who appears before the investigating judge is alone, he does not have the right to a lawyer', noted Cécile Thibaut in an amendment to the Bill reforming custodial legal assistance: see Document législatif n° 4-1079/2, Proposition de loi modifiant l'article 1er de la loi du 20 juillet 1990 relative à la détention préventive, afin de conférer de nouveaux droits, au moment de l'arrestation, à la personne privée de liberté.
61. Arr. Cass. P.09.0304.F, 11 March 2009. This was in line with pre-*Salduz* Belgian *Cour de cassation* jurisprudence: see, for example, Arr. Cass. P991585N, 14 December 1999. See also Sénat de Belgique, Commission de la Justice, Rapport 'Les suites de l'arrêt Salduz', Audition de M. Timperman, avocat général près la Cour de cassation, 2 March 2011, at 30. Cf. Arr. Cass. P.10.0914.F, 15 December 2010, where the Court found a violation of Article 6 ECHR as a result of the suspect making incriminating statements in the absence of a lawyer.
62. Cour d'assises de Liège, 30 March 2009, JLMB 2009/19 at 898.
63. Supra n 55 at para 31.
64. In Belgium, the *Conseil Supérieur de la Justice* said in a legal opinion in June 2009 that it was 'convinced of the restricted and often theoretical character of the rights [that were currently] guaranteed by [Belgian criminal] procedure': Conseil Supérieur de la Justice, Avis sur la proposition de loi modifiant l'article 1er de la loi du 20 juillet 1990 relative à la détention préventive. As far as Scotland is concerned, the UK Supreme Court opined in *Cadder* that '[t]he guarantees otherwise available [were] entirely commendable', but, at the same time, 'in a very real sense … beside the point': *Cadder v HM Advocate*, supra n 40 at paras 50 and 66.
65. *Cadder v HM Advocate*, ibid. at para 4. Leverick reinforces this point, by observing that Scotland had more specifically failed to take note of the conclusions of the Royal Commission on Criminal Procedure in England and Wales on the right to legal assistance. Published shortly after the Scottish provisions originally came into

effect, the Commission's report was critical of similar provisions in England and Wales and opened the way for the introduction there of the right to legal assistance with the Police and Criminal Evidence Act 1984: Leverick, 'The Supreme Court Strikes Back' (2011) 15*Edinburgh Law Review*287 at 292.

66. Article 28 Code of Criminal Procedure (the Netherlands). See also Spronken and Attinger,*Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, European Commission Report, Directorate General – Justice, Freedom and Security (2005) at 73.

67. Article 186 Code of Criminal Procedure (the Netherlands).

68. See Brants, supra n 3 at 300; Blackstock*etal.*,*Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions*(2014) at 109; and Brants, 'What Limits to Harmonising Justice' in Colson and Field,*EU Criminal Justice and the Challenges of Legal Diversity*(forthcoming 2016). In its 2009 Concluding Observations on the Netherlands, the UN Human Rights Committee noted that in the Netherlands 'a person suspected of involvement in a criminal offence has no right to have legal counsel present during police questioning', and recommended that 'full effect [should be given] to the right to contact counsel in the context of a police interrogation': Human Rights Committee, Concluding Observations regarding the Netherlands, 28 July 2009, CCPR/C/NLD/CO/4, at para 11.

69. Prakken and Spronken, 'The Investigative Stage of the Criminal Process in the Netherlands' in Cape*etal.* (eds),*Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*(2007) 155 at 168.

70. Brants, supra n 3 at 299. See also Brants, 'What Limits to Harmonising Justice', supra n 68.

71. On France, see Giannoulopoulos, supra n 49 at 324–6. On Belgium, see Fermon, Verbruggen and De Decker, 'The Investigative Stage of the Criminal Process in Belgium' in Cape*etal.*(eds), supra n 69, 29 at 48.

72. Brants, supra n 3 at 300–1.

73. Ibid. at 301.

74. Report of the Working Group to Advise on a System Providing for the Presence of a Legal Representative During Garda Interviews, July 2013, available at:www.justice.ie/en/JELR/Report%20Final%2015%20July.pdf/Files/Report%20Final%2015%20July.pdf[last accessed 24 August 2015].

75. Gormley, supra n 1.

76. Sections 28–32 Criminal Justice Act 1997. See also Sweeney, 'The Questioning of Criminal Suspects in Ireland' (2015) 25*Irish Criminal Law Journal*37 at 42.

77. Lavery v Member in Charge,*Carrickmacross Garda Station*, supra n 6.

78. Section 15A(3) Criminal Procedure (Scotland) Act 1995, as inserted by Section 1(4) Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

79. See Chalmers and Leverick, '"Substantial and Radical Change": A New Dawn for Scottish Criminal Procedure?' (2012) 75*Modern Law Review*837 at 846.

80. The Bill for this Act was passed by the Scottish Parliament on 27 October 2010 and received Royal Assent on 29 October 2010.

81. See generally Ferguson, 'The Right of Access to a Lawyer' [2009]*Scots Law Times*107; Ferguson, 'Repercussions of the*Cadder*Case: The ECHR's Fair Trial Provisions and Scottish Criminal Procedure' [2011]*Criminal Law Review*743; McCluskey, supra n 56 at 276; White and Ferguson, 'Sins of the Father? The "Sons of*Cadder*"' [2012]*Criminal Law Review*357; and Ferguson and Raitt, 'A Clear and Coherent Package of Reforms? The Scottish Government Consultation Paper on the Carloway Report' [2012]*Criminal Law Review*909. See also Ferguson's and White's brief rejoinder to Giannoulopoulos, supra n 3 at 384; and the comment on*Cadder*in*Scottish Criminal Law*, which starts with the observation that '[o]ne of the many interesting aspects of this decision is that it overrule[d] the view of a total of 15 Scottish High Court judges and three appeal courts': 'Case Comment:*Cadder v HM Advocate*' [2010]*Scottish Criminal Law*1265 at 1307.

82. The Carloway Review, Report and Recommendations, 17 November 2011, available at:www.scotland.gov.uk/Resource/Doc/925/0122808.pdf[last accessed 24 August 2015].

83. Criminal Justice (Scotland) Bill 2013.

84. Section 24(2) Criminal Justice (Scotland) Bill 2013.

85. Supra n 52.

86. For example, giving the suspect the opportunity to meet with a lawyer for 30 minutes only after 12 hours of interrogation, coupled with continuous legal assistance during questioning in cases where the interrogation would be extended beyond the initial 24-hour time limit: see Roujou de Boubée, 'L'assistance de l'avocat pendant la garde à vue' (2010)*Recueil Dalloz*868; and Avant-projet du future Code de procédure pénale, version du 1er mars 2010, available at:www.justice.gouv.fr/art_pix/avant_projet_cpp_20100304.pdf[last accessed 24 August 2015].

87. Decision No 2010–14/22 QPC of 30 July 2010, available in English at:www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/201014_22QPCen201014qpc.pdf[last accessed 24 August 2015].

88. Crim 19 octobre 2010, Bull crim 163; Crim 19 octobre 2010, Bull crim 164; Crim 19 octobre 2010, Bull crim 165; Crim 4 janvier 2011, n° 10-85.520,*Recueil Dalloz*2011, 242, obs Léna; Crim 18 janvier 2011, n 10-83.750,*Recueil Dalloz*2011, 381; Crim 16 février 2011, n 10-82.865,*Recueil Dalloz*2011, 953; Crim 15 avril 2011, 4 arrêts (n P 10-17.049, F 10-30.313, J 10-30.316 et D 10-30.242),*Recueil Dalloz*2011, 1080;*Recueil Dalloz*2011, 1128, interview Roujou de Boubée;*Jurisclasseur pénal*2011, 17, 483, Détraz.

89. See Giudicelli, 'Le Conseil constitutionnel et la garde à vue: "Puisque ces mystères nous dépassent, feignons d'en être l'organisateur"' [2011]*Revue de science criminelle et de droit pénal comparé*139; and de Lamy,

'L'avancée des garanties en matière de garde à vue ou la consécration d'un basculement de la procédure pénale vers la phase policière' [2011]*Revue de science criminelle et de droit pénal comparé*165. See, in detail, Giannoulopoulos, supra n 49 at 311–21.

90. Loi du 13 août 2011 modifiant le Code d'instruction criminelle et la loi du 20 juillet 1990 relative à la détention préventive afin de conférer des droits, dont celui de consulter un avocat et d'être assistée par lui, à toute personne auditionnée et à toute personne privée de liberté.

91. Article 4 of the Law of 13 August 2011 adding Article 2bis, para 1 to the Law of 20 July 1990.

92. Article 4 of the Law of 13 August 2011 adding Article 2bis, para 2 to the Law of 20 July 1990.

93. Circulaire n° 8/2011 du Collège des procureurs généraux près les Cours d'appel, 23 November 2011, at 16.

94. Circulaire n° 7/2010 du Collège des procureurs généraux près les Cours d'Appel, 4 May 2010; and Circulaire n° 15/2010 du Collège des procureurs généraux près les Cours d'Appel, 14 July 2010.

95. For example, the*Conseil d'État*, in a legal opinion issued on 19 April 2011, pointed out the lack of clarity in the jurisprudence of the ECtHR, advising the government to wait for further clarification, while proposals by the*Association des juges d'instruction*only went as far as to advocate a confidential meeting with a lawyer prior to, but not during, interrogation by the police, and giving investigating judges the discretion to allow the presence of the lawyer in interrogations undertaken by them: see respectively Conseil d'État, Rapport annuel 2010–11, Avis 49.413/AG, 19 April 2011, at 52; and Sénat de Belgique, supra n 61, Exposé introductif du Ministre de la justice, at 6.

96. Liège, 6e Chambre, 15 septembre 2010 confirming Correctionnelle Liège 14 avril 2010.

97. Supra n 60.

98. 98 Sénat de Belgique, supra n 61, Exposé de M Chevalier, président de l'Ordre des barreaux francophones et germanophones, at 68–9.

99. See Document parlementaire, Sénat 2008–09, 4-1079/1.

100. See Document parlementaire, Sénat 2010–2011, 5-663/1.

101. See, for example, Service de la politique criminelle, Évaluation de la 'loi Salduz', available at:www.dsb-spc.be/web/index.php?option=com_content&task=view&id=152[last accessed 24 August 2015].

102. Sénat de Belgique, supra n 61 at 8.

103. Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1. Article 3 of the Directive recognises the right of suspects to have access to a lawyer without undue delay, and to meet in private and communicate with the lawyer representing them, including prior to questioning, and, more importantly for present purposes, the right for their lawyer to be present and participate effectively when they are questioned by the police. The Directive goes as far as give suspects the right for their lawyer to attend particular investigative or evidence-gathering acts such as identity parades, confrontations and reconstructions of the scenes of the crime.

104. It is now believed that the Netherlands might wait until the transposition deadline of November 2016 before enacting the Bill into law. I am thankful to Chrisje Brants and Kelly Pitcher, experts in Dutch criminal procedure, for discussion on this point. See also Brants, 'What Limits to Harmonising Justice', supra n 68. On the Directive 2013/48/EU, see generally Van Puyenbroeck and Vermeulen, 'Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU' (2011) 60*International and Comparative Law Quarterly*1017.

105. HR 30 June 2009, NJ 2009, 349. See Verhoeven and Stevens, 'The Lawyer in the Dutch Interrogation Room: Influence on Police and Suspect' (2012) 9*Journal of Investigative Psychology and Offender Profiling*69 at 70.

106. Brants, supra n 3 at 302.

107. See Blackstock, supra n 68 at 109.

108. See Brants, supra n 3 at 303.

109. Groenhuijsen and Kooijmans,*The Reform of the Dutch Code of Criminal Procedure in Comparative Perspective*(2012) at 77.

110. See Leeuw, 'Access to a Lawyer in the Netherlands: Does Judicial Restraint Lead to ECHR Non-Compliance?', 26 June 2014, available at:www.fairtrials.org/press/guest-post-access-to-a-lawyer-in-the-netherlands-does-judicial-restraint-lead-to-echr-non-compliance/[last accessed 24 August 2015].

111. Brants, 'What Limits to Harmonising Justice', supra n 68.

112. The Court again relied on ECtHR jurisprudence, in addition to other international jurisprudence, to state that 'the entitlements of a suspect extend to having the relevant lawyer present':*Gormley*, supra n 1 at para 9.10.

113. See Daly and Jackson, 'The Criminal Justice Process: From Questioning to Trial' in Healy*etal.*(eds),*Routledge Handbook of Irish Criminology*(forthcoming 2016); and Robinson, 'Key Changes to Criminal Law Get the Silent Treatment',*Irish Times*, 19 May 2014. Mark Kelly, the Director of the Irish Council of Civil Liberties (ICCL), noted in an ICCL press release on the day*Gormley*was delivered that it was 'highly significant that the Supreme Court ha[d] also drawn attention to European Court of Human Rights case law that "irretrievable harm" to the fairness of a trial can result if a person does not have a lawyer present during police questioning' and that'[t]he Government should heed the Supreme Court's clear call for law reform in this area, by changing the law to require that a lawyer be present when people in custody are questioned by members of An Garda Síochána': ICCL, Press Release, 'Supreme Court Sends Government Clear Message on Fair Trial Reforms', 6 March 2014, available at:www.iccl.ie/news/2014/03/06/

supreme-court-sends-government-clear-message-on-fair-trial-reforms.html[last accessed 24 August 2015]. It must also be noted that the Department of Justice and Equality was considering the possibility of introducing a scheme providing for the presence of a lawyer during interviews since at least January 2013. When 'prompted by emerging international jurisprudence'—ECtHR jurisprudence and the EU Directive on the right of access to a lawyer—it established a Working Group to advise on this issue. The Group concluded that revisions could be made to the existing Garda Station Legal Advice Scheme to allow Ireland to align itself with ECtHR jurisprudence, even in case the Government decided not to opt into the Directive: see Report of the Working Group, supra n 74 at 22.

114. See also Hodgson, 'Safeguarding Suspects' Rights in Europe: A Comparative Perspective' (2011) 14*New Criminal Law Review*611 at 662.

115. See generally Delmas-Marty, Leçon inaugurale au Collège de France,*Études juridiques comparatives et internationalisation du droit*(2003) at 22. See also Bingham,*Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law*(2010) at 73–4; Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19*European Journal of International Law*125; Rozakis, 'The Particular Role of the Strasbourg Case-Law in the Development of Human Rights in Europe' (2009) 57*Nomiko Bima*20; Roberts and Zuckerman,*Criminal Evidence*, 2nd edn (2010) at 704. Waters specifically locates the transformative power of the ECHR in its enabling domestic courts to defer less to the executive branch and majority views: Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law' (2005) 93*Georgetown Law Journal*487 at 520.

116. See Scottish Parliament, Official Report col 29574, 27 October 2010, cited by Stark, 'The Consequences of*Cadder*' (2011) 15*Edinburgh Law Review*293 at 294.

117. As acknowledged by the Supreme Court in*Cadder v HM Advocate*, supra n 40 at para 4.

118. Sénat de Belgique, supra n 61 at 4. This message was echoed by many legal experts participating in the works of the parliamentary committee examining the consequences of*Salduz*. See indicatively Sénat de Belgique, ibid. at 31, 41 and 56.

119. Supra n 22. See also Commission des lois constitutionnelles, Compte rendu n° 25, Session ordinaire de 2010–11, 9 December 2010.

120. In relation to France, see generally Alix, 'Les droits de la défense au cours de l'enquête de police après la réforme de la garde à vue: État des lieux et perspectives' (2011) *Recueil Dalloz*1699; and Pradel, 'Procédure pénale: Septembre 2010 – août 2011' (2011)*Recueil Dalloz*2231. On Belgium, see Beys and Smeets, 'L'avocat chez les "flics": Le loup dans la bergerie ou l'agneau dans la guelle du loup?' in Guillain and Wustefeld (eds),*Le rôle de l'avocat dans la phase préliminaire du procès pénal*, Collection du Jeune Barreau de Charleroi (2012) at 89.

121. The French Law of 14 April 2011 forbids the lawyer from asking any questions before the police have finished interviewing the suspect and gives the police the right to block the lawyer from asking any questions even at the end of the interview, if the questions are seen as potentially damaging for the investigation. The police are also entitled to put an immediate end to the interview, at any time, for the ambiguous reason of facing a difficulty: see Article 63-4-3 Code de procédure pénale, as inserted by Article 8 of Law of 14 April 2011. The prosecution service circular bringing precision to the Belgian legislation of August 2011 specifically prohibits the lawyer from making a defence speech (*plaidoirie*), entering into discussions with the police, speaking to his client or whispering something into his ear: Circulaire n° 8/2011 du Collège des procureurs généraux, supra n 93 at 59. The Dutch Bill giving effect to*Salduz*and the EU Directive likewise provides for many exceptions such as 'temporary derogation' of the ability to exercise the right to legal assistance, limiting the lawyer to particular interventions and allowing him to ask 'questions only at the beginning and the end of the police interview': see Brants, 'What Limits to Harmonising Justice', supra n 68.

122. The Carloway Review, supra n 82.

123. Regarding France, see Article 63-4 Code de procédure pénale, as inserted by Article 7 of Law of 14 April 2011. Regarding Belgium, see Article 4 of Law of 13 August 2011 adding Article 2bis, para 1 to Law of 20 July 1990. Regarding the Netherlands, see the prosecution service binding instructions, cited by Brants, supra n 3 at 303. In Belgium, in addition to the 30-minute consultation prior to questioning, the suspect also has the right to request once that the questioning be interrupted in order to consult privately with his lawyer for a maximum duration of 15 minutes: see Article 4 of Law of 13 August 2011 adding Article 2bis, para 2 to Law of 20 July 1990.

124. See Blackstock, supra n 68 at 127. See also Nicholson, 'Rights under Question' [2010]*Journal of the Law Society of Scotland*, available at:www.journalonline.co.uk/Magazine/55-11/1008872.aspx[last accessed 24 August 2014].

125. Regarding France, see Article 63-4-2 Code de procédure pénale, as inserted by Article 8 of Law of 14 April 2011. Regarding Belgium, see Article 4 of Law of 13 August 2011 adding Article 2bis, para 1 to Law of 20 July 1990. Regarding the Netherlands, see the prosecution service binding instructions, cited by Brants, supra n 3 at 303.

126. See Articles 28e(1)–28e(4) Kamerstukken II, 2014–2015, 34157, nr. 2 (herdruk). The explanatory memorandum emphasizes that the application of Article 28e is meant to be exceptional: Kamerstukken II, 2014–2015, 34157, nr. 3 (tweede herdruk) at 37. I am grateful to Kelly Pitcher for her translations of relevant parts of the Bill and the memorandum.

127. The Carloway Review, supra n 82 at paras 6.1.29–6.1.32.

128. In Scotland,*Gormley*could be seen as providing support for the solution adopted by the Criminal Justice (Scotland) Bill 2013, which mandates that 'a constable

must not begin to interview the [suspect] until the [suspect's] solicitor is present'. This makes redundant any reference to a period after which the police can initiate questioning without a solicitor being present, save for 'exceptional circumstances'. See sections 24(3)(a) and 24(4) Criminal Justice (Scotland) Bill 2013.

129. Article 706-88 Code de procédure pénale.

130. Decision No 2011-191/194/195/196/197-QPC of 18 November 2011, at para 20. See generally Matsopoulou, 'Les dispositions de la loi du 14 avril 2011 sur la garde à vue déclarées conformes à la Constitution' (2011) *Recueil Dalloz* 3034; and Bachelet, 'Admission, sous réserve, de l'audition libre dans l'enquête préliminaire', 11 July 2012, available at: revdh.org/2012/07/11/admission-sous-reserve-de-laudition-libre-dans-lenquete-preliminaire/ [last accessed 24 August 2015].

131. All offences punished with a maximum sentence of less than one year imprisonment and all road traffic offences, including involuntary manslaughter resulting from a traffic accident, even though this is punishable by a maximum of five years imprisonment: see Circulaire n° 8/2011 du Collège des procureurs généraux, supra n 93 at 14.

132. See Circulaire n° 8/2011 du Collège des procureurs généraux, ibid. at 33.

133. HR 20 December 2011, LJN BU3504, cited by Blackstock, supra n 68 at 110.

134. Section 15A Criminal Procedure (Scotland) Act 1995, as inserted by Section 1(4) Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

135. The French practice of voluntary attendance is rightly seen as an effort to introduce through the back door the old regime of custodial interrogation without legal assistance (*garde à vue 'à l'ancienne'*): see generally Boudot and Grazzini, 'La réforme de la garde à vue à l'épreuve de la pratique'(2012) *Actualité Juridique Pénal* 512 at 515.

136. *Aleksandr Zaichenko v Russia* Application No 39660/02, Merits and Just Satisfaction, 18 February 2010.

137. *Brusco v France*, supra n 22.

138. *Salduz*, supra n 2 at para 54.

139. *Pishchalnikov*'s description of what is going on at the police station is timely here. The Court pointed out how the suspect may be 'surrounded by the police and prosecution authorities, experts in the field of criminal proceedings, who are well-equipped with various, often psychologically coercive, interrogation techniques which facilitate, or even prompt, receipt of information from an accused': *Pishchalnikov v Russia*, supra n 18 at para 86.

140. An important empirical study of suspects' rights in England and Wales, France, the Netherlands and Scotland, conducted in the period 2011–13, has brought to light important shortcomings as to the effective implementation of *Salduz* rights in practice: see Blackstock etal., supra n 68 at 435–9, 448–50 and 454–6. Beys and Smeets report that in some police stations in Belgium consultations are taking place behind a glass partition, that police officers can visually observe the interactions between suspects and lawyers and that many lawyers refuse to participate in legal aid schemes due to serious complications with remuneration: see Beys and Smeets, supra n 120 at 108 and 117. Similar problems have been encountered in France: see Seelow, 'Rien n'est prêt pour la "nouvelle" garde à vue', *Le Monde*, 15 April 2011.

141. Jackson and Summers, 'Confrontation with Strasbourg: UK and Swiss Approaches to Criminal Evidence' (2013) *Criminal Law Review* 114 at 115.

142. With regard to the reception of ECtHR jurisprudence in England and Wales, the argument can be seen in combination with Dennis' observation that English courts have not accepted Strasbourg's jurisprudence on evidential matters uncritically, where they have found it 'wanting in terms of clarity, consistency or coherence': Dennis, 'The *Human Rights Act* and the Law of Criminal Evidence: Ten Years On' (2011) 33 *Sydney Law Review* 333 at 337.

143. In Belgium, for example, *Salduz's* interchanging references to 'the assistance of a lawyer' and 'access to a lawyer' (*Salduz*, supra n 2 at paras 54–55) gave rise to contrasting interpretations as to its precise effect: a 'minimalist' interpretation, according to which access to a lawyer did not go any further than a right to consultation *prior* to questioning, and a 'maximalist' interpretation, which also encompassed the physical presence of the lawyer *during* questioning. The controversy at the national level was resolved when the ECtHR specified in *Brusco v France* (supra n 22) that the suspect has the right to be assisted by a lawyer during questioning, which provides a good illustration of the strength of the argument developed by Jackson and Summers. See Beernaert, 'La jurisprudence européenne *Salduz* et ses répercussions en droit belge' in Guillain and Wustefeld, supra n 120, 45 at 45–6. Lack of clarity in *Salduz* also 'helped' the Supreme Court in the Netherlands and the 'Working Group' in Ireland to read the relevant jurisprudence as not necessarily providing a right to have a lawyer present during questioning: see HR 30 June 2009, supra n 105; and Report of the Working Group, supra n 74 at 2.

144. Supra n 60.

145. Supra n 108.

146. The *Conseil constitutionnel* did not immediately repeal the custodial interrogation provisions it found unconstitutional, giving the Parliament an 11-month deadline to remedy the situation: see supra n 87 at para 30.

147. *HM Advocate v McLean*, supra n 55.

148. *JM v Member in Charge of Coolock Garda Station*, supra n 6 at para 27. The High Court considered *Salduz* and *Panovits*, but failed to examine *Brusco*.

149. Jackson and Summers, supra n 141 at 115.

150. For example, Bjorge interpreted *Horncastle* [2009] UKSC 14 as a manifestation of the Supreme Court's 'exceptionalist' approach to ECtHR jurisprudence, which he contrasted with the 'internationalist' approach adopted by the same Court in *Cadder*: see

Bjorge, 'Exceptionalism and Internationalism in the Supreme Court: *Horncastle* and *Cadder*' [2011] *Public Law* 475. Lord Hope explained the different outcomes in *Cadder* and *McLean* as a result of the 'difference of approach between the two courts to the Convention' and 'its effect on the domestic system': Lord Hope of Craighead, 'Scots Law Seen from South of the Border' (2012) 16 *Edinburgh Law Review* 58 at 73. In an analysis of the Belgian response to *Salduz*, Beernaert located in the country's attachment to the inquisitorial legal tradition its reluctance to legislate a fully ECHR-compliant right to legal assistance, despite wide recognition of the 'mandatory' effect of *Salduz*: Beernaert, supra n 143 at 66–7.

151. In *Cadder*, the Supreme Court made much of the fact that *Salduz* was 'a unanimous decision of the Grand Chamber', which was 'a formidable reason for thinking that [it] should follow it': *Cadder v HM Advocate*, supra n 40 at para 46. Writing extrajudicially, Lord Hope specified that, in contrast to an appropriate case like *Horncastle*, where the Supreme Court would ask the Strasbourg Court 'to "think again" on a particular point', *Cadder* was a case where 'no amount of dialogue with Strasbourg would result in a change of view on its part'. Interestingly, such pragmatism by the Supreme Court was largely the result of Strasbourg having based *Salduz* on a principle 'strongly embedded in the European jurisprudence' (the privilege against self-incrimination), which left 'no room for a decision based on expediency'. Lord Hope's analysis provides much support to the thesis developed by Jackson and Summers: see Lord Hope of Craighead, ibid. at 74.

152. In Belgium, it was argued that affording the right to legal assistance to all suspects, even when they were not detained by the police, would not be possible for logistical reasons, and that the reform should be implemented at different stages, prioritizing the more serious cases where the suspect was detained by the police first: see Circulaire n° 8/2011 du Collège des procureurs généraux, supra n 93 at 17. The *Conseil constitutionnel* referred to the need to put in place a system that 'could in practice be organised in a satisfactory way', which militated against expanding the scope of the right to legal assistance to include less serious offences: Conseil constitutionnel, Decision No 7/2013 of 14 February 2013, at para B.23.3.

153. As Judge Kovler explains, it is precisely when the ECtHR 'adopts a novel approach without the basis of an existing consensus' that the question of its acceptability in national and international courts becomes 'of particular importance': Kovler, 'The Role of Consensus in the System of the European Convention on Human Rights' in ECtHR, *Dialogue Between Judges* (2008) 11 at 19, available at: www.echr.coe.int/Documents/Dialogue_2008_ENG.pdf [last accessed 24 August 2015]. Conversely, an 'emerging European consensus' or 'common understanding' can be a convincing justification for judicial creativity by the ECtHR, as submitted by Ashworth: see Ashworth, 'A Decade of Human Rights in Criminal Justice' [2014] *Criminal Law Review* 325 at 335.

154. See generally Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009, available at: www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2013/hoffmann.pdf [last accessed 24 August 2015].

155. Directive 2013/48/EU, supra n 103.

156. See Hodgson, supra n 114 at 656.

157. The perplexing negotiations that preceded the adoption of the new Directive on the right of access to a lawyer provide good indication of the challenges inherent in this process, but also of the opportunities for the harmonization of fair trial standards across the EU. For a detailed discussion of the background of, and reactions to, the adoption of the EU Directive, see Anagnostopoulos, 'The Right of Access to a Lawyer in Europe: A Long Road Ahead?' (2014) 4 *European Criminal Law Review* 3. For the interactions between *Salduz* and the Directive, see Jackson, 'Cultural Barriers on the Road to Providing Suspects with Access to Lawyers' in Colson and Field (eds), *EU Criminal Justice and the Challenges of Legal Diversity* (forthcoming 2016).

158. This process has already started. In *A.T. v Luxembourg* Application No 30460/13, Merits and Just Satisfaction, 9 April 2015, at para 87, the ECtHR drew, for the first time, on the Directive on the right of access to a lawyer, when reaching the important conclusion that the lawyer's presence during questioning will not suffice for the right to fair trial to be respected, and that national legislation must also provide for private consultation with a lawyer prior to the beginning of the interrogation. In *Zachar and Černy v Slovakia* Applications Nos 29376/12 and 29384/12, Merits and Just Satisfaction, 21 July 2015, the Court relied on the Directive on the right of access to a lawyer and the Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1, when finding that a waiver of the right to custodial legal assistance had not been effective.

159. *Gormley*, supra n 1 at para 2.13.

160. Roberts and Hunter, 'Introduction – The Human Rights Revolution in Criminal Evidence and Procedure' in Roberts and Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (2012) 1 at 5–6.

161. *Gormley*, supra n 1 at paras 6.1–6.7.

162. Ibid. at para 7.1. See *Miranda v Arizona* 384 U.S. 436 (1966).

163. Section 10(b) Canadian Charter of Rights and Freedoms.

164. *R v Sinclair* [2010] 2 SCR 310 at para 27, discussed in *Gormley*, supra n 1 at para 7.4.

165. *R v Taylor* [1993] 1 NZLR 647, discussed in *Gormley*, ibid. at para 7.7.

166. *Gormley*, ibid. at para 7.6.

167. Ibid. at para 7.11. It must be explained here that, when reviewing relevant ECtHR case law, the Irish Supreme Court peculiarly made no reference to *Pishchalnikov v Russia*, which had raised very similar issues to those examined in *Gormley* and where the ECtHR had found that, even in the event that the lawyer originally requested is unavailable, the investigating authorities should

contact another lawyer or appoint a legal aid lawyer to ensure that the suspect is offered legal assistance: see *Pishchalnikov v Russia*, supra n 18 at paras 74–75. Reference to *Pishchalnikov* would have reinforced the Supreme Court's view that the jurisprudence of the ECtHR was consistent with the international position on this matter.

168. Ibid. at para 9.17.
169. Ibid. at para 9.5.
170. Ibid. at para 9.7.
171. Ibid.
172. Ibid. at paras 7.5–7.6.
173. Ibid. at para 9.7.
174. Ibid. at paras 9.8–9.9.
175. Ibid. at para 9.5. The judgment was delivered on 27 November 2008.
176. For an analysis of the differences in linguistic and cultural influence of the common law and civil law traditions at the level of international criminal justice, and the lack of interest in, or accessibility of, civil law sources: see Bohlander, 'Languages, Culture, Legal Traditions and International Criminal Justice' (2014) 12 *Journal of International Criminal Justice* 491.
177. See Department of Justice and Equality, 'Enhanced Rights for Accused Persons Agreed by Irish Presidency', 28 May 2013, available at: www.justice.ie/en/JELR/Pages/PR13000209 [last accessed 24 August 2015].
178. Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials? (2011) 11 *Human Rights Law Review* 213 at 229.
179. See generally Bratza, 'The Relationship Between the UK Courts and Strasbourg' [2011] *European Human Rights Law Review* 505. See also Rozakis, 'The European Judge as Comparatist' in Markesinis and Fedtke (eds), *Judicial Recourse to Foreign Law: A New Source of Inspiration* (2006) 338 at 348–53; Kerr, 'The Conversation between Strasbourg and National Courts – Dialogue or Dictation?' (2009) 44 *Irish Jurist* 12; and ECtHR, *Dialogue between Judges*, supra n 153. The wide-encompassing survey of comparative law undertaken in *Taxquet v Belgium* Application No 926/05, Merits and Just Satisfaction, 16 November 2010, offers strong evidence of the emergence of such cosmopolitan legal thinking at the ECtHR. According to Roberts, *Taxquet* demonstrates 'the ECtHR's new-found enthusiasm for a more systematic and methodologically sophisticated approach to comparative legal analysis': Roberts, ibid. at 229.
180. Belgium, France and Scotland provide such illustrations of surveying other European jurisdictions in the post-*Salduz* process of legislative reform. See, for example, Sénat, 'La garde à vue', Les documents de travail du Sénat – Série législation comparée, 2009, no LC 204. This report by the French *Sénat* preceded the 2011 legislation and reviewed police interrogation practice in Belgium, Denmark, England and Wales, Germany, Italy and Spain. In Belgium, the *Conseil supérieur de la justice* took into account, in its June 2009 legal opinion (supra n 64 at 6–8), the law of the Netherlands and France. In *Cadder* the UK Supreme Court paid attention to the comparative materials referred to in Justice's written intervention to the Court on reforms in Belgium, France, the Netherlands and Ireland: *Cadder v HM Advocate*, supra n 40 at para 49. This fast-evolving laboratory of European reforms also attracts the attention of observers outside Europe, and has the capacity to inform reform in their respective foreign jurisdictions: see, for example, Hock Lai, 'The Privilege against Self-Incrimination and Right of Access to a Lawyer: A Comparative Assessment' (2013) 25 *Singapore Academy of Law Journal* 826.

CHAPTER 3

THE INFLUENCE OF THE ECHR JURISPRUDENCE ON THE NATIONAL CRIMINAL PROCEDURE SYSTEM. THE ITALIAN PERSPECTIVE: FROM DIVERGENCE TO REALIGNMENT

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ABSTRACT

The paper will offer a survey of the most important and recent ECHR decisions that sentenced Italy on varied criminal procedure aspects. In particular, the essay will analyze how those decisions influenced both legislative choices and judicial decisions: as a matter of fact, the Italian Parliament approved specific laws in order to adapt the criminal procedure code to the ECHR decisions that sentenced Italy; the Constitutional Court, as well as the Trial Courts, also changed its perspective and followed the principles carried out by the ECHR. The overview will focus on: in absentia trials, defendant rights, revision of the final conviction and right to a renewal of the trial.

INTRODUCTION

One of the most important and up-to-date matters that involve lawyers is to understand at which level the European Convention of Human Rights should be placed among the Italian sources of law. The matter intersects several fields, including International law, European law, Constitutional law, Criminal and Criminal Procedure law. After many years of debate and after changing its perspective several times, in the last two years four decisions passed by the Constitutional Court seemed to acknowledge a new position for the rules of the Convention and, at the same time, paved the way for a forthcoming constitutionalization of the Convention as a Constitutional charter of fundamental rights. Aim of the essay is to point out which are the rules of the Constitution through which the Convention centers in the Italian legal system and, according to Constitutional Court decisions, which is the role of the Trial Courts in case a national law violates a rule of the Convention. Once this matter will be solved, the research will focus on other topics in the field of criminal procedure which are related especially on the effects of ECHR decisions which sentenced Italy because of the unlawfulness of a trial. The core question is: if a trial whose decision is final didn't respect an article of the Convention, how and through which legal instruments should that trial be renewed? After pointing out the rules in force both at European Council and national law level, the essay will offer a case study on recent and relevant decisions, offering a perspective for a new law that Italy cannot put off any longer. Afterwards, the survey will analyze the legislative reforms that have been approved and entered into force after ECHR sentenced Italy on in absentia trials, pointing out which are the problems still pending. The essay will show a law case in which the Courts play a relevant role

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in avoiding the violations of the Convention interpreting the Italian laws according to the principles carried out by ECHR decisions. Offering an overview of the above mentioned issues and formulating hypothesis for matters that have not been solved yet, the aim of the study is to put on the floor the core matters in order to provoke a debate with Scholars from other Countries, in light of the harmonization pursued by the ECHR jurisprudence.

1. The position of the European Convention of Human Rights in the hierarchy of the Italian sources of law.

Since Italy implemented the European Convention of Human Rights, judges and Scholars had to face the problem of the relationship between the rules of the Convention and those of the national sources of law. In particular, the core question is where to place the European Convention among the Italian sources of law. In analogy with all other European Council member States, Italy was entitled to choose among four options: first, to either be bounded by the European Convention at the international level only, or, second, to recognize a constitutional significance to the Convention's rules, or, third, to regard them at an intermediate level between the Constitution and the statutory laws approved by Parliament or, finally, to consider them au par with statutory law. To better understand the current Italian approach to the rules of the Convention, it is useful to offer a short overview on the previous ways, that can be summarized as follows:

1) At a first stage, in light of the theory that states that the national and the Convention systems are separated, the Convention, as any other international treaty that Italy has signed, has been considered as a law issued by the Italian Parliament. The main reason is that the legal instrument through which an international treaty enters into force in Italy is in fact a law of the Parliament.
2) At a second stage, all levels of Courts' jurisprudence set forth several solutions in order to assure to the rules of the Convention an acknowledgment by the rules of the Constitution as well as the respect of the national statutory laws. However, the varied solutions brought to very different decisions, which cannot be accepted inside a unique and coherent legal system.
3) Finally, further to the constitutional reform approved in 2001 together with the interpretation proposed by the Constitutional Court on the new articles in 2007, the relationship between the Italian system and the Convention changed: in the sources of law hierarchy, the Convention took a higher placement with respect to the law of the Parliament, but still lower than the Constitution.

The articles of the Constitution by means of which the Convention could receive acknowledgement in our legal system are four: art. 10, paragraph 1, which states that «The legal system of Italy conforms to the generally recognized principles of international law»; art. 11, on the basis of which «Italy […] agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends»; art. 2, which states that «The republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity»; art. 117, paragraph 1 on the Legislative power, which has been modified in the year 2001 and whose wording is: «Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European union law and international obligations». The turning point for Italy is represented by two "twin" decisions that the Constitutional Court handed down in 2007: the Court passed the interpretation that, due to the new art. 117, paragraph 1 of the Constitution, the Convention can be used as a criteria to check the respect of the Constitution by a law of the Parliament. In other words, as art. 117, paragraph 1 mentions «European union law and international obligations» and as the Convention is, as a matter of fact, an international obligation, a law of the Parliament or a law of a local Parliament (which exist in each Italian region) must respect, apart of course from the Constitution, even the rules of the European Convention of Human Rights. This means that a law of the Parliament can't change the law which implemented the Convention and can't breach its rules without being declared unconstitutional. From the point of view of the Italian Courts, the decision means that, as the control of the respect of the Constitution belongs only to the Constitutional Court, a judge who has to apply in a trial a law which seems to violate the European Convention of Human Rights' rules must ask to the Constitutional Court to check its constitutionality and eventually declare the annulment of the law. The only thing that a judge can do by itself in order to avoid an appeal for the intervention of the Constitutional Court is, while interpreting the national law, to do the utmost to save the constitutionality of the law, which means to find an interpretation which could be coherent with the European Convention of Human Rights. If this is not possible unless causing a breach in the system, the judge should ask to the Constitutional Court the annulment of the statutory law. The Constitutional Court itself, prior to declare the unconstitutionality of the law, should try to offer an interpretation coherent with the Convention. The outcome of this decisions is that the Constitutional Court will check the Convention respect of the rules of the Constitution. On the other hand, the rules of the Convention itself should be applied in light of the interpretation given by ECHR decisions. As stressed by the Court itself, this is pretty different from what happens when a national rule breaks the European union law: after many years of debate between the Constitutional Court and the European Court of Justice, the outcome is that, in case a law violates the European Union law, a judge (both at Trial Courts level and at the Supreme Court level) can decide not to apply that law in the concrete case in order to save the respect of the European union law, which deserves a special position in the hierarchy of the sources of law and is able to produce direct effects on our legal system. Recently, the Constitutional Court passed two new decision in which it is stated that, depending on their content, the rules of the Convention find their acknowledgement not only in art. 117, paragraph 1, but also in art. 10, paragraph 1, of the Constitution: as a matter of fact, art. 117, paragraph 1, will be the basis of the acknowledgment in our legal order when referring to rules of the Convention which are new in the international landscape, while art. 10, paragraph 1, will be the basis when the rules of the Convention are only reproducing through their wordings a generally recognized principle of international law (i.e. prohibition of torture). The framework resulting from the above mentioned decisions shows that the Convention rules cannot breach any of the rules of the Constitution. On the other hand, as the Convention still keeps its nature of international treaty, its rules cannot be forced or changed in their meaning in light of the Constitution. Nevertheless, for sure the Constitutional Court decisions seem to pave the way for the acknowledgment of the Convention as a Constitutional charter of fundamental rights, pursuing eventually the aim to place the Convention and the Constitution altogether at the top of the hierarchy.

As a final remark, in view of future developments of the role of the Convention in the Italian legal system, it is interesting to point out a recent debate, which follows a controversial ECHR decision. In Lautsi v. Italy case, issued in November 2009, the ECHR stated that the crucifix, which is present in public School classrooms, should be banned, as it discriminates those who observe other religions or those who are atheists. The topic is discussed deeply in Italy and has caused a bitter debate, involving politicians, Vatican representatives and the civil society as a whole. The decision has been appealed and the ECHR Grand Chambre is about to decide. It's not unlikely to foresee that, if the first-instance decision will be confirmed, the Italian Courts' enthusiasm in applying principles and rights provided by the Convention could diminish, maybe causing a step backward in the way to a complete constitutionalization of the Convention.

2. ECHR decisions effects in light of recent Italian jurisprudence.

As stated in art 46, paragraph 1, of the European Convention, «if the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party». The Committee of Ministers is competent in identifying the public administration of the sentenced Country in charge of the payment of the «just satisfaction». A second effect is the obligation to conform to the sentence purview: the State has the duty to reproduce the situation existent before the breach of the Convention and to adopt any needed measure to stop the violation, delete its consequences or prevent other similar violations. The practice of the Committee of Ministers in supervising the execution of the Court's judgements shows that in exceptional circumstances the re-examination of a case or a reopening of the proceedings has proved the most efficient, if not the only, means of achieving restitutio in integrum. As a matter of fact, in the year 2000 the Committee of Ministers approved a Recommendation inviting the member States to adopt measures in order to assure the injured person's restitutio in integrum, also by means of a re-examination of the case, including reopening of the proceeding. In particular, when the violation consists in the breach of the defendant's right to take part at the trial, ECHR jurisprudence states that «a retrial or the reopening of the case, if requested, represents in principle the appropriate way of redressing the violation», all the same confirming that it's not her duty «to indicate how any new trial (or re-examination of the applicant's appeal) is to proceed and what form it is to take»10. Recently, on January, 15th 2010, the State Duma of the Russian Federation has voted in favour of the draft law ratifying Protocol No. 14 to the European Convention on Human Rights. On February, 19th 2010, the President of the Court has received the depositing by the Russian Federation of its instrument of ratification. Protocol no. 14 will be effective three months after its deposit. As for what matters to the present study, it is relevant that art. 46 of the Convention will be amended: the new provisions are more strict in introducing an infringement procedure towards the State which does not respect its obligation to adopt measures requested by the ECHR decision. A large number of States adopted special legislation providing for the possibility of reexamination of the case or reopening of the proceedings. In other States this possibility has been developed by the Courts and national authorities under existing law. The two missing States are Spain and Italy. From the Italian perspective, the question becomes ticklish when it comes into consideration that the Italian criminal procedure law doesn't provide any remedy against the execution of a decision adopted in breach of the ECHR principles nor the Italian criminal procedure code gives the opportunity to replace the trial with a new one that respects the Convention rules. The revision of the final decision is an extraordinary remedy on an otherwise final judgment conviction. Such an attack is allowed only when there is a new evidence which alone, or in connection with other evidences, shows that the defendant must be acquitted, or that the conviction was based on false or fabricated evidence. This remedy is not available to a condemned person who seeks for a more favorable disposition or for a mild punishment. Up till now, only the Courts tried to solve the problem interpreting the rules of the Italian criminal procedure code provided for different kind of situations: in these decisions, judges acted as substitutes of the Parliament in lack of a specific law for the case.

The first decision passed by the Supreme Court (Corte di Cassazione) is related to the "Cat Berro case". ECHR sentenced Italy because the trial at the end of which the accused was sentenced was unfair. Therefore, the defendant's counsel of the defense asked to the competent Court of Appeal the annulment of the execution. The Court of Appeal rejected the request and the defendant seek review by the Supreme Court, which stated that the matter of the effects of ECHR decisions on a final conviction issued at the end of an unfair trial cannot be decided by the Court of Appeal pending the execution, but should be analyzed in a cross-examination procedure. Accordingly, the Supreme Court annulled the Court of Appeal decision, which had to decide again on the point, but rejected the defendant's request a second time. More insightful has been the decision handed down in the "Somogyi case". An Hungarian citizen sentenced in Italy for trafficking in weapons at the end of an in absentia trial appealed to the ECHR, which sentenced Italy for violating the defendant's right to be present at trial because there was no evidence of the fact that the defendant was aware of the ongoing trial. After that, the Supreme Court stated that the defendant could appeal the first instance decision in accordance with art. 175 of the code of procedure, which entitles a person who, without his fault, was not aware of the trial to appeal the decision even if the time period to apply has expired[15]. The third one is known as "Dorigo case": Mr Dorigo was final sentenced in 1996 to thirteen years in prison. After Mr Dorigo appeal, the ECHR sentenced Italy because the conviction was based on statements made during the investigations by three witnesses who, once the trial came to the Court, took the right to refuse to answer. This caused a breach of the defendant's right to confront and question the witness against him provided by art. 6 of the Convention. After the ECHR decision, Mr Dorigo asked to the competent judge (Court of Appeal in Bologna) to stop the execution of the final decision condemning him, taking advantage of ECHR decision. However, the Court of Appeal, refused to accept the request and asked the Constitutional Court to decide whether the Italian rule which provides the review only in the abovementioned hypothesis was respectful of the principles of the Constitution. The Constitutional Court stated that only the Parliament is competent to decide whether a trial can be reviewed: according to the Italian principio di tassatività delle impugnazioni, the hypothesis in which it is possible to apply for appeal are limited by the statutory law. Therefore, it's a duty of the Parliament to find a remedy in case a final decisions is passed at the end of trials that the ECHR considers unlawful accordingly to the European Convention rules. At the same time, the Public prosecutor in Udine, competent for the execution of the sentence condemning Mr Dorigo and aware of the critical situation, asked to the execution judge to declare that Mr Dorigo's detention was not lawful because based on a final decision which was the outcome of an unlawful trial. However, the execution judge rejected its request stating that: a) the execution judge should only control the existence of a final decision, no matter what happened on merit points during the trial; b) there's no instrument to renew a trial in this case, and a decision stopping the execution would create the strange situation in which a final decision is suspended without an end and the subsequent possibility to be executed. The Public prosecutor seek review of the Supreme Court, which admitted the Public prosecutor's claim stating that, whenever ECHR sentences Italy for unlawfulness of a trial, the defendant has the right to ask for a review of the decision and Italy should respect the decision, according to art. 46 of the Convention. Even if the Italian code of criminal procedure doesn't allow a review for this particular case, the judge in charge of the execution should declare that he cannot execute the decision condemning the defendant, because doing so he would breach the Convention rules for two times in the same case (in particular, a breach of art. 5 of the Convention). According to art. 670 of the criminal code of procedure, should the judge stop the execution, the defendant will have again the time to apply for the appeal. However, in the Dorigo case, the Supreme Court only blocked the execution, stating nothing about the renewal of the trail. Doing this, the Supreme Court avoided a breach of art. 5 of the Convention but still didn't solve the problem of the right of a review of the final decision. In the "Drassich case", Mr Drassich was sentenced to eight years and three months in prison for corruption. Seeking review by the Supreme Court, he said that the crime has lapsed, but the Court rejected his claim giving a different qualification of the fact committed: instead of "simple" corruption, the conduct was considered corruption of the judiciary, which deserves a harder punishment. The effect was a longer prescription time and the final conviction of Mr Drassich. Therefore, Mr Drassich presented his appeal to the ECHR, that sentenced Italy because the changing in the description of the fact was not respectful of art. 6 of the European Convention, because nor the defendant or the Public prosecutor had the possibility to discuss the new qualification. Taking advantage of the ECHR decision, Mr Drassich asked to the competent judge to stop the execution on the basis of art. 670 of the Italian criminal procedure code, as the Supreme Court stated in the "Dorigo case". Nevertheless, in this case the Supreme Court, though stating that the final decision couldn't be executed, didn't apply art. 670 of the criminal procedure code. As a matter of fact, its decision was based on art. 625-bis: however, art. 625-bis provides an extraordinary remedy useful only in case of mistake on fact[18].

Finally, on February 2010 the Supreme Court decided the "Scoppola case". Mr Scoppola was final sentenced to life-imprisonment because he murdered his wife and tried to kill one of his sons. During the first-instance trial, Mr Scoppola asked to apply for a special proceeding (giudizio abbreviato) that grants the defendant to obtain: a) reduction of the punishment by 1/3 if he is found guilty; b) a change from in life imprisonment to thirty years imprisonment; c) no daytime isolation during life imprisonment[19]. The first-instance Court admitted Mr Scoppola request and sentenced him to thirty years in prison. However, on the day of the decision, a law entered into force providing an interpretation of the said special proceeding: according to that law, Mr Scoppola should have been sentenced to life imprisonment because the punishment for murder together with other crimes he committed is punishable with life imprisonment and daytime isolation. Then, thanks to giudizio abbreviato, it would have turned into life imprisonment. On this basis, the Public prosecutor applied to the Court of Appeal, which admitted the claim and sentenced Mr Scoppola to life imprisonment, stating that, in respect of the tempus regit actum principle, the judge should apply the new law to the pending case. The core question is: if that law is considered as a procedural law, then the judge should respect tempus regit actum principle. If, instead, is considered as a substantive criminal law, the judge should apply the rules which provide the lesser punishment, in respect of art. 2 of the criminal code, art. 25 of the Constitution and, last but not least, art. 7 of the European Convention. Firstly, the Court explained that «Article 7, paragraph 1, of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the Courts must apply the law whose provisions are most favourable to the defendant». Secondly, the Court considers that Article 442, paragraph 2, of the criminal procedure code is a «provision of substantive criminal law concerning the length of the sentence to be imposed in the event of conviction following trial under the summary procedure. It therefore falls within the scope of the last sentence of Article 7 § 1 of the Convention». In respect of this reasoning, the ECHR sentenced Italy because of violation of art. 7 of the Convention20. Therefore, taking advantage of the "Drassich case", Mr Scoppola asked for the special remedy provided by art. art. 625-bis. The Supreme Court accepted its request in February, but the decision has not been published yet. From the above mentioned examples, we can say that Italian jurisprudence found a solution utilizing a technique that, from the point of view of the victim's rights, deserves approval. However, even Scholars agree that, following the Constitutional Court decision, the Parliament should approve a specific law in order to avoid uncertainty and discrimination among defendants. As an evidence of the fact that the solution is not completely welcomed by the judges of the Supreme Court itself, at the end of April all the sections of the Supreme Court will take part to a meeting in order to decide whether to submit the question to the plenary session, so to find a shared solution in lack of a law on the point. The only relevant reform has been introduced on the 28th November 2005 with the decree of the President of the Italian Republic n. 289, which provides a new ruling for the criminal records, stating that the ECHR decisions must be added to the defendant's criminal record below the Italian final decision to which they are referred. Even if this is not practically useful, it has the implicit meaning of a first step towards a modification of the effects of the Italian decision.

3. Draft bills on the renewal of the trial.

The above mentioned Recommendation R (2000) 2, encourages «the Contracting Parties to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that: (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of». Bearing in mind these wordings, from 1998 on, several draft bills have been presented to the Parliament in order to introduce an instrument that allows a renewal of the trial or a revision of the decision passed at the end of a trial considered unlawful by the ECHR, but none of them has been approved nor even discussed by the two Chambers of the Parliament yet. The drafts choose among two options: modify art. 630 of the criminal procedure code, which provides four cases in which it is possible to ask for a revision of the decision condemning the defendant, or introduce a specific rule for the case. Analyzing the drafts, it's possible to notice that they entitle the sentenced defendant to apply for a renewal of the trial only if criminal procedure rules have been violated during the trial. Nothing is provided in case the breach is related to substantial rules. Some of them are even more strict, limiting the possibility to seek review only when a breach of art. 6 of the Convention is committed. Of course this is not in line with the Committee of the Ministers Recommendation R (2000) 2 and would exclude from the remedy a large number of cases. From the above mentioned cases, we can mention the last one (Scoppola), as an example in which ECHR sentenced Italy for violation of art. 7 of the Convention. Secondly, some of the drafts provide the special remedy only if the defendant has been sentenced in prison, or to any other no-pecuniary punishment, thus excluding all the unlawful trials at the end of which the defendants are obliged to pay a fine. The competent judge will be the Court of Appeal, and the judge should renew only the part of the trial in which ECHR ascertained a violation of the Convention.

revision of the final decision is admitted in the Italian system only if it could held to the defendant's acquittal. However, this is not always useful for the situation we are analyzing, because not necessarily a new trial, hold in respect of the Convention, must lead to the defendant's acquittal. The draft-bills suggest that at the end of the new trial which respects the rules of the Convention, there are two options for the competent judge: a) confirm the first decision, b) annul it. Moreover, as suggested by Scholars, three more questions rise: 1) in case the trial was held against two or more defendants and only one of them applied to the ECHR, what should happen to the co-accused who didn't apply to the ECHR?; 2) what is it going to happen to the victim who already had her compensation for the damages suffered?; 3) how is the new law going to solve the matter that both judge and participants to the trial should face in terms of possible loss of evidence due to the period elapsed. These question are still unanswered and should be taken into consideration by the draft-bills before the approval of a new law.

4. ECHR decisions about Italian in absentia trials.

As a general rule, the criminal trial must guarantee that the accused will be present during the hearing and will be able to follow and understand any part of the proceedings. Interpreting art. 6 of the Convention, the ECHR stated that, although not expressly mentioned, «the object and purpose of Art. 6 taken as a whole show that a person "charged with criminal offence" is entitled to take part in the hearing»24. However, proceedings held in the absence of the accused are not necessarily incompatible with the Convention, particularly when the accused can obtain a new determination of the charge, in respect of both law and fact. Furthermore, even in those cases where there is no possibility of a re-trial, the in absentia trial may be compatible with art. 6 of the Convention, namely when the accused was aware of the summons: States can consider the failure of the accused to appear as implicit waiver, and thus carry out a trial in absentia. In 1975, the Committee of the Ministers approved a Resolution in which the States were recommended to apply the following minimum rules: «no one may be tried without having first been effectively served with a summons in time to enable him to appear and to prepare his defence, unless it is established that he has deliberately sought to evade justice». Moreover, «6. A judgement passed in the absence of the accused must be notified to him according to the rules governing the service of the summons to appear and the time-limit for lodging an appeal must not begin to run until the convicted person has had effective knowledge of the judgement so notified, unless it is established that he has deliberately sought to evade justice. 7. Any person tried in his absence must be able to appeal against the judgement by whatever means of recourse would have been open to him, had he been present. 8. A person tried in his absence on whom a summons has not been served in due and proper form shall have a remedy enabling him to have the judgement annulled. 9. A person tried in his absence, but on whom a summons has been properly served is entitled to a retrial, in the ordinary way, if that person can prove that his absence and the fact that he could not inform the judge thereof were due to reasons beyond his control»[25].

From the Italian perspective, we can notice that there are three different cases related to the defendant's absence during the trial, ruled by artt. 420ter, 420quater, 420quinquies (as far as regards the preliminary hearing) and art. 484, paragraph 2bis (as far as regards the trial at Court) of the code of criminal procedure: a) contumacia / absentia, which means that the person is not available at the trial even if he has been summoned in person or otherwise informed of the date and place of the hearing of the trial going on against him. More precisely, the code distinguishes between: 1) summon in person, which means that the person has received the writ of summon directly and is aware that a process is going on against him; 2) presumption of knowledge of the trial, which is obtained after sending services of writ of summon to persons (i.e. relatives, employers, etc.) or institutions (i.e. local authorities) that have a relation with the defendant; b) assenza al processo / absence at the trial depends on the defendant's will. It means that the defendant has been correctly summoned but he declares that he doesn't want to attend the trial and in fact asks that the trial is continued even if he will not attend it. If the defendant is in jail, and he refuses to attend the trial, still the trial is continued without him. The attorney-at-law will act on behalf of the defendant and will ensure a proper defense at the trial; c) legittimo impedimento / legitimate impediment, which is related to the fact that the defendant, even if imprisoned in jail, cannot stand to the hearings for a reason that doesn't depend on his will (i.e. fortuitous events, necessities or other lawful impediments). The process is held over till the end of the impediment. As far as regards contumacia / in absentia trials, Italy has been sentenced several times under the principles stated by two important ECHR decisions. Before the new criminal code of procedure entered into force, the ECHR sentenced Italy in the "Colozza case". Mr Colozza was sentenced in absentia even if he was not aware of the trial. He applied for an appeal and then seek review to the Corte di Cassazione because he didn't receive any summon even if his address was known by the office of the Prosecutor, as it was testified by summons that Mr Colozza received and that were related to different proceedings in which he was involved as defendant. However, the decision became final and he applied to the ECHR, which sentenced Italy. After the new criminal code of procedure entered into force, Italy has been sentenced because, according to our criminal procedure code, a defendant convicted in absentia doesn't have an immediate right to appeal against the decision convicting him if he is not aware of the trial going on against him (except the case of his negligence). To be more precise, the former wordings of art. 175 of the criminal code of procedure stated that the defendant convicted in absentia had to prove that he was not aware of the trial and that this lack of awareness was not related to his fault or negligence. If he would have successfully carried out that proof, then he would have been given the time to apply for an appeal against the decision convicting him. Thus, the ECHR sentenced Italy in the cases Sejdovic and Somogyi because the two defendants were convicted even if there was no evidence that they were aware of the trail: in the first case the Court presumed that the defendant gave up his right to be present at the trial, but there was no evidence about the voluntary waiver to this right; in the second case, the Court stated that the defendant had received and signed the writ of summon, so he was aware of the trial: however, the defendant claimed that the writ had been signed by a different person and there was no evidence that he had signed in person the writ. Moreover, in this two decisions the ECHR criticized the Italian rulings on in absentia trial: first of all, the terms to prove the lack of awareness when applying for a new term to appeal were too short; secondly, the defendant's duty to prove his blameless lack of awareness about the trial instead of the Prosecutor's burden of proof about the awareness of the trial was not in line with the principles of the Convention. Following the ECHR decisions, in the year 2005 the Italian Parliament approved a law that modified art. 175 of the criminal code of procedure. The new wording reads that the defendant who has been convicted without being aware of the trial is given the time to apply for the appeal: he must ask for the appeal within thirty days after he gets to know about the decision. Furthermore, it's not a defendant's burden to carry the proof that he has received no information about the trial. But still some matters have not been solved. First of all, even if the person is given the time to present an appeal, this is only a review of the first decision, and not a retrial, which means that the person has the right to attend only one stage related to the merit of the fact. However, in absentia trials are in line with the principles of the Constitution, namely art. 24, which provides the right of defense, and art. 112, which introduces the mandatory prosecution principle. Furthermore, the Italian Constitution states that the defendant has only the right for a petition to the Corte di Cassazione (art. 111, paragraph 7 of the Italian Constitution), which decides only on points of law. This means that there is no defendant's right protected by Constitution to two merit trials (first and second instance judgments). Actually, there is the right to one only merit trial and to a reviewing of the decisions of an inferior Court on points of law. This means that art. 175 of the criminal code of procedure is in line with the Italian Constitution provisions stating that: 1) the defendant who has been convicted without being aware of the trial against him is automatically given the time to present appeal (excepts for the hypotheses in which the lack of awareness depends on the defendant's fault or negligence); 2) it is no more a defendant's duty to provide the proof that he was unaware of the trial against him. A second matter is related to a lack of coordination between new art. 175 and art. 603 of the criminal procedure code, which deals with renewal of the proceedings, by means, for example, of the possibility to confront and question the witnesses. Renewal of the proceedings in appeal can take place only in four hypothesis. One of these regards in absentia decisions given at the end of the first instance trial. Art. 603, paragraph 4, states that a renewal of the proceeding is possible only if the defendant carries the proof that he was not able to attend the trial due to fortuitous events, necessities, other lawful impediments, or that he was not informed of the ongoing trial against him. So, if the defendant isn't anymore obliged to provide the proof of his unawareness in order to be allowed to present appeal, that proof is still on him in case he wants to obtain a renewal of the proceeding. Furthermore, the defendant misses the opportunity to ask for an alternative proceeding (such as applicazione della pena su richiesta delle parti and giudizio abbreviato) that grant a reduction of the punishment, because the deadline for this proceedings is, in general, the preliminary hearing during the first-instance trial. This causes a breach in the system and Italian Scholars assert that a decisions of the Constitutional Court is needed on the subject. The Constitutional Court decided several times upon the constitutionality of the articles of the criminal procedure code dealing with the summons' procedure. In each decision, the Court stated that there is no breach with the Constitution if the criminal procedure code doesn't provide a postponement of the proceedings whereas it is impossible to find the defendant or there's no evidence that he is aware of the trial. In fact, as confirmed by the ECHR jurisprudence, in absentia trials are not incompatible with the Convention once the State provides the defendant with the opportunity to ask for a renewal of the trial. Secondly, the Constitutional Court explained that the choice between the postponement or the renewal of a trial that involves a person who is impossible to find must be demanded to law. Thus, the Court cannot interfere with the current choice of the Parliament, which consists, as already mentioned, in the possibility to apply for an appeal as stated in art. 175 of the code of criminal procedure. Therefore, two different ways can be suggested to solve the matter: the first assumes that art. 159 of the criminal procedure code should be interpreted in light of the Convention, as suggested by the Constitutional Court decisions n. 348 and 349 passed in 2007. However, the wordings of art. 159 are clear in providing a situation in which the summon served only to the defendant's attorney-at-law is valid and lawful even if the defendant's himself was not aware of the trial. Thus, this way is not practicable. A second possibility is related to the interpretation of art. 648 of the criminal procedure code where the definition of a sentence which is final is provided. The question is: is it logical to consider as final a decision passed at the end of a trial held in the defendant's absence and whereas the defendant was not aware of the trial? The problem is that this final decision can be executed. However, thanks to art. 175 of the code of criminal procedure, the defendant can ask a renewal of the trial. So, the suggestion is to ask to the Constitutional Court to declare the unlawfulness of art. 648 of the criminal procedure code whereas it considers that a decision is final even if the defendant is provided with the opportunity to ask for a renewal of the trial, due to the fact that the trial was held in absentia and without the evidence of the fact that the defendant was aware of it.

CONCLUSIONS

The matters presented in this essay show that main topics are still on the socks and have not been totally solved yet. First of all, the question about where the Convention should be placed among the sources of law is still pending. In fact, two decisions handed down by the Constitutional Court in November 2009 seem, from one hand, to confirm the decisions passed in 2007, and, on the other hand, that a different interpretation is possible, as they state that the rules of the Convention receive acknowledgment in our system through art. 117 and art. 10 of the Constitution. Moreover, things seem to be on the way of a deep change, as the Council of European Union received on 17th March 2010 the mandate to sign the European Convention of Human Rights on behalf of the European Union. This means that, from the point of view of the national judges, the Convention, the Treaty and the other rules approved by the European Union could be applied and interpreted through a unique approach, instead of the two current approaches explained in paragraph 1. Since the Lisbon Treaty entered into force in December 2009 and the European Union is supposed to sign the European Convention of Human Rights in June 2010, this field of discussion will probably be one of the most interesting, as it involves both the European top-level Courts (ECHR, ECJ) and the national judges (Constitutional Court, Corte di Cassazione and merit Courts). As regards the matter related to the duty for the State to abide the final ECHR judgment, the subject is really tricky and both Scholars and judges are waiting for the approval of a new law that should introduce an instrument through which a final sentence passed at the end of a trial which the ECHR considers not fair could be reviewed. Unfortunately, we must remark that the draft bills awaiting for discussion at the Parliament are not at all satisfactory, as they limit the possibility to obtain a new trial only in case of violations of art. 6 of the Convention. However, as the Italian Courts have tried different solutions through interpretation in order to grant a remedy for the defendant who has been sentenced at the end of an unfair trial, the only way to obtain a unique solution is the approval of a statutory law, which shouldn't be put off any longer. Finally, as explained in paragraph 4, in absentia trials represent a matter which has not been solved yet, even if the Parliament approved a law in 2005 that introduces a new wording inside art. 175 of the criminal procedure code, in order to adapt it to the Convention principles and the ECHR decisions. The matter becomes even tougher if we consider that a sentence passed at the end of a trial in which the defendant was not present could be considered final and then able to produce the ne bis in idem effect. From one point of view, it is important to grant the defendant's right to ask for a renewal of the trial previously held in the defendant's absence. From another point of view, to exclude that a sentence passed at the end of a trial in absentia could be considered as final and then able to stop a second trial against the same person charged of the same facts, would be against art. 54 of the Convention implementing the Schengen Agreement. What is certain is that up till now there is no harmonization among member States as far as regards in absentia trials. The European Union, being aware that the mutual trust itself is not enough to grant a shared position on in absentia trials, is trying to offer a common definition of in absentia decisions: as a matter of fact, on 26th February 2009 the European Union Council approved a framework decision «enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial». One of the main reasons that led the Council to approve the framework decision is due to the fact that the various framework decisions «implementing the principle of mutual recognition of final judicial decisions do not deal consistently with the issue of decisions rendered following a trial at which the person concerned did not appear in person. This diversity could complicate the work of the practitioner and hamper judicial cooperation.

This topic could be discussed also through a dialogue between the ECHR and the European Union Court of Justice, as the Lisbon Treaty explicitly mentions that the European Union joins the European Convention of Human Rights (as well as the 2000 Charter of Fundamental Rights signed in Nice, which reproduces several principles carried out by the Convention), including the provisions related to the defendant's presence at the trial as interpreted by the ECHR (see paragraph 4). Another way to deal with the subject could be to issue an EU regulation stating when a final in absentia decision must be subjected to the ne bis in idem principle or instead must be reviewed because the defendant was not aware of the trial going on against him: the main thing is to avoid impunity spots or, even worse, to cause a detriment in the defendant's rights to a fair trial34.

CHAPTER 4

ANOTHER BRICK IN THE WHOLE: THE CASE-LAW OF THE COURT OF JUSTICE ON FREE MOVEMENT AND ITS POSSIBLE IMPACT ON EUROPEAN CRIMINAL LAW

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ABSTRACT

European Union, and criminal, laws had been interacting in many ways even before explicit competence in criminal matters was acquired by the Union in the Treaty of Maastricht. Such intersections between supranational and national provisions have frequently been handled by the CJEU. In the main, the intervention of the Court is triggered by Member States' recourse to penal sanctions in situations covered by EU law. In such cases, the CJEU is called upon to strike a complicated balance: it has to deal with Member States' claims of competence in criminal law, whilst ensuring that that power is used consistently with EU law. By making reference to selected cases, this paper highlights the impact that principles established in the context of the fundamental freedoms can have on EU criminal law.

INTRODUCTION

European Union (EU)I law is not just a framework of coexisting watertight areas. Quite the opposite, it is a 'whole' whose constituent parts are highly connected and influence each other. As time has gone by, many bricks have built up and strengthened such a connection, with the Court of Justice of the European Union ('the Court' or the 'CJEU') playing a major role in this respect. This paper aims to put another brick in this 'whole', and to discuss how the Court's case-law on free movement can improve fundamental rights' protection in EU criminal law. By EU criminal law, I mean: the instruments adopted by the Union according to the competences conferred in the Treaty,II as well as the law of the former 'third pillar'; the interaction between EU and national criminal law. Interdependence is an inherent feature in the EU; where interaction takes place not only among the different areas of Union law, but also between the latter and national systems. This is even truer as far as penal law is concerned. Many principles usually traced back to EU criminal law have been firstly stated and developed in the context of free movement. What is more, in many cases this has resulted in heightening the standard of protection of individual rights. Three different expressions of interaction can be seen here.III Firstly, the impact of EU law on Member States' (MS) law has concerned the infringements of EU law provisions, criminalised at national level, where the CJEU has set aside those MS' rules that limited the rights established by EU law in a disproportionate manner.IV Secondly, the use of criminal penalties has been upheld by the EU as a tool in maintaining the effectiveness of EU law. The "Greek Maize" case is the landmark judgment in this respect.V The Court, by founding its reasoning on effectiveness, established the principle of assimilation. Here the obligation is for MS to treat

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comparable violations of Community and national law with analogous means, for MS reactions to amount to effective, proportionate and dissuasive penalties, and for these to be enforced with the same diligence as those applied to national situations. Though initially used in isolation, the Greek Maize 'formula' has progressively been accompanied by an explicit obligation for MS to impose penalties involving deprivation of liberty.

In the third way of interaction, criminal law principles have been regarded as general principles of EU law, particularly in order to ensure the application of Union law in compliance with the principles of legal certainty and non-retroactivity in criminal proceedings.VI The Treaty of Lisbon has resulted in the enhancement of the potential in terms of mutual impact among the different areas of EU law; which can be mostly ascribed to the collapse of the pillar-based structure of the EU. In this respect, the existing case-law of the Court offers further opportunities to strengthen the protection of individuals in EU criminal law through the use of the principles stated in the context of free movement. Broadly speaking, the interplay between criminal law and free movement has increased at the EU level over the years, with two broad fronts of interaction emerging in particular. On the one hand, we have seen the use of the legal rules, and their interpretation by the CJEU, where criminal law is overtly resorted to. In the Area of Freedom Security and Justice (AFSJ), criminal law is explicitly used in EU instruments since the Union has specific competences in this respect. On the other hand, there are extensive areas of EU law where criminal law is not mentioned, since this would fall outside the Union powers; this is the case of the internal market and fundamental freedoms. In this way penal rules are put under the spotlight by the interaction between EU and national laws, with the Court deliberating on the role attached to criminal penalties. The high relevance of the interaction between fundamental freedoms (or, more broadly, Union law) and criminal law has been extensively analysed.VII Indeed, free movement has been, and is, the core of EU law since the latter was born, though many other areas have been gaining ground over the years (such as citizenship and criminal law). Right from the establishment of the EU, national provisions of criminal law have been increasingly covered by the law of the four freedoms (consisting of the Treaty and secondary law). Thereby, the chance for both kinds of rules (national and supranational) to interact has significantly heightened. Such dynamics have triggered many interpretative dilemmas, the resolution of which have been referred to the CJEU by national judges. In these contexts, the CJEU has been asked to find an equilibrium between economic freedoms and state sovereignty in criminal law. Two fundamental questions arise in this respect: is criminal law restricting, or capable of restricting, a fundamental freedom; and if so, may such a restriction be allowed?

Many studies have focused on the use of general principles by the CJEU in this area,[VIII] and its impact on criminal law. Therefore, in this paper I discuss possible consequences for EU criminal law that have not been explored in-depth so far. I select a restricted number of Court's rulings, and outline two main scenarios. As for the choice of the judgments, a key criterion has been the value of primary law taken on by the Charter of Fundamental Rights of the EU (CFREU or the Charter). I am interested in dealing with the possible impact of free movement case-law on fundamental rights in EU criminal law. Therefore, I analyse those judgments explicitly referring to a fundamental right or a general principle now enshrined in the Charter. The first scenario regards the use of the principle of proportionality; here I argue that the CJEU's use of the principle where criminal law encounters the fundamental freedoms has been largely beneficial to individuals. Such interactions have given the Court the opportunity to develop a manifold application of the principle of proportionality to criminal penalties featured at the national level. In this part I present the cases of Skanavi IX and Awoyemi.X As mentioned above, there is an extensive case-law of the Court's limitation of MS's use of criminal penalties in light of the principle of proportionality. Such a restraint has often been based on the argument that the measure in question was so disproportionate that it hampered the exercise of free movement. I decided to focus on Skanavi and Awoyemi as they examined exactly the same situation (driving in a host Member State with a non-recognised licence) and the same penalty (criminal sanctions, in particular imprisonment and a fine). The only difference lies in that Mrs Skanavi was an EU national, while Mr Awoyemi was not. Therefore, I jointly read these two decisions to contrast the differences between the proportionality test applied by the Court to an EU citizen, and that applied to a third-country national. From this, I stress the importance of EU citizenship to the application of proportionality in criminal law. Admittedly, these judgments were issued before the adoption of the Charter; however, the CFREU now provides for the universal principle of proportionality of penalties in Article 49(3). I argue that the relationship established by the Court between the enjoyment of such a principle and the entitlement to free movement requires clarification, in light of the legally-binding value taken on by the Charter. The second scenario concerns the possible non-implementation of EU secondary law on fundamental rights grounds, where I deal with the BerlusconiXI and CaronnaXII rulings. In this scenario, the cases form part of a consistent case-law of the Court of Justice, according to which criminal liability cannot be directly determined or aggravated by EU law, without a national law of implementation. Here I argue that the Court allowed the possible noncompliance of national law with EU secondary law. It did so by arguing that the implementation of the latter might have caused the infringement of a general principle or a fundamental right. At stake in particular was the principle of legality now enshrined in Article 49 CFREU. The first reason for choosing these cases is that the CJEU backed up its argument by explicitly referring to a general principle (as is the case of Berlusconi) or a fundamental right of criminal law (Article 49 Charter in Caronna). Furthermore, in Berlusconi the Court was faced with the contrasting effect of three subsequent laws: (1) EU company law; (2) the first Italian law which correctly implemented it, by the introduction of effective (criminal) penalties for violations of EU law; (3) the subsequent Italian law, which partially decriminalised offences provided for in the first law, and posed for that reason serious doubts of compatibility with the Union rules concerned. The preliminary ruling arose in the context of criminal proceedings, which regarded conducts (allegedly) committed under the first Italian law, but which were then decriminalised by the second one. However, the latter law was potentially not in compliance with EU law for lack of effectiveness. The Court was essentially asked as to whether such non-compliance could result in setting aside the subsequent Italian law, so opening the door to the criminal liability of the persons concerned. The scenario depicted makes Berlusconi a perfect showcase for analysing the relationship between the implementation of EU secondary law and the protection of fundamental rights. Likewise, Caronna concerned the possibility of determining criminal liability directly on the basis of an EU directive. In that judgment the Court was clear in finding that respect for the Charter would prevail even where national law is contrary to EU law. As clarified below, I argue that the rationale behind the decisions in the second scenario provides EU criminal law with an important tool to better protect fundamental rights in the context of mutual recognition. The article is structured as follows. I firstly deal with the scenario regarding proportionality, and I present the cases of Skanavi and Awoyemi. I then discuss their importance for EU criminal law, taking into consideration in particular Article 49(3) CFREU. Secondly, I address Berlusconi and Caronna. In this part I try to show how the cases can be highly relevant to mutual recognition in criminal matters. Lastly, I recall the topics touched upon, and I argue that the case-law of the CJEU can be used to enhance protection of individuals.

EU CITIZENSHIP AND PROPORTIONALITY

Skanavi and Awoyemi

The question in Skanavi arose in the context of criminal proceedings against Mrs Skanavi and her husband, Mr Chryssanthakopoulos, who were charged with driving without a licence. According to German Law, the conduct was an offence punishable by imprisonment or a fine. As far as EU law is concerned, driving licences were first harmonised by First Council Directive 80/1263/EEC of 4 December 1980 on the introduction of a Community driving licence.XIII That instrument in particular set a system for the mutual recognition and the exchange of driving licences, when the holder had her/his residence or workplace in another MS. By virtue of that directive, when the holder of a valid driving licence took up residence in another MS, the licence would remain valid for up to a maximum of a year after the establishment of residency. At the request of the holder within that period, and against surrender of the licence, the host MS was to issue the driver with a Community model driving licence for the corresponding category or categories without requiring the holder, inter alia, to pass a practical and theoretical test or to meet medical standards. According to the subsequent Directive 91/439/EEC,[XIV] the holder of a valid driving licence residing in another MS was not obliged to exchange it. The Court was firstly asked whether, as EU law stood prior to the implementation of the latter directive, a MS could require the holder of a driving licence issued by another MS to exchange that licence within one year from the establishment of the residence in the host State, in order to retain the entitlement to drive in the state. The Court recognised that the rules concerning driving licence can have a significant impact on the freedom of movement for workers, as well as on the freedom of establishment and provision of services.[XV] The Court also found that the gradual harmonisation carried out at EU law level allowed MS to retain some powers in this respect. Such a latitude included requiring the holder of a valid licence to exchange it in the MS where s/he had moved to.

The Court was further asked whether the Treaty precluded the act of driving of a motor vehicle by a person who had not exchanged licences from being treated as driving without a licence, and thus rendered punishable by imprisonment or a fine. The Court acknowledged that the obligation to exchange the licence was compatible with EU law, but also that it constituted a mere administrative requirement. Though the MS remain competent with regard to the use of criminal law, the latter must be used in such a way as not to obstruct free movement. This is especially the case when it comes to imprisonment,[XVI] where on that ground the CJEU ruled that EU law prohibited MS from treating driving without the exchanging of the licence as a criminal offence, since it would jeopardise the enjoyment of free movement.[XVII] Awoyemi regarded exactly the same situation as that occurred in Skanavi, but the difference laid in the fact that the person concerned was a third-country national. The Court was asked whether EU law precluded MS from treating driving without exchanging a licence as a criminal offence. The Court found that the former directive applied irrespective of nationality, and also recalled Skana[vi], when stating that MS must use criminal law in compliance with EU law and the principle of free movement.[XVIII] However, the Court found that a person such as Mr Awoyemi, as a third-country national, may not rely on the principle of free movement of persons, which applies only to a national of a MS.[XIX] As the law stood at that moment, the position of the person concerned was not governed by provisions of EU law, as he was not entitled to free movement. The Court mitigated this statement by means of the principle of retroactivity of a more favourable norm. The Court relied on the applicability of Directive 91/439/EEC on driving licences, which in the interim had substituted Directive 80/1263/EEC. The newest directive imposed on MS the prohibition of the requirement to exchange driving licences issued by another MS, regardless of the nationality of the holder. The Court recognised that the situation of Mr Awoyemi fell under the principle that an individual may rely - against the State - on provisions of a directive which are unconditional and sufficiently precise, where that State failed to: transpose the directive within the prescribed period, or implement the directive correctly.[XX] On that ground, the Court found that EU law allowed a national judge, by reason of the principle that forms part of national law in certain MS of the retroactive effect of more favourable provisions of criminal law, to apply such a provision even where the offence took place before the date set for compliance with that directive. The Court recalled the principle of the retroactive effect of more favourable provisions of criminal law.

Impact in Terms of Proportionality

The cases discussed above are highly relevant to EU criminal law, and they are also interesting because judgements were given when the Charter did not have legally-binding value. Therefore, it is appropriate to raise the question as to how the principle stated therein can be upheld in the EU legal framework as developed by the Treaty of Lisbon. At stake there is in particular the interaction between different understandings of the principle of proportionality. As is well-known, that principle has been used to balance (inter alia) fundamental freedoms and national laws. Eminent scholars have debated on the principle of proportionality in general terms,[XXI] as well as with particular reference to EU law.[XXII] In the latter area, it has been highlighted that the multiform application of proportionality depends on the peculiarities of the area of law at stake, and the nature of the interests involved.[XXIII] As provided for in Article 5 of the Treaty of EU (TEU), proportionality is a polestar (jointly with the principle of subsidiarity) for the Union in the application of its competences. The proportionality test famously provides that: the means adopted are appropriate to achieve the objectives legitimately pursued (suitability test); the means adopted are necessary in order to achieve the objectives legitimately pursued (necessity test); and the means adopted should not impose an excessive burden on the individual (proportionality stricto sensu). Put simply, the principle of proportionality under EU law requires that a legitimate aim be pursued through the least intrusive measure for individuals. Furthermore, Article 52 CFREU states that limitations on the exercise of the rights and freedoms recognised by the Charter are subject to the principle of proportionality. In this sense, evaluating criminal law on the basis of this principle of proportionality is to examine how the MS justify their use of criminal law, and more specifically, how criminal law is related to a given objective, and which function the former is supposed to fulfil.

However, this principle has also a criminal law understanding.[XXIV] Scholars have written extensively on the reach of proportionality[XXV] at EU criminal law level, and on its interaction with the principle of subsidiarity in criminal law.[XXVI] Given that the debate on the meaning of these principles is huge, I can just try to simplify it for the purposes of this paper. The interaction between the meanings of proportionality and subsidiarity in EU law and (EU) criminal law is highly relevant. As they can overlap and be understood in more than one way, their interaction can significantly impact on the individuals concerned. Subsidiarity in criminal law (also known as ultima ratio or last resort principle) means that penal sanctions should be resorted to only where other instruments would be insufficient to protect the interests at stake. This is the outer dimension of ultima ratio,[XXVII] which looks at criminal law in relation to other less intrusive legislative means. As Husak states, it focuses on the alternatives to punishment, rather than on what kind of punishment to prefer and alternative means of punishment.[XXVIII]

In this sense, Giudicelli-Delage argued that the necessity under EU law proportionality test is imbued not only with a utilitarian logic (relation between means and end), but also with the principle of criminal law as ultima ratio. Therefore, such a necessity would cover two fundamental guarantees: punishing "as long as it is useful and as long as it is fair. The legitimacy of punishment rests on its fairness and usefulness. The combination of these two principles is key to establishing conditions and limits of punishment (…), since considering both of them in isolation would lead to dangerous consequences".[XXIX] Such a picture is made even more complicated by the advent of the Charter with a legally-binding value, where Art. 49,[XXX] established the proportionality test between the level of punishment and the seriousness of the offence. Furthermore, the evaluation of proportionality under criminal law involves both the legislative and the sentencing levels, that is to say the penalties as provided by the law and applied to the concrete cases by the judges.[XXXI] The Court's judgments in Skanavi and Awoyemi show exactly the importance of these different understandings. In the cases, the application of the principle of proportionality has been linked to the entitlement to free movement, which applies to persons satisfying the following conditions: being an EU citizen; having moved to another MS; having been, or being engaged in some economic activity in the MS where s/he has moved to. The reach of the Treaty freedoms is expanded to include covering the driving licence system. As such the protection offered by free movement law is significantly enhanced, so that the compatibility of criminal sanctions with EU law is tested in light of this enlarged dimension. The consequence is evident: the broader the area within which criminal law is required to be consistent, the higher the chances that it will be found not in compliance with EU law. Personal liberty might have been treated as an instrument for the purposes of exercising an economic freedom. More than one question arises in this respect: are there penalties which are disproportionate while not hindering free movement, and if so, how could they be justified? However, one should not overlook that in cases such as those discussed, the Court ruled on the compliance of a national measure with Treaty freedoms, so that the latter are assumed as a benchmark of lawfulness. Furthermore, in a way the CJEU is deciding on the fairness of a national criminal law system, in a moment where a (weak) Union competence in criminal matters had just come into being. Nonetheless, such an approach may have its drawbacks, as seen in Awoyemi; in this case the Court was true to the general principle according to which the free movement law applies only to EU citizens, so that an individual may be subject to a penalty which the Court has explicitly recognised as disproportionate, if applied to EU citizens. One may uphold the CJEU coherence as follows; a criminal penalty is disproportionate where related to the exercise of free movement, that sanction ceases to be disproportionate, when applied to a person not entitled to free movement. Granted, there are at least two elements that must be considered in the analysis of the case. Firstly, at that time the Charter had not yet been adopted. Secondly, the Court might have opted for that interpretation because there were no elements capable of triggering the application of EU law. Indeed, at stake there was the protection of the exercise of free movement. The principle of free movement could not apply, because in that case Mr Awoyemi fell outside the scope of EU law: neither the Treaty, nor secondary law, governed that situation. That said, it must be pointed out that there was relevant EU law in the area, namely Directive 91/439/EEC, confirmed by the fact that the Court resorted to it when applying the principle of retroactivity of more favourable provisions of criminal law. However, it was not considered a matter of EU law because the person concerned did not enjoy free movement. The main problem in upholding such a hands-off approach is that it takes for granted the link between the application of the principle of proportionality and the entitlement to free movement. Indeed, the Court found that the penalty was lawful, and proportionality did not apply exactly, because that principle was subject to the exercise of free movement.

This caveat notwithstanding, I submit that Awoyemi should be regarded as a case on the proportionality of penalties, rather than a case on the application of free movement. The advent of legally-binding value with the CFREU seems to corroborate such an interpretation. If the Court were to be asked the same question today, the following circumstances would be taken into account. Firstly, Article 51 CFREU states that the

Charter applies when MS implement EU law. In a case such as Awoyemi, it would be difficult affirming the non-application of the CFREU, since the national law would be implementing EU law.[XXXII] Secondly, Article 49(3) lays down the universal principle that the entity of penalties must be proportionate to the seriousness of the offences. Arguing for the application of such a principle to EU citizens only would seem rather unsound. In light of these arguments, there appears to be the possibility that the Charter challenges the wellestablished link between the entitlement to free movement and the principle of proportionality of penalties.[XXXIII] Otherwise, the right to free movement would become a prerequisite of the enjoyment of fundamental rights, which appears in sharp contrast to the framework provided for in the Treaties. Now I move on to the second scenario, where I discuss Berlusconi and Caronna, and their possible importance for judicial cooperation in criminal matters within the EU.

HIERARCHY AND COMPLIANCE WITH EU LAW AND REFUSAL OF MUTUAL RECOGNITION

Berlusconi and Caronna

The Berlusconi case concerned the interaction between EU company law and the implementing Italian law, where, in compliance with EU company law, Italian law initially provided for effective (criminal) penalties. However, the law was subsequently amended by a subsequent law, which decriminalised the specified conducts to some extent. The referral for a preliminary ruling arose in the context of criminal proceedings that concerned facts dating back the first version of the Italian law. As a consequence, the alleged behaviour could have been subject (in theory) to criminal liability. On the other hand, the subsequent legal framework introduced by the newer law set a regime more favourable to the accused, but potentially less effective than the former one. Therefore, at stake here was a contrast between the need for effective penalties at national law level for infringements of EU law (embodied by the first Italian law), and the respect of the principle of retroactivity of more lenient penalties in criminal law. The Court firstly stated that the principle of the retroactive application of the more lenient penalty is a general principle of EU law, which 'national courts must respect when applying the national legislation adopted for the purpose of implementing EU law' (emphasis added).[XXXIV] Following the latter principle would have led to the application of the subsequent Italian law, potentially contrary to EU law. The Court further found that, in case of non-compliance of the national law with EU law, 'the national courts would be required to set aside, under their own authority, those new articles without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure.'[XXXV] However, the Court also recalled the principle that a directive cannot determine or aggravate criminal liability, in the absence of a national law of implementation.[XXXVI] As the application of EU law, and the consequent disapplication of the newer Italian law, could have set aside those two principles (retroactivity and requirement of national law for criminal liability), the Court concluded that the provisions of EU secondary law in question 'cannot be relied on as such against accused persons by the authorities of a MS within the context of criminal proceedings.'[XXXVII] Caronna regarded the interpretation of Directive 2001/83/EC on medicinal products for human use,[XXXVIII] and the Italian law implementing it. The Directive imposed on the MS a general obligation to make the wholesale distribution of medicinal products subject to the possession of a special authorisation. Such an obligation should also apply to 'persons authorised or entitled to supply medicinal products to the public if they may also engage in wholesale business.'[XXXIX] This also concerned pharmacists, who according to Italian law are authorised to operate as wholesalers in medicinal products. The Italian law correctly implemented the Directive through Decree 219/2006. Following amendments introduced over the years, that law also treated wholesale distribution without authorisation as a criminal offence. The criminal liability of Mr Caronna was precisely based on the Italian law implementing the Directive. Doubts arose as to whether the law applicable at the material time in the main proceedings made pharmacists subject to the requirement of a special authorisation and, in case of infringement, to criminal liability. If not, criminal liability could have been established only by means of an interpretation consistent with EU law, as it was not explicitly stated by a national provision. In this regard, the Court firstly reaffirmed the principle that a directive cannot, of itself and independently of a national law adopted by a MS for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive. XL More interestingly, the Court concluded that 'the principle that criminal penalties must have a proper legal basis, enshrined in Article 49(1) of the Charter of Fundamental Rights of the European Union, would prohibit the imposition of criminal penalties for such a conduct, even if the national rule were contrary to European Union law (emphasis added).'[XLI] What emerges from these judgments is that the CJEU establishes a hierarchy in different levels of compliance with Union law. The Court states that fundamental rights and general principles prevail over the full implementation of EU secondary law by MS. In both cases the Court confirmed the adage that EU law can never result in aggravating or determining criminal liability without a national legal basis. More broadly, respect for the principle of legality and the Charter outweighs compliance with EU secondary law. In the next section, I argue that this case-law can be highly relevant for European criminal law, with particular regard to the possibility to refuse mutual recognition on fundamental rights grounds.

The Importance of Mutual Recognition in Criminal Matters

The application of mutual recognition to judicial cooperation in criminal matters within the EU was firstly decided at the European Council of Tampere in 1998,[XLII] and, as known, is a principle borrowed from internal market law.[XLIII] Introduced by the CJEU with the Cassis de Dijon judgment,[XLIV] it required that a product/economic activity, that has been lawfully produced/marketed/exercised in one MS, should be capable of being marketed into another MS without further burdens or conditions. Such a principle finds a limit in the Treaty exceptions (e.g. public policy or public health) and the mandatory requirements/justifications as elaborated by the Court of Justice.[XLV] Thereby, mutual recognition is mostly a sort of negative integration, which facilitates the enjoyment of

Treaty rights by the free movements of products and persons under a de-regulatory logic.

The application of this logic to criminal law has caused a heated debate.[XLVI] Indeed, in criminal matters, each instrument of mutual recognition concerns one or more kinds of judicial decisions (arrest warrant, custodial sentence, and probation measure) and abolishes the requirement of double criminality for a list of 32 offences. According to this requirement, the conduct at the basis of the judicial act at stake must constitute an offence in the jurisdictions of both the requesting and the requested states. Once that requirement has been removed, the balance in cooperation substantially changes. Indeed, when one of these judicial decisions is issued for one of the 32 conducts by MS 'A' (the issuing MS) to MS 'B' (the executing MS), the latter has to recognise and execute the decision without any further formality. For those offences not included in the list, the double criminality principle remains. However, although the executing MS does not treat that conduct as a crime in its own legal order, it may surrender the person concerned all the same, once the issuing MS has required it. The automaticity of mutual recognition in criminal matters is mitigated by mandatory and optional grounds for refusing the execution, as well as by specific rules leaving some discretion to the executing judge. The first and most prominent example of mutual recognition in criminal matters is the European Arrest Warrant Framework Decision (EAW FD),[XLVII] which aimed at replacing the previous system of extradition between MS. The operation of the EAW in practice brought to the fore the thorny issue of the possible refusal of mutual recognition on fundamental rights grounds.[XLVIII] That is mainly so because the EAW FD (as many other framework decisions on mutual recognition in criminal matters) do not provide an explicit ground for refusal based on fundamental rights reasons. On the other hand, a standard clause is used, according to which the FD should not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU. This article states that the CFREU has the same values as the Treaties, and that the European Convention of Human Rights and the constitutional traditions common to MS form part of the general principles of EU law. What followed from this was the flourishing of a heated debate,[XLIX] fuelled by the caselaw of the Court of Justice on the EAW FD. Indeed, the Court in Radu excluded the refusal of mutual recognition even where it can result in a violation of fundamental rights.L Thereafter, in Lanigan, the CJEU seemed to open a space by arguing that the EAW FD must be interpreted in light of the Charter.LI Whether or not such a statement can also imply refusal on fundamental rights grounds remains to be seen. I argue that the case-law discussed above (Berlusconi and Caronna) can be helpful to overcome the stalemate. Whilst concerning different situations, the rationale behind these decisions can be described as follows: the need to comply with 'higher' sources (general principles and fundamental rights) prevails over the full implementation of EU secondary law. Such a principle can be perfectly applied also to mutual recognition. Where there are serious reasons to believe that the execution e.g. of an EAW would result in a violation of a general principle, the relevant mutual recognition instrument of EU secondary law should be set aside. This would be consistent with the broader case-law of the Court, and enhance the protection of individual rights across the EU.

Concluding Remarks

In this paper, I have tried to show how the case-law of the CJEU issued in the context of free movement can be highly relevant to European Criminal Law. Firstly, in Skanavi and Awoyemi the Court linked the application of the principle of proportionality to entitlement to free movement. Thereby, EU citizenship comes to the fore as a requirement of the proportionality review. The consequence is that a measure can be regarded as lawful (or not) depending on whether the person concerned is a national of a MS, as such entitled to the exercise of the fundamental freedoms. The advent of the principle of proportionality of penalties under Article 49 CFREU will require clarifications in this respect. Indeed, that provision states a universal principle, and cannot be made subject to requirement of nationality. In this context, one can envisage two possible, unprecedented scenarios. If proportionality were to be applied to third-country nationals, the relationship between entitlement to free movement and the application of the principle of proportionality of penalties would be challenged. Were this not to be the case, free movement could be read as a precondition of access to fundamental rights and personal liberty. The second way in which the case-law on free movement can be linked to European criminal law regards in particular fundamental rights and mutual recognition. In Berlusconi and Caronna, the Court seems to establish a hierarchy of levels of compliance within EU law. The full implementation of EU secondary law should be set aside, when the latter can result in a violation of fundamental rights or general principles. Such a principle can prove helpful to the highly debated possibility to refuse mutual recognition on fundamental rights grounds. Where there is a serious risk of fundamental rights infringement, the relevant legislation should give the way to EU primary law. In this light, a refusal of execution seems to be not only admitted, but also required by EU law to some extent. These scenarios discussed shows that EU law must be considered as a 'whole', and that there is great potential to heighten the standard of protection of the individual throughout the Union.

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I For the purposes of this article, by 'EU law' I mean the legal framework both post and pre Maastricht.

II In particular, Articles 82 and 83 TFEU.

III See Mitsilegas (2009: 60).

IV ECJ, Case C-203/80, Casati, 1981 ECR 2595; ECJ, Case C-274/96, Bickel and Franz, 1998 ECR I-7637; ECJ, Joint cases C-338/04, C-359/04 and C-360/04, Placanica, Palazzese and Sorricchio, 2007 ECR I-1891.

V ECJ, Case C-68/88, Commission v. Greece, 1989 ECR 2965. See also the forerunner Court's decision, Case C-50/76, Amsterdam Bulb, 1977 ECR 137.

VI ECJ, Case C-168/95, Arcaro, 1996 ECR I-06065, paras 36-37; ECJ, Case 384/02 Grøngaard and Bang, 2005 ECR I-09939, paras 29-30.

VII Mitsilegas, 2009; Klip, 2012.

VIII On general principles, see above all Tridimas (2006).

IX ECJ, Case C-193/94, Skanavi and Chryssanthakopoulos, 1996 ECR I-929.

X ECJ, Case C-230/97, Awoyemi, 1998 ECR I-06781.

XI ECJ, Joined cases C-387/02, C-391/02 and C-403/02, Berlusconi and Others, 2005 ECR I-03565.

XII ECJ, Case C-7/11, Caronna, 2012.

XIII First Council Directive 80/1263/EEC on the introduction of a Community driving licence, OJ L 375/1, 31.12.80.

XIV Council Directive of 29 July 1991 on driving licences, OJ L 237/1, 24.8.1991.

XV ECJ, Case C-16/78, Choquet, 1978 ECR 2293, para 4.

XVI Case C-265/88 Messner, 1989 ECR 4209, para 14.

XVII Skanavi (n VII), Court's judgment, para 39.

XVIII Ibidem, paras 36 and 38.

XIX ECJ, Case C-147/91, Laderer, 1992 ECR I-4097, para 7.

XX Awoyemi (n VIII), Court's judgment, paras 39-45.

XXI See in particular Alexy (2010: 21-32); Barak (2010: 1-16); Beatty (2004); Endicott (2012); Gerards (2009).

XXII Among many, see De Búrca (1993: 105-150); Craig (2010: 265- 302); Fontanelli and Martinico (2013: 32- 58); Jacobs (1999: 1-22); Reich (2011); Tridimas (2006).

XXIII See Harbo (2010: 180).

XXIV On the subject Ashworth (2010: 104-155); Robinson and Darley (2004: 173-205); von Hirsch (1992: 55- 98); von Hirsch and Ashworth (2010: 131-163).

XXV See Asp (2007: 207–219) Bernardi (2012: 15-65); Böse (2011: 34-42); Fichera and Herlin-Karnell (2013: 759–788); Gibbs (2011: 121–137); Sotis (2012: 111-122).

XXVI See on this Asp (2011: 44-55); Donini (2003: 141-183); Herlin-Karnell (2009: 351–361); Kaiafa-Gbandi (2011: 6-33); Melander (2013: 45-64).

XXVII Melander (2013: 51).

XXVIII Husak (2004: 214).

XXIX Giudicelli-Delage (2010: 69). According to the original version, the EU law necessity would imply punishing "pas plus qu'il n'est juste, pas plus qu'il n'est utile. Les principes du juste et de l'utile constituant les E – 18 deux éléments sur lesquels repose la légitimité de la peine en se combinant pour en tracer les conditions et limites - combinaison indispensable, (...), car, isolés l'un de l'autre, le juste et l'utile conduiraient à des conséquences également dangereuses".

XXX For a commentary on Article 49 Charter, see Mitsilegas (2014: 1351-1372).

XXXI On the importance of proportionality in sentencing, see van Zyl Smit and Ashworth (2004: 541-560).

XXXII For a recent and thorough assessment of the academic debate on the CFREU's scope of application, also in the light of the recent judgments of the CJEU, see Fontanelli (2014a, b).

XXXIII As noted, the Charter 'puts into the limelight two issues that have been discretely managed in the past by the CJEU, but now demand a clear and direct answer: the division of competences between the Union and its Member States, and the status of the individual as a Union citizen'. See Sarmiento (2013:70).

XXXIV Berlusconi (n IX), Court's judgment, paras 67-69.

XXXV ECJ, Case C-106/77, Amministrazione delle Finanze dello Stato v Simmenthal, 1978 ECR 629, paras 21 and 24; ECJ, Joined Cases C-13/91 and C-113/91, Debus, 1992 ECR I-03617, para 32; ECJ, Joined Cases C-10/97 to C-22/97, Ministero delle Finanze v IN.CO.GE.›90 and Others, 1998 ECR I-06307, para 20.

XXXVI ECJ, Case C-80/86, Kolpinghuis Nijmegen, 1987 ECR 03969, para 13.

XXXVII Berlusconi (n IX), Court's judgment, para 78.

XXXVIII Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311/67, 28.11.2001.

XXXIX Ibidem, Article 77, paras 1-2.

XL ECJ, Case C-60/02, X, ECR 2004 I-00651, para 61.

XLI Caronna (n X), Court's judgment, para 55.

XLII Tampere European Council, 15 and 16 October 1999, Presidency Conclusions.

XLIII Janssen, 2013; Snell, 2014

XLIV ECJ, Case C-120/78, Rewe v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), 1979 ECR 00649.

XLV Rosas, 2010; Barnard, 2013.

XLVI Among countless publications on the topic, see Mitsilegas (2006: 1277-1311); Peers (2004: 5-36);

Lavenex (2007: 762-779). For a state-by-state overview of the application of mutual recognition across EU area, see Vernimmen-Van Tiggelen, Surano, Weyembergh (2009). On mutual recognition and extraterritoriality, see Nicolaidis and Shaffer (2005: 267).

XLVII Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18.7.2002, as amended by the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24, 27.3.2009.

XLVIII Keijzer and van Sliedregt, 2005; Herlin-Karnell, 2013; Marin, 2014.

XLIX Weyembergh, Armada, Brière, 2014.

L ECJ, Case C-396/11, Radu, para 43.

LI ECJ, Case C-237/15 PPU, Minister for Justice and Equality v Francis Lanigan, nyp, para 54.

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CHAPTER 5 THE COMMON LAW AND CIVIL LAW TRADITIONS

Most nations today follow one of two major legal traditions: common law or civil law. The common law tradition emerged in England during the Middle Ages and was applied within British colonies across continents. The civil law tradition developed in continental Europe at the same time and was applied in the colonies of European imperial powers such as Spain and Portugal. Civil law was also adopted in the nineteenth and twentieth centuries by countries formerly possessing distinctive legal traditions, such as Russia and Japan, that sought to reform their legal systems in order to gain economic and political power comparable to that of Western European nation-states. To an American familiar with the terminology and process of our legal system, which is based on English common law, civil law systems can be unfamiliar and confusing. Even though England had many profound cultural ties to the rest of Europe in the Middle Ages, its legal tradition developed differently from that of the continent for a number of historical reasons, and one of the most fundamental ways in which they diverged was in the establishment of judicial decisions as the basis of common law and legislative decisions as the basis of civil law. Before looking at the history, let's examine briefly what this means.

Common law is generally uncodified. This means that there is no comprehensive compilation of legal rules and statutes. While common law does rely on some scattered statutes, which are legislative decisions, it is largely based on precedent, meaning the judicial decisions that have already been made in similar cases. These precedents are maintained over time through the records of the courts as well as historically documented in collections of case law known as yearbooks and reports. The precedents to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping American and British law. Common law functions as an adversarial system, a contest between two opposing parties before a judge who moderates. A jury of ordinary people without legal training decides on the facts of the case. The judge then determines the appropriate sentence based on the jury's verdict.

Civil Law, in contrast, is codified. Countries with civil law systems have comprehensive, continuously updated legal codes that specify all matters capable of being brought before a court, the applicable procedure, and the appropriate punishment for each offense. Such codes distinguish between different categories of law: substantive law establishes which acts are subject to criminal or civil prosecution, procedural law establishes how to determine whether a particular action constitutes a criminal act, and penal law establishes the appropriate penalty. In a civil law system, the judge's role is to establish the facts of the case and to apply the provisions of the applicable code. Though the judge often brings the formal charges, investigates the matter, and decides on the case, he or she works within a framework established by a comprehensive, codified set of laws. The judge's decision is consequently less crucial in shaping civil law than the decisions of legislators and legal scholars who draft and interpret the codes. The following sections explore the historical roots of these differences.

Above: Woodcut of a court scene from Praxis criminis persequendi, Jean Milles de Souvigny, 1541. The Robbins Collection.

HISTORICAL DEVELOPMENT OF CIVIL LAW

The term civil law derives from the Latin ius civile, the law applicable to all Roman cives or citizens. Its origins and model are to be found in the monumental compilation of Roman law commissioned by the Emperor Justinian in the sixth century CE. While this compilation was lost to the West within decades of its creation, it was rediscovered and made the basis for legal instruction in eleventh-century Italy and in the sixteenth century came to be known as Corpus iuris civilis.

Succeeding generations of legal scholars throughout Europe adapted the principles of ancient Roman law in the Corpus iuris civilis to contemporary needs. Medieval scholars of Catholic church law, or canon law, were also influenced by Roman law scholarship as they compiled existing religious legal sources into their own comprehensive system of law and governance for the Church, an institution central to medieval culture, politics, and higher learning. By the late Middle Ages, these two laws, civil and canon, were taught at most universities and formed the basis of a shared body of legal thought common to most of Europe. The birth and evolution of the medieval civil law tradition based on Roman law was thus integral to European legal development. It offered a store of legal principles and rules invested with the authority of ancient Rome and centuries of distinguished jurists, and it held out the possibility of a comprehensive legal code providing substantive and procedural law for all situations. As civil law came into practice throughout Europe, the role of local custom as a source of law became increasingly important—particularly as growing European states sought to unify and organize their individual legal systems. Throughout the early modern period, this desire generated scholarly attempts to systematize scattered, disparate legal provisions and local customary laws and bring them into harmony with rational principles of civil law and natural law. Emblematic of these attempts is the Dutch jurist Hugo Grotius' 1631 work, Introduction to Dutch Jurisprudence, which synthesized Roman law and Dutch customary law into a cohesive whole. In the eighteenth century, the reforming aspirations of Enlightenment rulers aligned with jurists' desire to rationalize the law to produce comprehensive, systematic legal codes including Austria's 1786 Code of Joseph II and Complete Civil Code of 1811, Prussia's Complete Territorial Code of 1794, and France's Civil Code (known as the Napoleonic Code) of 1804. Such codes, shaped by the Roman law tradition, are the models of today's civil law systems.

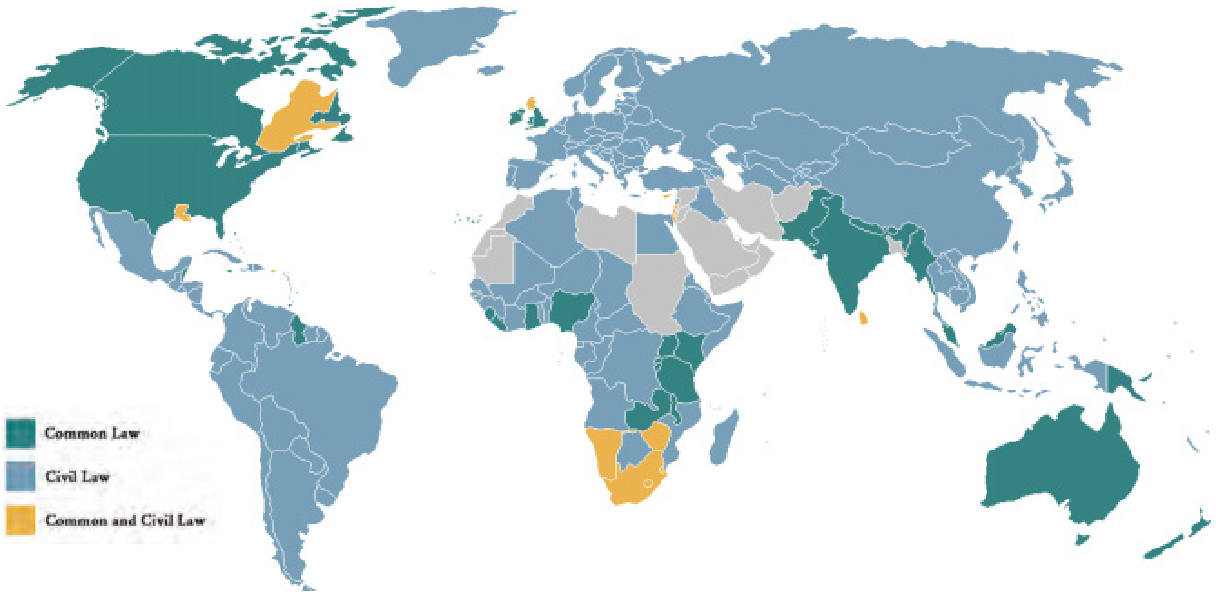
HISTORICAL DEVELOPMENT OF ENGLISH COMMON

Law English common law emerged from the changing and centralizing powers of the king during the Middle Ages. After the Norman Conquest in 1066, medieval kings began to consolidate power and establish new institutions of royal authority and justice. New forms of legal action established by the crown functioned through a system of writs, or royal orders, each of which provided a specific remedy for a specific wrong. The system of writs became so highly formalized that the laws the courts could apply based on this system often were too rigid to adequately achieve justice. In these cases, a further appeal to justice would have to be made directly to the king. This difficulty gave birth to a new kind of court, the court of equity, also known as the court of Chancery because it was the court of the king's chancellor. Courts of equity were authorized to apply principles of equity based on many sources (such as Roman law and natural law) rather than to apply only the common law, to achieve a just outcome. Courts of law and courts of equity thus functioned separately until the writs system was abolished in the mid-nineteenth century. Even today, however, some U.S. states maintain separate courts of equity. Likewise, certain kinds of writs, such as warrants and subpoenas, still exist in the modern practice of common law. An example is the writ of habeas corpus, which protects the individual from unlawful detention. Originally an order from the king obtained by a prisoner or on his behalf, a writ of habeas corpus summoned the prisoner to court to determine whether he was being detained under lawful authority. Habeas corpus developed during the same period that produced the 1215 Magna Carta, or Great Charter, which declared certain individual liberties, one of the most famous being that a freeman could not be imprisoned or punished without the judgment of his peers under the law of the land—thus establishing the right to a jury trial. In the Middle Ages, common law in England coexisted, as civil law did in other countries, with other systems of law. Church courts applied canon law, urban and rural courts applied local customary law, Chancery and maritime courts applied Roman law. Only in the seventeenth century did common law triumph over the other laws, when Parliament established a permanent check on the power of the English king and claimed the right to define the common law and declare other laws subsidiary to it. This evolution of a national legal culture in England was contemporaneous with the development of national legal systems in civil law countries during the early modern period. But where legal humanists and Enlightenment scholars on the continent looked to shared civil law tradition as well as national legislation and custom, English jurists of this era took great pride in the uniqueness of English legal customs and institutions. That pride, perhaps mixed with envy inspired by the contemporary European movement toward codification, resulted in the first systematic, analytic treatise on English common law: William Blackstone's (1723-1780) Commentaries on the Laws of England. In American law, Blackstone's work now functions as the definitive source for common law precedents prior to the existence of the United States.

CIVIL LAW INFLUENCES IN AMERICAN LAW

The American legal system remains firmly within the common law tradition brought to the North American colonies from England. Yet traces of the civil law tradition and its importance in the hemisphere maybe found within state legal traditions across the United States. Most prominent is the example of Louisiana, where state law is based on civil law as a result of Louisiana's history as a French and Spanish territory prior to its purchase from France in 1803. Many of the southwestern states reflect traces of civil law influence in their state constitutions and codes from their early legal heritage as territories of colonial Spain and Mexico. California, for instance, has a state civil code organized into sections that echo traditional Roman civil law categories pertaining to persons, things, and actions; yet the law contained within California's code is mostly common law. And while Blackstone prevails as the principal source for pre-American precedent in the law, it is interesting to note that there is still room for the influence of Roman civil law in American legal tradition. The founding fathers and their contemporaries educated in the law knew not only the work of English jurists such as Blackstone, but also the work of the great civil law jurists and theorists. Thomas Jefferson, for example, owned several editions of Justinian's Institutes, and praised the first American translated edition from 1812, with its notes and annotations on the parallels with English law, for its usefulness to American lawyers. Indeed, a famous example of its use is the 1805 case of Pierson v. Post, in which a New York judge, deciding on a case that involved a property dispute between two hunters over a fox, cited a Roman law principle on the nature and possession of wild animals from the Institutes as the precedent for his decision. Today Pierson v. Post is often one of the first property law cases taught to American law students. United States v. Robbins, a 1925 California case that went to the Supreme Court and paved the way for the state's modern community property laws, was based upon a concept of community property that California inherited not from English common law but from legal customs of Visigothic Spain that dated to the fifth century CE. Cases such as these illuminate the rich history that unites and divides the civil and common law traditions and are a fascinating reminder of the ancient origins of modern law.

Above: Sir William Blackstone, 1774, by Thomas Gainsborough. Oil on canvas. Tate Collection, London



Above: A world map showing countries today that have a civil law system (light blue), countries that have a common law system (green), and countries that have both (orange).

GLOSSARY

- Canon law – the body of laws that govern the Catholic Church and its members, deriving from the decrees and rules ("canons") made by the pope and ecclesiastical councils.
- Civil law – the system of law that emerged in continental Europe beginning in the Middle Ages and is based on codified law drawn from national legislation and custom as well as ancient Roman law.
- Code – the collection of laws of a country or laws related to a particular subject.
- Codification – the process of compiling and systematizing laws into a code.
- Common law – the system of law that emerged in England beginning in the Middle Ages and is based on case law and precedent rather than codified law.
- Corpus iuris civilis – meaning "body of civil laws," the name given to the compilation of Roman law ordered by the Byzantine emperor Justinian I in 529 CE.
- Equity – in English common law tradition, a body of legal principles that emerged to supplement the common law when the strict rules of its application would limit or prevent a just outcome.
- Precedent – a judicial decision in a court case that may serve as an authoritative example in future similar caseses.
- Writ – a formal written order from a judicial or administrative authority that directs a form of legal action. Originally writs were royal orders from the court of the English king.
- Yearbooks/reports – collections of common law court cases and judicial opinions recorded and organized by year. Yearbooks were the earliest editions compiled in England from the mid-thirteenth century until 1535, when they were superseded by officially printed and bound editions called Reports.

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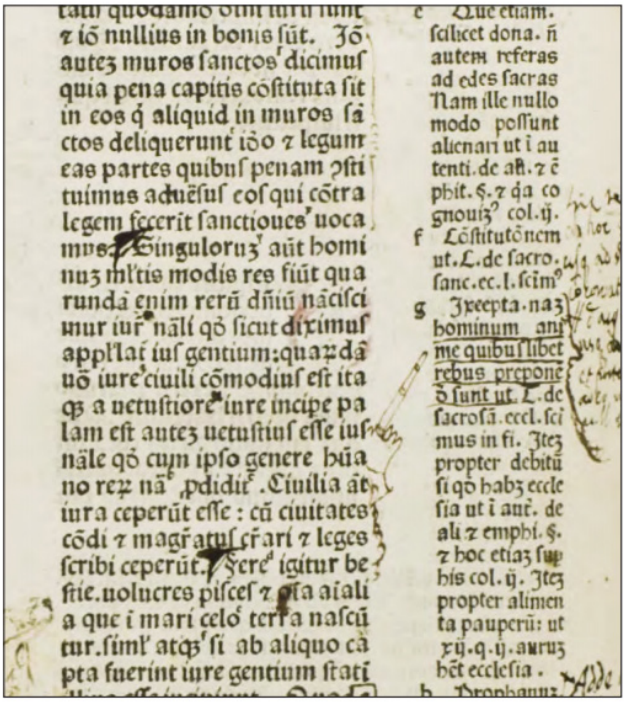
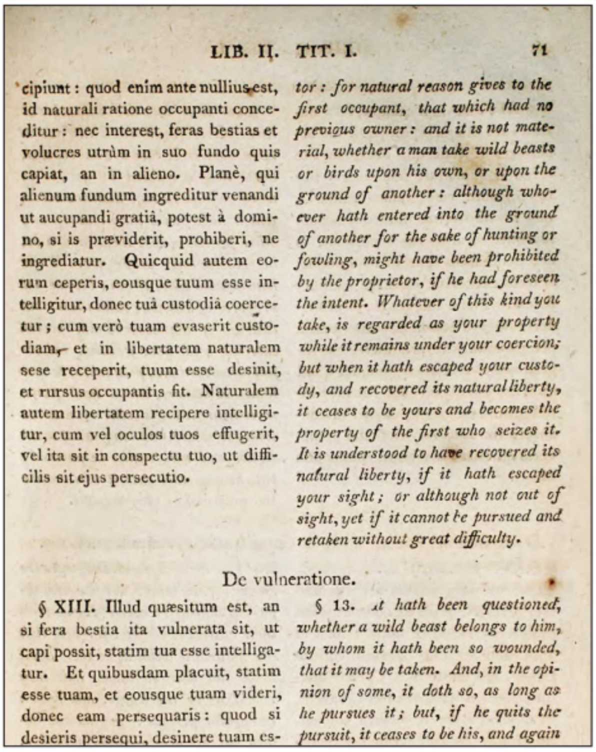
Justinian I Institutes Venice, 1478

One of the four parts of Emperor Justinian's monumental sixth-century compilation of Roman law, the Institutes was created as a textbook for law students. It has remained a resource for legal scholars for centuries because it offers a more rationally ordered and concise summary of the main concepts of Roman law than the much larger Digest. The illuminated detail from this early printed edition highlights the beginning lines of the Institutes: "Imperial majesty should be not only embellished with arms but also fortified by laws so that the times of both war and peace can be rightly regulated." Numerous marginal notes and markings reflect its use by students and scholars.



Even in modern common law culture, the Institutes and other important civil law sources may appear as precedent in case law. A classic case still taught to American law students today is the 1805 property law case of Pierson v. Post. At its heart was a hunting dispute in which the defendant killed and carried off from public land, in sight of the plaintiff, a fox that the plaintiff had been actively hunting with his dogs for some time. Deciding for the defendant, the New York Supreme Court cited Book II, Title 1, Section 12, of the Institutes as precedent for its finding that "pursuit alone gives no right of property in animals ferae naturae (wild by nature), which can be acquired only by possession." The original citation, which defines the right to ownership of wild animals, may be found in this text detail from the 1478 Institutes edition near the end of the page's center text block, just below the ink-drawn manicula (pointing hand): "Ferae igitur bestiae, et volucres, et pisces, et omnia animalia, quae mari, coelo, et terra nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt: quod enim ante nullius est id naturali ratione occupanti conceditur: nec interest feras bestias et volucres utrum in suo fundo quis capiat, an in alieno." Examining this text detail closely, one can also see that the faint ink doodle just to the left of the passage is a human figure with what appears to be a falcon, a wild bird of prey, flying overhead—presumably the work of a long-ago law student looking for a moment's diversion from his studies.



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cipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur: nec interest, feras bestias et volucres utrùm in suo fundo quis capiat, an in alieno. Planè, qui alienum fundum ingreditur venandi ut aucupandi gratiâ, potest à domino, si is præviderit, prohiberi, ne ingrediatur. Quicquid autem eorum ceperis, eousque tuum esse intelligitur, donec tuâ custodiâ coercetur; cum verò tuam evaserit custodiam, et in libertatem naturalem sese receperit, tuum esse desinit, et rursus occupantis fit. Naturalem autem libertatem recipere intelligitur, cum vel oculos tuos effugerit, vel ita sit in conspectu tuo, ut difficilis sit ejus persecutio.

tor: for natural reason gives to the first occupant, that which had no previous owner: and it is not material, whether a man take wild beasts or birds upon his own, or upon the ground of another: although whoever hath entered into the ground of another for the sake of hunting or fowling, might have been prohibited by the proprietor, if he had foreseen the intent. Whatever of this kind you take, is regarded as your property while it remains under your coercion; but when it hath escaped your custody, and recovered its natural liberty, it ceases to be yours and becomes the property of the first who seizes it. It is understood to have recovered its natural liberty, if it hath escaped your sight; or although not out of sight, yet if it cannot be pursued and retaken without great difficulty.

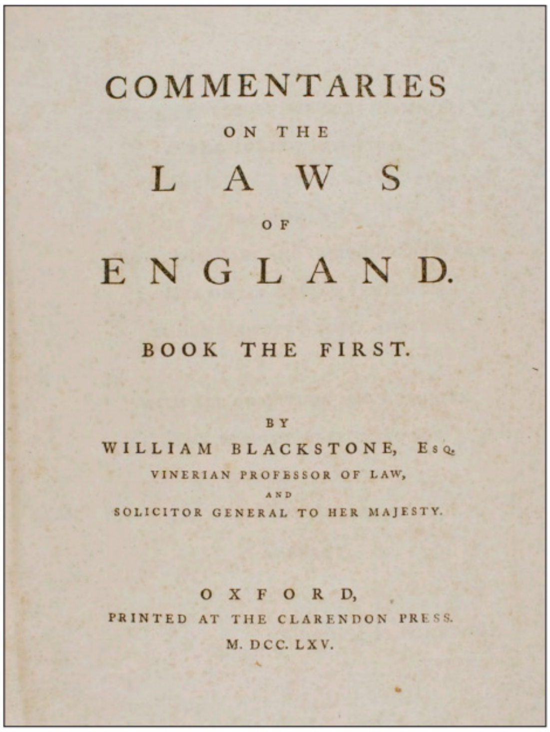
De vulneratione.

§ XIII. Illud quæsitum est, an si fera bestia ita vulnerata sit, ut capi possit, statim tua esse intelligatur. Et quibusdam placuit, statim esse tuam, et eousque tuam videri, donec eam persequaris: quod si desieris persequi, desinere tuam es-

§ 13. *It hath been questioned, whether a wild beast belongs to him, by whom it hath been so wounded, that it may be taken. And, in the opinion of some, it doth so, as long as he pursues it; but, if he quits the pursuit, it ceases to be his, and again*

Thomas Cooper The Institutes of Justinian Philadelphia, 1812

This is a page from the first American edition of the Institutes, translated and annotated by Thomas Cooper, a distinguished scholar whose long career began with his appointment by Thomas Jefferson as the first professor of natural science and law at the University of Virginia. Cooper sent a copy of the translated edition to his friend Jefferson, who replied, "I possessed Theopilus', Vinnius' and Harris' editions, but read over your notes and the addenda et corrigenda, and especially the parallels with the English law, with great satisfaction and edification. Your edition will be very useful to our lawyers, some of whom will need the translation as well as the notes." The page shown here shows the translation of the passage cited in Pierson v. Post: "Wild beasts, birds, fish, and all animals, bred either in the sea, the air, or upon the earth, so soon as they are taken, become by law of nations, the property of the captor: for natural reason gives to the first occupant, that which had no previous owner.



COMMENTARIES

ON THE

LAWS

OF

ENGLAND.

BOOK THE FIRST.

BY

WILLIAM BLACKSTONE, Esq.

VINERIAN PROFESSOR OF LAW,

AND

SOLICITOR GENERAL TO HER MAJESTY.

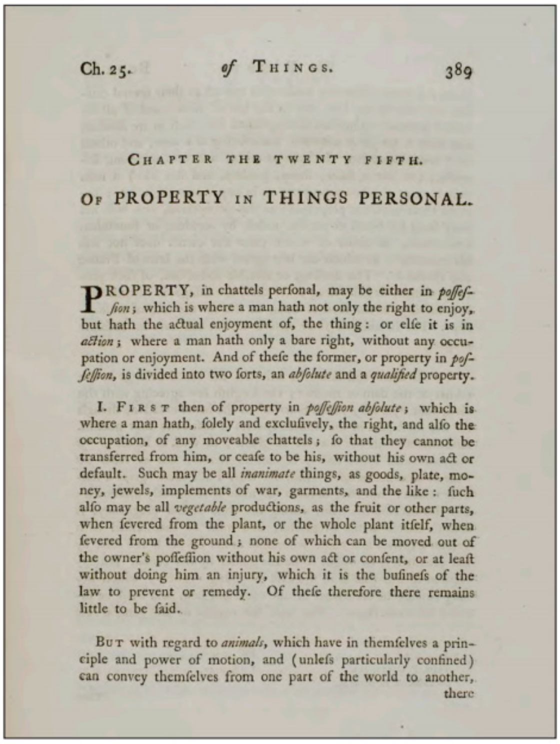
OXFORD,

PRINTED AT THE CLARENDON PRESS.

M. DCC. LXV.

Sir William Blackstone Commentaries on the Laws of England Oxford, 1765-1769

This title page is from the first edition of Blackstone's Commentaries, considered by some scholars to be "the most important legal treatise ever written in the English language." Published in four volumes from 1765 to 1769, it was the first treatise on common law that was comprehensive yet clear and accessible to a lay audience. As such, it was not only powerfully influential in Britain, but also provided much of the common law foundation of the American legal system. Each volume of the Commentaries addresses a distinct area of law: Book One treats "the rights of persons," Book Two treats "the rights of things" (property), Book Three treats "private wrongs" (torts and civil procedure), and Book Four treats "public wrongs" (crimes and criminal procedure).



Ch. 25. *of* THINGS. 389

CHAPTER THE TWENTY FIFTH.

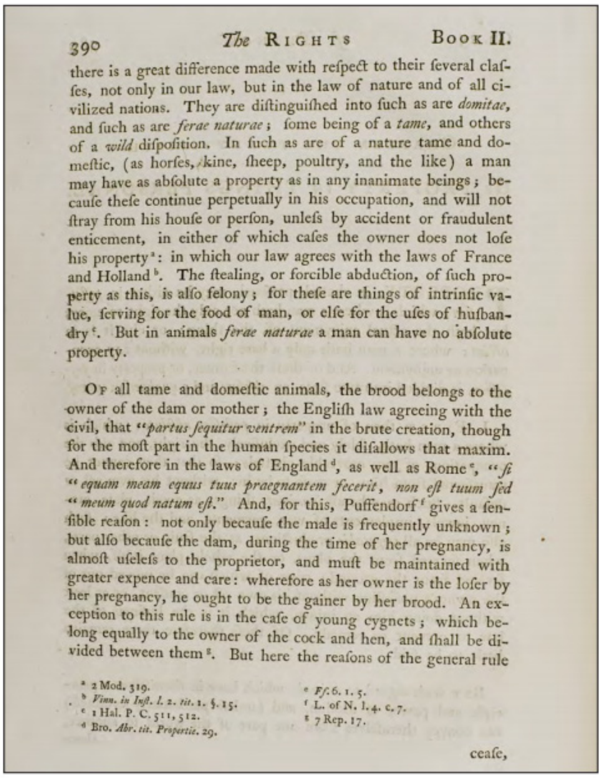
OF PROPERTY IN THINGS PERSONAL.

PROPERTY, in chattels perſonal, may be either in *poſſeſſion*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or elſe it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of theſe the former, or property in *poſſeſſion*, is divided into two ſorts, an *abſolute* and a *qualified* property.

I. FIRST then of property in *poſſeſſion abſolute*; which is where a man hath, ſolely and excluſively, the right, and alſo the occupation, of any moveable chattels; ſo that they cannot be transferred from him, or ceaſe to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: ſuch alſo may be all *vegetable* productions, as the fruit or other parts, when ſevered from the plant, or the whole plant itſelf, when ſevered from the ground; none of which can be moved out of the owner's poſſeſſion without his own act or conſent, or at leaſt without doing him an injury, which it is the buſineſs of the law to prevent or remedy. Of theſe therefore there remains little to be ſaid.

BUT with regard to *animals*, which have in themſelves a principle and power of motion, and (unleſs particularly confined) can convey themſelves from one part of the world to another, there

Like the pages excerpted from the Institutes, these two pages from Book Two of Blackstone's Commentaries, on "the rights of things," discuss laws relating to animals as property. One may see in the text how Blackstone compares the English common law on the subject to Roman law as well as the contemporary laws of other nations.



390 *The* RIGHTS BOOK II.

there is a great difference made with reſpect to their ſeveral claſſes, not only in our law, but in the law of nature and of all civilized nations. They are diſtinguiſhed into ſuch as are *domitae*, and ſuch as are *ferae naturae*; ſome being of a *tame*, and others of a *wild* diſpoſition. In ſuch as are of a nature tame and domeſtic, (as horſes, kine, ſheep, poultry, and the like) a man may have as abſolute a property as in any inanimate beings; becauſe theſe continue perpetually in his occupation, and will not ſtray from his houſe or perſon, unleſs by accident or fraudulent enticement, in either of which caſes the owner does not loſe his property[a]: in which our law agrees with the laws of France and Holland[b]. The ſtealing, or forcible abduction, of ſuch property as this, is alſo felony; for theſe are things of intrinſic value, ſerving for the food of man, or elſe for the uſes of huſbandry[c]. But in animals *ferae naturae* a man can have no abſolute property.

OF all tame and domeſtic animals, the brood belongs to the owner of the dam or mother; the Engliſh law agreeing with the civil, that "*partus ſequitur ventrem*" in the brute creation, though for the moſt part in the human ſpecies it diſallows that maxim. And therefore in the laws of England[d], as well as Rome[e], "*ſi* "*equam meam equus tuus praegnantem fecerit, non eſt tuum ſed* "*meum quod natum eſt.*" And, for this, Puffendorf[f] gives a ſenſible reaſon: not only becauſe the male is frequently unknown; but alſo becauſe the dam, during the time of her pregnancy, is almoſt uſeleſs to the proprietor, and muſt be maintained with greater expence and care: wherefore as her owner is the loſer by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the caſe of young cygnets; which belong equally to the owner of the cock and hen, and ſhall be divided between them[g]. But here the reaſons of the general rule

[a] 2 Mod. 319.
[b] *Vinn. in Inſt. l. 2. tit. 1.* §. 15.
[c] 1 Hal. P. C. 511, 512.
[d] Bro. *Abr. tit. Propertie.* 29.
[e] *Ff.* 6. 1. 5.
[f] L. of N. l. 4. c. 7.
[g] 7 Rep. 17.

ceaſe,

CHAPTER 6

PUNITIVE PREFERENCES, MONETARY INCENTIVES AND TACIT COORDINATION IN THE PUNISHMENT OF DEFECTORS PROMOTE COOPERATION IN HUMANS

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ABSTRACT

Peer-punishment is effective in promoting cooperation, but the costs associated with punishing defectors often exceed the benefits for the group. It has been argued that centralized punishment institutions can overcome the detrimental effects of peer-punishment. However, this argument presupposes the existence of a legitimate authority and leaves an unresolved gap in the transition from peer-punishment to centralized punishment. Here we show that the origins of centralized punishment could lie in individuals' distinct ability to punish defectors. In our laboratory experiment, we vary the structure of the punishment situation to disentangle the effects of punitive preferences, monetary incentives, and individual punishment costs on the punishment of defectors. We find that actors tacitly coordinate on the strongest group member to punish defectors, even if the strongest individual incurs a net loss from punishment. Such coordination leads to a more effective and more efficient provision of a cooperative environment than we observe in groups of all equals. Our results show that even an arbitrary assignment of an individual to a focal position in the social hierarchy can trigger the endogenous emergence of more centralized forms of punishment.

INTRODUCTION

The second-order free rider problem is a key problem in social theory1–4. Actors cooperate at high rates if defectors can expect to be punished. If punishment is voluntary and costly, self-regarding actors will refrain from punishing defectors and first-order cooperation will break down or not emerge at all. The punishment of defectors can thus be regarded as a second-order public good dilemma. It has been shown that the provision of a peer-punishment mechanism can sustain first-order cooperation if a certain proportion of group members punish defectors at a cost to themselves5–7. The punishment mechanism employed in these studies can be conceptualized by a (second-order) linear public good game. It has been argued that punitive preferences are a key driver of peer punishment8–10. However, it is an open question how punitive preferences could have evolved in humans, as peer punishment does not always lead to a net benefit for the punisher and the group11–14. In many situations in which defection can be punished, only one group member's punishment is necessary and sufficient to establish cooperation. For example, in a group of people who are affected by the norm violation of

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another person (e.g., a neighbor playing too loud music), only one person's intervention may be necessary and sufficient to stop the transgressor and benefit the group. In this case, the punishment mechanism can be better conceptualized by a (second-order) step-level public good game15. Moreover, if the benefits outweigh the punishment costs, it may be preferable even for self-regarding actors to engage in the punishment of defectors16. It has been shown theoretically that conceptualizing the second-order public good by a nonlinear production function allows for the coexistence of punishers and non-punishers in large groups of unrelated individuals17,18.

With a certain amount of punishment sufficing to establish cooperation, a coordination problem can arise with regard to which group members should exercise how much punishment on the defectors19. Too little punishment may fail to establish cooperation; too much punishment may succeed but cancel or even exceed the benefits. Appointing a designated punisher20–22, or establishing a pool punishment institution23–27 can solve this coordination problem. However, both mechanisms presuppose the existence of a central authority that consolidates and legitimizes the use of violence. How such an authority emerges in the first place remains in need of an explanation. In accordance with a conceptual framework of institutional emergence28 and insights from game theoretic analyses29,30, we argue that individuals' distinct ability to punish defectors may be key to explain the transition from peer-punishment to more centralized forms of punishment. In particular, we argue that in a state devoid of any norm enforcing institutions, social order will be maintained by the "strongest" individuals, who emerge as the "violence specialists"28 in a group.

This idea is consistent with results from simulation experiments investigating the evolution of cooperation in the spatial prisoner's dilemma game. These simulations show that diversity in agents' abilities to translate their prisoner's dilemma payoffs into fitness scores, promotes the evolution of cooperative clusters led by high-ability agents31. Moreover, evidence from laboratory experiments with step-level public good games suggests that an unequal distribution of punishment costs across group members may tacitly single out the strongest member to carry out the punishment efficiently32. In linear (second-order) public good games, the coordinating effect of punishment cost heterogeneity seems harder to achieve without communication33–35. We conduct a laboratory experiment to investigate how the interplay of punitive preferences, monetary incentives and actors' relative strength affects the punishment of defectors and hence first-order cooperation.

We employ a punishment mechanism in which only one group member is necessary and sufficient to produce the second-order public good. We vary the structure of the punishment situation (i.e. second-order public good game) while keeping the complexity of the first-order cooperation problem at a minimum. Our theoretical argument is based on a game theoretic model, which allows us to derive clear hypotheses that can be put to an empirical test. In a group of four equally endowed individuals, one randomly chosen group member has the opportunity to "steal" half the endowment of the other three. While not stealing maintains the status quo of equal benefits for all, by stealing, one group member makes a gain at the expense of the other three. Thus, the first-order cooperation problem is comparable to a common-pool resource dilemma in which three group members do not over extract the resource while a fourth group member has the opportunity to over extract. In case of theft, the three group members can decide independently whether to reclaim the stolen endowment U_i . If at least one of them decides to reclaim it, the initial endowments will be restored for all group members (including the thief). However, every group member who decides to reclaim the endowment incurs a cost K_i , and if no one decides to reclaim the endowment, the thief keeps the entire "loot" of $3U_i$.

Our experiment comprises 30 rounds and after each round, the groups of four are disbanded and randomly formed anew. In the first 15 rounds (part 1), reclaiming the stolen endowment does not impose a penalty on the thief. As from round 16 (part 2), if at least one group member reclaims the stolen endowment, initial endowments are restored and the thief incurs a penalty P; the size of the penalty is independent of the number of other group members' decisions to also reclaim the money. Thus, only in the second part does reclaiming correspond to the standard notion of punishment, where both the punisher and the punished incur a cost.

To keep the language simple, we will call a person's decision to reclaim the stolen endowment in both parts "punishment", and a person's decision to steal or not to steal part of others' endowments "defection" and "cooperation", respectively. Based on the structures of the second-order public good games devised in Table 1 and the game theoretic model predictions devised in the Methods section, we can derive testable hypotheses. In one variant of the second-order public good game – the missing hero dilemma (MHD) – the punishment costs exceed the benefits ($K_i > U_i > 0$) and self-regarding actors will not punish36. In another variant of the game – the volunteer's dilemma (VOD) – the benefits exceed the punishment costs ($U_i > K_i > 0$) and self-regarding actors will exert punishment with a certain probability37. So, if we assume all actors to be self-regarding, we can expect punishment rates to be zero in the MHD (hypothesis H1) and hence to be higher in the VOD than in the MHD (H2). With both the MHD and the VOD we employ the symmetric game, in which all group members have the same punishment costs ($K_i = K_j$ " $i \neq j$), and an asymmetric game in which one "strong" group member has slightly lower punishment costs than the rest of the group ($K_i < K_j$ " $j \neq i$)38. Assuming self-regarding actors, this distinction will not make a difference in the MHD (see H1). In the symmetric VOD, coordination on only one group member carrying out the punishment is hardly possible without communication. However, in the asymmetric VOD, we expect groups to be able to tacitly agree on mainly the strong person to punish defectors (H3)29. Consequently, we expect defectors to be punished at a higher rate (H4) and more often by one person only (H5) in the asymmetric than in the symmetric VOD. Hence, when a penalty for punished defectors is introduced in the second half of the experiment, we expect (first-order) defection rates to be lower in the asymmetric VOD than in the other conditions (H6).

Table 1. Experimental games and design. The table shows the varying structure of the second-order public good game across experimental conditions. U_i denotes the stolen endowment a group member can reclaim; Ki denotes the costs a group member incurs if they decide to reclaim the stolen endowment; P denotes the penalty a thief incurs if the stolen endowment is reclaimed by at least one group member. MU stands for monetary units; 100MU correspond CHF 1 (≈USD 1.14). In the experiment, we varied the structure of the second-order public good game between-subject, and whether or not a punished defector incurred an extra penalty within-subject. Six sessions were conducted with 36 participants in each session (N = 216). In each session, participants were randomly assigned to two of the four experimental conditions. Participants interacted in groups of four which were randomly formed anew in each round. Before a group was disbanded, all group members received full information feedback about the outcome of their interaction and learned how every group member had decided. See the Methods section for further details on the experimental design.

	MHD		VOD	
	symmetric $U_i = 50$ MU $K_i = 55$ MU	asymmetric $U_i = 50$ MU $K_{1,3} = 65$ MU $K_2 = 55$ MU	symmetric $U_i = 50$ MU $K_i = 25$ MU	asymmetric $U_i = 50$ MU $K_{1,3} = 35$ MU $K_2 = 25$ MU
part 1:	no penalty	no penalty	no penalty	no penalty
rounds 1–15	$P = 0$ MU	$P = 0$ MU	$P = 0$ MU	$P = 0$ MU
part 2:	penalty	penalty	penalty	penalty
rounds 16–30	$P = 60$ MU	$P = 60$ MU	$P = 60$ MU	$P = 60$ MU

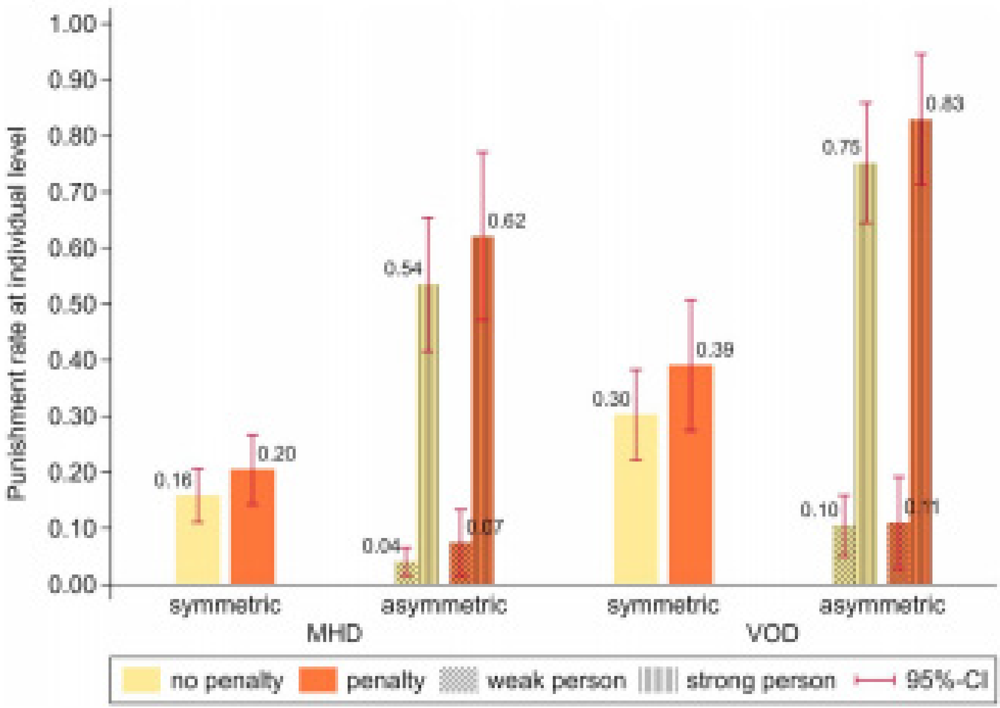

Figure 1. The figure shows the individual punishment rates across experimental conditions and person types. The significant rates in the symmetric MHD condition confirm that punitive preferences partly drive punishment decisions. The fact that the rates are significantly higher in the VOD than in the MHD conditions indicates that monetary incentives also matter. In both asymmetric conditions, the strong group member is much more likely to punish defectors than a weak group member. This shows that groups are able to tacitly coordinate on mainly the strong group member to punish defectors based on differences in punishment costs alone. See section S2 in the SI for further details on the data analysis.

If we assume also other-regarding actors with punitive preferences, we can expect the punishment rate in the MHD to be larger than zero (H1a). Moreover, since we would expect monetary incentives to be stronger than or even complementary to punitive preferences in their driving punishment decisions, assuming also other-regarding actors does not affect hypothesis H2, and hypotheses H3 through H5 can also be tested with the MHD. Finally, we can extend hypothesis H6 to reflect the empirical punishment rates. Correspondingly, (first-order) defection rates should be negatively correlated with the rates at which defectors are punished. In particular, defection will be lower in the asymmetric VOD than in the symmetric MHD (H6e).

RESULTS

Figure 1 shows the punishment rates at the individual level across experimental conditions and person types. Note first that punishment rates within experimental conditions and person types do not substantially depend on whether a penalty is imposed on a punished defector. Although this result is

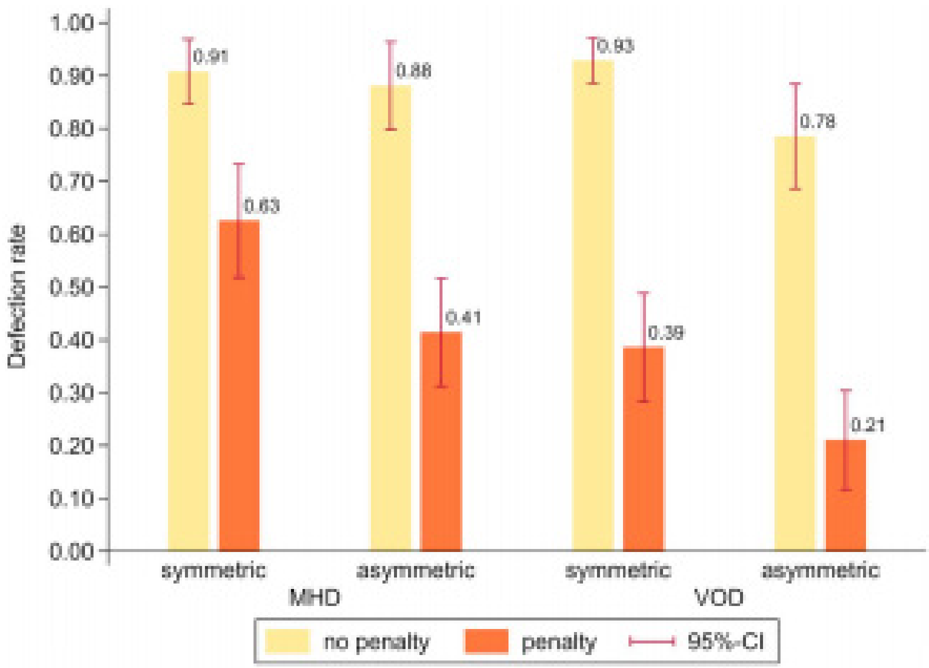

Figure 2. The figure shows defection rates across experimental conditions. The rates hardly differ without a penalty imposed on punished defectors. With a penalty, the rates drop significantly to levels that are inversely proportional to the punishment levels in the respective conditions. Except for the difference between the asymmetric MHD and the symmetric VOD, all differences between defection rates in the conditions with penalty are statistically significant. This shows that groups with an unequal distribution of punishment costs are more effective in deterring defections than groups of all equals. See section S2 in the SI for further details on the data analysis.

interesting in itself, because it suggests that subjects are not primarily driven by spite in their punishment decisions39, we will not further expand on it here (see the Methods section for a brief discussion). If not otherwise stated, we will base subsequent analyses regarding the punishment of defectors on the pooled data from both parts of the experiment. Section S2 in the Supplementary Information (SI) contains the separate analyses. It becomes immediately apparent that our results support hypothesis H1a rather than H1. There is a significant proportion of punishment in the MHD, which can be attributed to group members with punitive preferences punishing defectors. The relation between punishment costs and benefits also matters. In line with hypothesis H2, punishment rates are significantly higher in the VOD than in the MHD, overall (χ^2 (1)= 15.61, p< 0.001) as well as in the symmetric (χ^2 (1)= 9.04, p= 0.003) and asymmetric games (χ^2 (1)= 9.30, p= 0.002) separately. Moreover, for the asymmetric VOD and MHD, Fig. 1 shows that the strong group member is overwhelmingly more likely to carry out the punishment than the other group members40. These results clearly support our hypothesis H3 and prompt the next two important questions. Does the possibility to tacitly agree on the strong member to punish defectors in the asymmetric games indeed lead to higher rates at which defectors are punished than in the symmetric games? And, is punishment in the asymmetric games more efficient because carried out more often by one person only than in the symmetric games? In line with H4, the rates at which defectors are punished, that is the rates at which at least one group member punishes a defector, are higher in the asymmetric MHD and VOD (60% and 81%, respectively) than in the symmetric MHD and VOD (44% and 73%, respectively). Both differences are statistically significant (MHD: χ^2 (1)= 15.20, p< 0.001; VOD: χ^2 (1)= 4.34, p= 0.037). The same is true for the rates at which defectors are punished efficiently, i.e. by exactly one group member. In line with H5, the rates of efficient punishment are higher in the asymmetric MHD and VOD (53% and 66%, respectively) than in the symmetric MHD and VOD (35% and 50%, respectively). Again, both differences are statistically significant (MHD: χ^2 (1)= 18.96, p< 0.001; VOD: χ^2 (1)= 12.93, p< 0.001). These results show that punitive preferences and monetary incentives drive punishment decisions, but they also show that the efficiency at which punishment is carried out can be enhanced considerably through punishment cost heterogeneity. Punishment cost heterogeneity gives actors a simple means to tacitly coordinate on the optimal amount of punishment necessary to produce the second-order public good. The remaining question is whether (first-order) defection rates are indeed negatively correlated with the rates at which defectors are punished in the four experimental conditions. Figure 2 shows the defection (i.e., "stealing") rates across experimental conditions. Unlike for punishment decisions, the penalty matters for first-order cooperation. Without a penalty imposed on punished defectors, defection rates remain very high and, except for the drop in the asymmetric VOD, barely differ across experimental conditions (χ^2 (3)= 7.16, p= 0.067). As soon as a penalty is introduced in the second part of the experiment, defection rates fall drastically and reveal an interesting pattern. In line with hypothesis H6, defection rates are lowest in the asymmetric VOD (21%). Defection rates are highest in the symmetric MHD (63%), and they are intermediate in the asymmetric MHD and the symmetric VOD (41% and 39%, respectively). Although the difference between the last two conditions is statistically insignificant, the rank order of the defection rates in all four conditions is the inverse of the rank order of the rates at which defectors are punished (H6e).

Table 2. The volunteer's dilemma (VOD).

	Number of other persons choosing C			
Person *i*'s choice	0	1	...	$n - 1$
C: punish	$U_i - K_i$	$U_i - K_i$	$U_i - K_i$	$U_i - K_i$
D: not punish	0	U_i	U_i	U_i

Discussion The solution of the second-order public good problem is an important stepping stone to the solution of the first-order cooperation problem. It has been shown that decentralized peer-punishment can produce the second-order public good but often at a net cost for the group. These findings prompted scholars to invoke more organized forms of enforcement to explain cooperation, leaving the strategic nature of the punishment situation underexplored. Here we take a step back and show that dissecting the second-order public good problem can reveal some interesting and hitherto understudied mechanisms of second-order public good provision. We start from the assertion that in many situations only one group member is necessary and sufficient to produce the second-order public good. We thus model the second-order public good dilemma as a step-level public good game. This approach allows us to derive clear hypotheses that can be put to an empirical test. The results of our laboratory experiment corroborate that punitive preferences and monetary incentives are important determinants of peer-punishment. More importantly, however, individual differences in punishment costs prove to be at least as effective in driving the punishment of defectors. First, punishment cost heterogeneity enables groups to tacitly coordinate on only the strongest group member to carry out the punishment thereby increasing the efficiency of second-order public good production. Second, with other things kept constant, groups in which punishment costs are unequally distributed are more effective in deterring defections than groups of all equals. These findings confirm that it can be fruitful to account for individual differences in evolutionary games31,[41–43]. Future research should explore how other types of individual differences can promote coordinated action in the production of (second-order) public goods. Our study corroborates that punishment cost heterogeneity facilitates the tacit emergence of a designated punisher. However, the more general prediction, that individual differences in the net benefits from the second-order public good will produce the same results, has not yet been tested. Moreover, it would be interesting to see how groups of heterogeneous actors perform against groups of homogenous actors in which a designated punisher is randomly and explicitly appointed22. In egalitarian societies, unequal endowments should not matter for individuals' life-time outcomes. Inequality, however, may have arguably been an important element in the evolution of centralized punishment institutions. In a state of relative disorder, perceivable individual differences may have been a simple yet powerful means to coordinate action44. Our results show that even an arbitrary assignment of an individual to a focal position in the social hierarchy allows for the endogenous emergence of more centralized forms of punishment. Processes of cumulative advantage[45,46], possibly paired with processes of territorial segregation[47,48], may consolidate the power of those who happen to be stronger, and lead to new forms of organization which allow for cooperation in much larger groups than we are able to re-enact in our lab31. Our findings help us understand how social order was possible in human prehistory, when centralized punishment institutions did not exist. It has been suggested that a possible next step in the transition from a state in which violence specialists maintain social order in small groups, to the next higher state of social organization, is the formation of dominant coalitions28. Members of the dominant coalition hold special functions (military, religious, political and economic) and privileges (material goods and power). By limiting access to these privileges, members of the coalition create incentives to cooperate rather than to fight with each other in the long run. Such cooperation thus requires that rents can be efficiently extracted and limited access to privileges continuously enforced. With regard to the latter, it appears more plausible to conjecture that a centralized punishment institution, such as pool punishment, would emerge to consolidate the violence potential of the coalition than a peer-punishment mechanism.

METHODS

The volunteer's dilemma and the missing hero dilemma. We start with the volunteer's dilemma (VOD) to model the second-order public good problem[37]. The VOD is a step-level public good game where only one actor's contribution is necessary and sufficient to produce the public good[15]. Here, punishing the thief to reclaim the stolen endowment for the entire group constitutes the public good. More formally (Table 2), a public good of value $\sum Ui$ for a group of size $n \geq 2$ is produced by a single actor i choosing C (punish) at a cost K_i where $U_i > K_i > 0$ “ i. The public good is not provided if all actors choose D (not punish) and there is a welfare loss if more than one actor chooses C. We distinguish between a symmetric VOD, where $U_i = U_j$ and $K_i = K_j$ “ $i \neq j$, and an asymmetric VOD38, where $U_i \neq U_j$ and/or $K_i \neq K_j$ \$ $i \neq j$. Both the symmetric and asymmetric VOD have n Pareto-optimal Nash-equilibria in pure strategies, in which one group member chooses C and the n–1 other group members choose D. However, in the symmetric VOD, an equilibrium in pure strategies is not easily attainable without communication; although the benefits outweigh the costs of producing the public good, free riding on another group member's punishment is even more beneficial. As a result, the entire group may end up losing part of their endowment to the thief while waiting for someone else to punish and reclaim the stolen amount. The symmetric VOD has a payoff-symmetric Nash-equilibrium in mixed strategies, which can be used to model this diffusion of responsibility effect[49]. How the mixed strategy equilibrium is derived can be seen elsewhere[15,37,38]. In the mixed strategy equilibrium (MSE), a group member i's probability pi * of choosing C is:

$$p_i^* = 1 - \sqrt[n-1]{K_i/U_i} \quad (1)$$

With qi *= 1 – pi *, we can calculate the probability p* that at least one group member will punish the defector and the second-order public good will be produced in the MSE:

$$p^* = 1 - \prod_{i=1}^{n} q_i^* \quad (2)$$

Note that both pi * and p* are decreasing in n (group size), decreasing in K (punishment cost) and increasing in U (size of the stolen endowment). In the asymmetric VOD, group member i's probability pi * of punishing in the MSE is:

$$p_i^* = 1 - \frac{U_i}{K_i}\left(\prod_{j=1}^{n} \frac{K_j}{U_j}\right)^{\left(\frac{1}{n-1}\right)} \quad (3)$$

Unlike for the symmetric VOD, equation (3) implies that pi * decreases as Ui increases and/or K_i, decreases. In other words, the stronger a group member i is (in terms of benefits from and/or costs of producing the second-order public good) the lower is this group member's probability to punish a defector. This is counter-intuitive and, moreover, for certain combinations of U and K an MSE does not exist. This makes the MSE not a very useful model of human behavior in the asymmetric VOD. However, alternative theoretical arguments[38,50–52] as well as recent empirical evidence[32] suggest that for the special case of an asymmetric VOD with one strongest group member, the pure strategy equilibrium will be selected in which the strongest group member chooses C and the rest of the group chooses D. In line with these theoretical arguments and empirical findings, a recent study has established that for the asymmetric VOD with one strong group member and n – 1 weak group members, the pure strategy equilibrium in which only the strong group member cooperates is evolutionary stable[29]. The volunteer's dilemma turns into a missing hero dilemma (MHD) if the punishment costs exceed the benefits[36], that is, if $K_i > U_i > 0$ " i. Unlike in the VOD, choosing D is a dominant strategy in the MHD and there is a unique Nash-equilibrium (in pure strategies), in which all group members choose D, irrespective of whether the game is symmetric or asymmetric.

Model predictions and hypotheses

Based on the payoff structures of the stage games specified in Table 1, the probabilities of second-order public good provision (i.e. punishment) at the individual (pi *) and the group level (p*) can be calculated from equations (1) and (2), respectively (see upper half of Table 3). Clearly, in the MHD, the punishment probabilities will be zero both in the symmetric and the asymmetric versions of the game. Plugging the numbers for the symmetric VOD into equations (1) and (2) yields pi *= 0.293 and p*= 0.646, respectively. As mentioned above, in the asymmetric VOD, we base our expectations on an alternative theoretical model[29,50–52]. For the asymmetric VOD, we expect that only the strongest group member (i= 2) will carry out the punishment (p^2 *= 1 and p^1 *= p^3 *= 0) and thus the second-order public good will always be produced (p*= 1). The latter also implies that the punishment will always be carried out by one person only and, therefore, the second-order public good will always be produced efficiently. In the symmetric VOD, the probability that punishment will be carried out by one person only is 0.439 [$np_i^*(1 – p_i^*)^{n-1}$]. Recall that in each round of our experiment subjects are randomly assigned to be the potential thief (i.e. defector) or one of the other three group members. Subjects could therefore adopt the "always steal and never punish" strategy. This strategy would produce both efficient and equal outcomes. However, "never punish" is not an equilibrium strategy in the symmetric VOD, and it is not an equilibrium strategy for all group members in the asymmetric VOD. Moreover, since groups are randomly formed anew after each round, it is hardly possible to enforce a "never punish" strategy by means of trigger strategies, for instance. Thus, in accordance with the above predictions, some of the subjects always have an incentive to punish and reclaim their stolen endowments in the VOD, but none ever do in the MHD.

Table 3. Predicted punishment probabilities and thief 's incentives to steal.

	Predicted punishment probabilities							
	MHD				VOD			
	symmetric		asymmetric		symmetric		asymmetric	
$p_{1,3}^*$	0		0		0.293		0	
p_2^*	0		0		0.293		1	
p^*	0		0		0.646		1	
	Thief's expected gains from stealing							
	MHD				VOD			
	symmetric		asymmetric		symmetric		asymmetric	
Penalty	no	yes	no	yes	no	yes	no	yes
$\pi_X(s)$	150	150	150	150	53.1	14.3	0	−60
$\pi_X(\neg s)$	0	0	0	0	0	0	0	0

Based on our model predictions, and the assumption that actors are rational and self-regarding, we can state our hypotheses with regard to punishment:

H1: Punishment rates will be zero in both the symmetric and asymmetric MHD.

H2: Punishment rates will be higher in the VOD than in the MHD.

H3: In the asymmetric VOD, the strong group member will more often punish defectors than a weak group member.

H4: In the asymmetric VOD, defectors will be punished more often than in the symmetric VOD.

H5: In the asymmetric VOD, punishment will be carried out more efficiently (i.e. more often by one group member only) than in the symmetric VOD. Based on the predicted probabilities that punishment will be carried out by at least one group member (p*), a potential thief 's expected gain from stealing [$\pi_X(s)$] can be calculated both for the condition without and the condition with an extra penalty (see the bottom half of Table 3). Note first that the gains from not stealing [$\pi_X(\neg s)$]

are always zero. Hence, whenever the gains from stealing are larger than zero, we can expect actors to steal with certainty. For example, in the symmetric VOD, a thief 's expected gain from stealing is 150MU× (1 – 0.646)= 53.1MU if there is no penalty, and 150MU× (1 – 0.646) – 60MU× 0.646= 14.3MU if there is a penalty. Thus, our hypothesis regarding (first-order) defection can be stated as follows:

H6: Defection rates will be lower in the asymmetric VOD than in the symmetric VOD and the MHD. If we now assume also other-regarding actors with punitive preferences, we can state an alternative hypothesis to H1:

H1a: Punishment rates will be larger than zero in both the symmetric and asymmetric MHD. Models of other-regarding preferences usually imply that actors attach larger weights to own monetary gains and losses than to others' monetary gains and losses53. Thus, assuming also other-regarding actors with punitive preferences does not change hypothesis H2 of higher punishment rates in the VOD conditions than in the MHD conditions. Moreover, hypotheses H3 through H5 can now also be tested with the MHD. That is, we can expect that in the asymmetric MHD the strong group member will punish defectors more often than a weak group member (H3); that in the asymmetric MHD defectors will be punished more often than in the symmetric MHD (H4); and that in the asymmetric MHD punishment will be carried out more efficiently than in the symmetric MHD (H5). We can extend hypothesis H6 to reflect the empirical punishment rates. Correspondingly, (first-order) defection rates should be negatively correlated with the rates at which defectors are punished. In particular, defection will be lower in the asymmetric VOD than in the symmetric MHD:

H6e: Defection rates in the four experimental conditions will be inversely proportional to the rates at which defectors are punished in the four conditions. Originally, we also expected that those who steal in the penalty condition (i.e. second part of the experiment) will be perceived as more provocative, and may therefore induce more emotion-driven and spiteful punishment. Consequently, we expected to observe higher punishment rates across all conditions in the second part of the experiment. In fact, in all experimental conditions are punishment rates higher in the second part than in the first part, both at the individual and the group level, and the difference is statistically significant in the symmetric VOD condition (see Figure S5 in the SI). However, testing this hypothesis was not central to our paper. We therefore decided not to expand on this result in the main part of the paper.

Experimental procedure

In total, 216 subjects participated in our computerized laboratory experiment. The experiment comprised six sessions and 36 subjects participated in each session. Subjects were students from the University of Zurich and ETH Zurich, 57.9% were female and they were 23.1 years old on average (sd= 5.57). Upon arrival in the lab, subjects were randomly assigned to two of the four experimental conditions. Table 4 shows the sequence in which the experimental conditions were tested. Subjects received condition-specific instructions on paper. The instructions that were given to subjects in one of the experimental conditions (asymmetric MHD) are reproduced in figures S1 through S4 in the SI (translated from German by the authors). Instructions explained the decision situations step by step and contained shots of the actual decision screens. Moreover, subjects learned that their decisions were anonymous, that their payments would correspond to the sum they earned in each round and that payments would be administered by a person not involved in the implementation of the experiment. After reading the instructions, subjects took a quiz with questions about the decision situations. Questions for which at least one wrong answer was given were read out loud and the correct answer was explained to all subjects at the same time. Then, the experiment started. A session lasted for about 1h and subjects earned CHF 38 (incl. CHF 10 show-up fee) on average (≈USD 43.4). After the experiment, subjects filled in a questionnaire and could leave the lab to get their payment in private. The experiment was programmed and conducted with the software z-Tree54.

Table 4. Experimental conditions tested per session.

Session	Condition 1 (subjects 1–16)	Condition 2 (subjects 17–36)
1	asym. VOD	asym. MHD
2	sym. VOD	sym. MHD
3	sym. MHD	asym. VOD
4	asym. MHD	sym. VOD
5	sym. MHD	asym. MHD
6	asym. VOD	sym. VOD

Statement of research conduct

All the research was performed in the Decision Science Laboratory (DeSciL) at ETH Zurich, Haldeneggsteig 4, CH-8092 Zurich, Switzerland. The review board of DeSciL is called DeSciL Review Board, and its members are listed on the DeSciL website (https://www.descil. ethz.ch/people). Our experiment was conducted in accordance with DeSciL Operational Rules, which are approved by the review board and published on the DeSciL website (https://www.descil.ethz. ch/ research/policies). All participants in our experiment were recruited from the subject pool maintained by the University Registration Center for Study Participants (UAST) of the University of Zurich and ETH Zurich. Every person who has signed up to this subject pool also gave his or her informed consent by agreeing to the terms and conditions of UAST. These terms and conditions are published on the UAST website (https://www.uast.uzh.ch/register).

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AUTHOR CONTRIBUTIONS

A.D. and W.P. conceptualized and designed the experiment; W.P. implemented and conducted the experiment, and analyzed the data; A.D. and W.P. wrote the paper.

ADDITIONAL INFORMATION

Supplementary information accompanies this paper at http://www.nature.com/srep Competing financial interests: The authors declare no competing financial interests.

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CHAPTER 7

PREDICTION OF OFFENDING: SARPO—THE CZECH TOOL FOR ASSESSMENT OF OFFENDERS' CRIMINOGENIC RISK AND NEEDS

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ABSTRACT

In the past three decades, developed prison and probation services have paid large attention to risk assessment tools predicting the probability of reoffending. This not only resulted in a more accurate classification of offenders, but also in a more informed choice of effective intervention helping to reduce relapse in offending behaviour. In terms of reducing the risk of reoffending intervention programmes considering the principle of criminogenic risks, needs, and responsivity proved successful, while imprisonment on its own, where intervention methods were not applied, showed only limited effectiveness. For historical reasons, the Czech Prison Service underwent a different development, although its objectives were similar. It was not until the beginning of a new millennium when the Czech prison system together with a newly created probation service decided to seek new methods of assessing offenders based on criminogenic risks. This paper presents development and results of the first Czech tool used for assessment of offenders' risks and needs, called SARPO (from the Czech abbreviation of Complex Analysis of Offenders' Risk and Needs).

INTRODUCTION

Offenders are imposed imprisonment sentences in order to prevent them from further offending, to rehabilitate them, and to protect the public. It means to protect the public not only in the time when the offender serves the prison sentence, but also after the offender is released. Developed prison and probation systems have lately turned their attention more and more to the latter aspect. They are aware of their share of responsibility for potential reoffending of the released offenders and they aim at mitigating the risk of reoffending, while assisting the released offender in reintegration into the community. For this purpose they have designed a large number of intervention methods.

In order to work with offenders it is necessary to have enough information about their attitudes towards themselves and others, what threats they pose to people that work with them and what chances of their rehabilitation there are. For this reason any intervention with the offender must be necessarily preceded by assessment mapping his/her personal features considering the situations in which the outputs will be used. These outputs may be different during imprisonment and after early release. Thus for a prison guard it will be important to know to what degree the offender is dangerous and whether he/she will present any risk of harm during the imprisonment

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both towards other people and to himself/herself. A therapist needs to assess any progress the offender has made in his/her own perception and any changes he/she has made in his/her attitudes. An early release board and the judge will be interested in knowing the likelihood of his/her reoffending after the release and of his/her law-abiding integration into the community. A probation officer will plan and organize the scheme of suitable intervention and make sure that the rehabilitation and reintegration of the released person is successful.

BACKGROUND

Approaches to Offender Assessment

In the second half of the 20th century there was probably hardly a justice or prison system in the developed countries that would not be engaged in assessment and classification of offenders. A concise account of the development of assessment tools is given by Bonta [1] who distinguishes four generations of tools.

According to Bonta, the first generation of assessment tools was clinical judgments, which were unstructured and based on experience of the assessor. Bonta believes this assessment to be inaccurate and unreliable leaving little space for consideration of other circumstances of offending. For this reason, in the 1980s, there came a second generation of tools using actuarial methods which started to emphasize so-called static factors, that is, those that could not be changed anymore: age, sex, start of the offending career, number of convictions, and other features typical of offending behaviour. This model showed higher predictive validity; nevertheless, it failed to match the criminogenic factors with intervention leading to rehabilitation of offenders. The 1990s brought about tools combining static and dynamic factors which built upon the premise that in order to be able to determine the risk of reoffending and to be able to choose a suitable intervention it is necessary to know both offender's risks and criminogenic needs. While some of the tools of the third generation sum the items to arrive at numeric risk scores, other approaches incorporate evidence-based information about risk factors and expert interpretation of the seriousness, frequency, or duration of these risk factors—such as structured professional judgments (SPJ). Although the SPJ do not present higher predictive validity than actuarial tools, they help to concentrate on influencing the offender. Since the introduction of the SPJ it has not been sufficient to ask just whether and to what extent the offender is dangerous and also why it is so and what can be done in order to change that. Not later than at the turn of the millennium there appeared tools that take into account the length and intensity of the proposed intervention according to the seriousness of risks and needs: intervention and offenders must correspond; they must be responsive. This enables designing the intervention to individual offenders and at the same time to predict their future behaviour if certain conditions are met. Therefore, case management is considered by some authors an integral part of the fourth generation tools [2].

At present, all the four generations of tools are in use at once. Common praxis in the Anglo-Saxon countries shows that different approaches may well coexist with each other: the clinical rating scale Psychopathy Checklist-Revised (PCL-R) [3], the structured professional judgement HCR-20 [4], or the actuarial tools Violence Risk Appraisal Guide (VRAG) [5] or Level of Service Inventory-Revised (LMI-R) [6]. Nevertheless, also the interest of countries from continental Europe (especially German speaking countries) has been shifting from the clinical methods to validated predictive instruments targeted at certain groups, especially at violent or sexual offenders [7]. In terms of prediction of violent reoffending of offenders with a mental disorder and behaviour disorder, the effect size of the actuarial risk assessment (r=0.30) is approximately three times higher than of clinical instruments (0.09); in predicting reoffending of sexual offenders, it is even more than four times higher (0.46 versus 0.10) [8]. This has been ascertained repeatedly in several studies. It begs the question whether omitting use of actuarial tools for prediction of risks should not be considered unethical and unprofessional [9].

Offender Assessment in the Czech Republic

In the former Czechoslovakia, prediction of offending behaviour and reoffending started to be dealt with from the end of the 1960s. It was the Correctional Education Unit of The Penitentiary Research Institute that substantially contributed to this activity and that, based on the outputs of the assessment, researched also options for applying intervention methods as part of "treatment of prisoners" [10, 11]. From the 1970s to the end of the 1980s there were a number of instruments designed for prediction of likelihood of offending career, structured as statistical tests [12]. Paradoxically enough, most of these intentions go back before the 1989 political revolution. The consolidation of the Czech prison system after the revolution took an entire decade when fundamental issues such as the approach to criminal law and prison system had to be addressed. Only with an increased emphasis on postprison intervention, creation of probation assistant positions at district and regional courts in 1996, with establishment of the Probation and Mediation Service of the Czech Republic in 2001 and upon learning about other countries' experience, the stress started to be placed on targeted and effective intervention, which must be necessarily preceded by appropriate assessment speaking the same language.

One of the first Czech prediction tools was Veverka's Green Test which evaluated information relevant from a psychiatric point of view and his Blue Test focusing on data about offender's criminal history and social background and identifying "risk" factors that make the offending career more likely [13, 14]. A large longitudinal research of reoffenders served as a basis of Dufek's individual prediction of offending, distinguishing 36 weighed prediction factors in socio-legal, psychological, and psychiatric context [15]. A set of 14 "static" predictors influencing reintegration of offenders released from prison was drawn up by Neumann and Vonkova in their social prediction instrument of offending, called RAOK [16]. Heretik's Prognosis Index of Reoffending, called PIR [17], rendered a percentage likelihood of specific and general reoffending; however, it did not distinguish between static and dynamic factors and employed also projective methods.

A different approach when preparing his predictive critical sets of features was taken by Dobrotka [18] who distinguished between social, personal, and symptomatic (today we would call them criminogenic) factors. Using a percentage representation of critical factors, he was probably the first Czech researcher who introduced scaling of predictive outputs while creating a scale ranging from positive to very bad prognosis.

For the time being, the last product in the Czech context is a working version of a five-item prediction instrument based on analysis of static data on the offending history of 100 persons drawn up by the Institute of Criminology and Social Prevention [19]. This tool, which uses only static factors, is designed for the needs of workers in the justice or for judicial experts in the field of psychology, and it has not yet been validated.

Compared to the development of predictive and assessment tools in the world, there were certain differences in the Czech environment.(a)Although the tools intended to implement clinically relevant elements, in general they hardly ever regarded the possibility that an offender could change. Therefore, they concentrated mostly on static factors only.(b)Some tools provided comprehensive prediction of reoffending, but had hardly any impact on prisoners' treatment and rehabilitation. If taken in account, interventions were not aiming at mitigation of the risk of reoffending.(c)The tools did not work with criminogenic factors in the sense of criminogenic risk and needs.(d)If we were to classify the Czech tools within the above generations of tools used in the world, they would belong, with the exception of Dobrotka's instrument, to the second generation of actuarial tools, even in cases where they included dynamic factors; the outputs of their dynamic part were not taken into account more than just by including them in numeric risk scores.(e)And the most important one is that the tools never left the academic ground and were never employed in the judicial, correctional, and postpenitentiary routine.

At present, the Czech prison and justice systems use almost invariably psychodiagnosis and questionnaire methods, which either do not belong to assessment tools in terms of risk or needs assessment or which belong to the clinical generation. The emphasis is placed on individual approach; the collection of data from the prisoners is very large, while paying attention to the personality of the offender and obviously following the structure and function of judicial expert opinions. On the one hand, these are strengths that are traditionally and permanently inherent of the Czech environment. On the other hand, what may be seen as a weakness is that this information has not been used appropriately and its potential has been left unexplored. Thus, the acquired information has served the purpose of protection of the public in terms of reducing reoffending only to a limited degree. Therefore there is a need to have a completely new tool that would take into account the abovementioned risk and needs principles.

Risk and Needs Assessment

The assessment of offenders, as it has been perceived generally by the modern prison [20] or probation systems [21] in the recent decades and as it is perceived also in this paper, is based on offender's criminogenic risk and needs. Most often the assessment is done in connection with statement of the judgment, classification of the prisoners, assessment of the prisoner during his/her imprisonment, and consideration of early release and as part of parole.

The objective of risk assessment is primarily to predict likelihood of offender's reoffending and to adjust further intervention to the offender based on this prediction. Risk assessment is a process in which the offender is assessed based on selected variables which, as the evidence proved, increase the likelihood of failure.

These variables, called risk factors, are further subdivided into static and dynamic factors. Both these categories are causally linked to the offending behaviour, where the static factors are based on the history and they are fixed, while the dynamic factors are currently present and they can be influenced. The examples of static factors include the age at which the offender committed his/her first offence, history of the previous sentences, sex, type of offence, or motivation for committing previous offences. Typical dynamic factors include financial situation, employment, attitudes encouraging criminal conduct, addictions, family relations, criminal friends and acquaintances, or leisure time activities. In addition, there are other factors that come into play which proved to be associated with committing crime (e.g., low self-confidence, depression, anxiety, and fear), yet they are not causally linked [1].

Research into criminal conduct [22–24] and especially recent studies evaluating the effectiveness of intervention programs [25–27] showed that the principle of risk and needs as such is not enough to achieve good results or to be precise that the same factors may have a different impact on different respondents (the youth, adults). Such examples led to respect personal qualities of individuals, who respond to the above factors in a diverse way. In connection with this, Andrews and Bonta [6] introduced a so-called responsivity principlewhich states that the intensity and length of the intervention should reflect the degree and quality of criminogenic risk and needs.

Assessing criminogenic risk and needs helps—unlike other assessment methods—to define and address the management of prisoners as a whole: it helps to define who the target of the intervention is (in case of prisoners with high-risk of harm or risk of reoffending), what the intervention objectives are (mitigation of the risk of reoffending, that is, criminogenic needs, rather than, for example, clinical symptoms), what intervention strategy in terms of duration and intensity to take, while having in regard the motivation factors, the degree to which the offender is likely to be influenced and how he/she learns based on the responsivity principle (taking into account the current possibilities and abilities of the assessed person), and how the effectiveness of the intervention is measured.

Development of Assessment Tool SARPO

The SARPO Project (from the Czech abbreviation Complex Analysis of Offenders' Risk and Needs) is a joint project of the Czech Prison Service and the Czech Probation and Mediation Service which commenced as a part of the PHARE Project in 2003 by setting up a multidisciplinary team. At the beginning the team included employees of the Prison Service, Probation and Mediation Service, National Probation Service of England and Wales, the Czech Institute of Criminology and Social Prevention, City Centre of Social Services and Prevention, Association for Probation and Mediation in Justice, Municipal Court in Brno, State Prosecution Office in Prague 4, and the Police President Office of the Czech Republic. Once the PHARE Project ended in 2004, a team of prison and probation experts was established and strove to create its own assessment instrument which could be used by both Prison

Service and Probation and Mediation Service. Originally the SARPO Project was based on the Offender Management System assessment tool (OASys) which is currently used by the prison and probation service in England and Wales [28] and is considered a high quality European tool for prediction of offending [29]. However, the new assessment tool was intended to be adjusted to Czech conditions, taking into account specific sociocultural aspects and the legal environment, so that its conceptual structure could reflect the practical needs of assessors as much as possible. It was therefore decided to develop an own independent tool. The first version of the tool SARPO 1 was finished and presented to the professional public in 2006 [30, 31]. Figure 1 shows the basic parts of the SARPO 1 instrument and assessment mechanism.

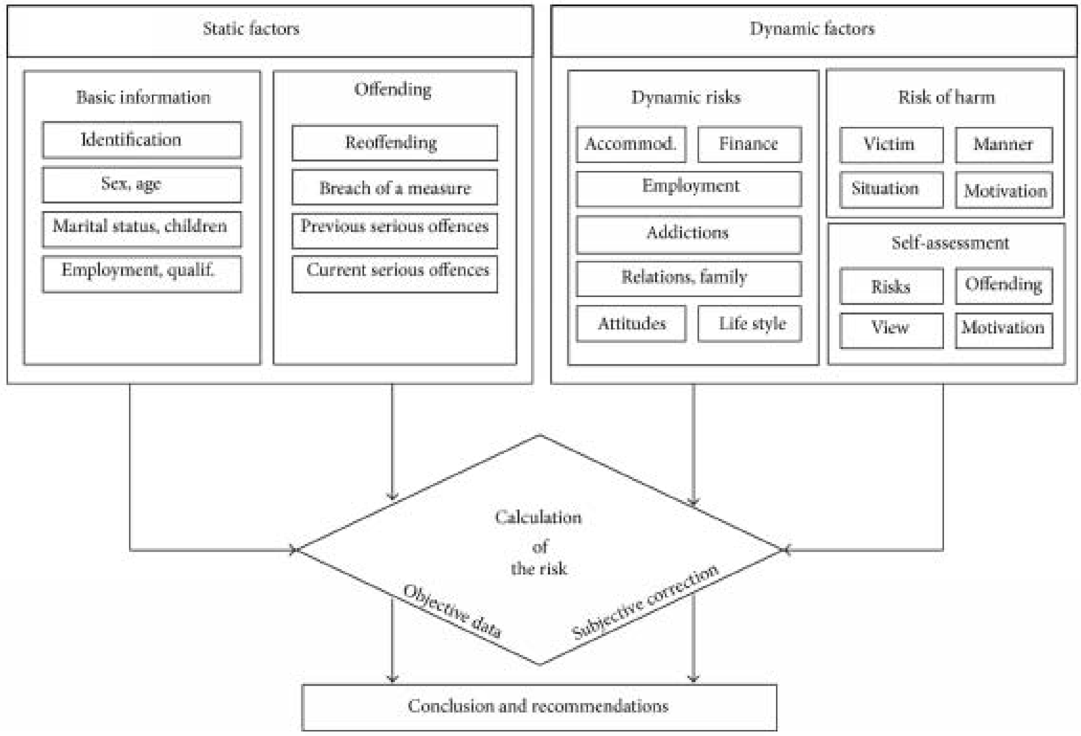

Figure 1: Basic parts of the SARPO 1 instrument and assessment mechanism.

Philosophy and Structure of SARPO

SARPO uses static and dynamic risk factors to determine risk and needs. The risk in this context refers to two concepts: the risk of harm and the risk of reoffending [32]. The risk of harm is defined as a serious harm jeopardizing life or causing trauma and it is difficult or impossible to be overcome from both the physical and mental viewpoint. This risk determines the degree of serious harm caused by any possible future offending especially of violent and sexual offenders, while regarding the potential victims.

The risk of reoffending reflects the likelihood of a future event of loss, damage, or harm. Here the risk of reoffending is mainly determined based on the offending history, and the likelihood of his/her further offending career is assessed by making a profile of the offender.

The risk itself includes needs of the offender. The need in this sense is perceived as a criminogenic dynamic factor which can, in most cases, be targeted. For instance, a person can find a new job, change his/her accommodation, change his/her attitudes, or stop using drugs, which, as a consequence, results in reducing his/her need to commit crime for the above reasons. An important part of the tool is evaluation of offender's motivation—to what extent he/she is capable and willing to participate in making the changes in his/her life. All the outputs of the risk and needs assessment are afterwards translated into a final plan of subsequent intervention.

The basic structure of the tool consists of five parts. The first one evaluates information about the offender's criminal history focusing on specific features of the offending. The second part of the tool analyses data relating to the circumstances, factors, and incentives relevant in the overall context of the offender's criminal conduct, with a view to a potential object of harm. The third part is made of a set of dynamic risk factors (a total of 40) divided into six areas: housing, employment, finance situation, addictions, family and social relations, and attitudes and life-style. The fourth part contains a self-assessment form whose aim is to obtain feedback from the offender who himself/herself fills in this part. The last part is the final output where the results of the analysis of the offender's risk and needs are interpreted, the offender's motivation to address the difficult issues is assessed, and recommendation is made by the assessor, including proposed further treatment of the assessed person.

SARPO makes use of both objective and subjective methods of assessment. The objective method is represented by calculation of objectively determined risks on a scale from 0 to 10 points for each dynamic factor. Based on his/her justifiable expertise, the assessor is allowed to make a correction up to 2 points up or down. In addition to this, the calculated risks are compared with the self-assessment items made by the offender.

Data

The pilot study designed to test the predictive validity of the SARPO instrument started in 2007 and was conducted by trained (all participating assessors underwent a three-day intensive training on using the instrument) assessors in 16 prisons and 19 probation centres across the Czech Republic. The original aim was to obtain a sample of 500 assessments in total: 350 by the Prison Service and 150 by the Probation and Mediation Service. The pilot study targeted two groups of respondents: prisoners prior to filing an application for an early release (Prison Service) and persons just after being released on parole. A total of 513 assessments were carried out: 379 prisoners and 134 persons on probation.

Evaluation of the pilot data was conducted in three modules over the next five years. In the first phase, basic information including quantitative, qualitative, and methodological evaluation was carried out and formulas for static and dynamic risk assessment were calculated. In the second phase, a certain correction of these formulas was suggested.

Finally, data on reincarceration of offenders from the Prison Service sample only were collected during spring 2012. Only those prisoners were involved who were actually granted conditional release from prison after the SARPO assessment and where the time period from their release lasted for no less than 3 years. Out of 379 tracked prisoners, only 282 were usable for the purpose of analysis of reoffending. The other prisoners were still in prison in 2012, or the time from their release was still shorter than 3 years. The analyzed dataset consists only of male offenders since the number of women included into SARPO study was minimal.

Measures

The indicator of recidivism used in this study is a new incarceration within 3 years after the release from prison. The recidivism rate is examined with relation to a set of static and dynamic risk factors. Static risk factors include age at the time of release, age of the first conviction, total number of convictions, crime intensity measured by Copas rate [33], and seriousness of offending which is a proportion of prison sentences out of all convictions. (The indicator of seriousness was dichotomized before it was used in analysis. Values lower than two-thirds were coded 0 (less serious category) and larger values were coded 1 (highly serious category).)

Dynamic risk factors—36 items with dichotomous scales coded 0 if the risk is not present and 1 if present—were divided into six groups which covered the following areas: accommodation, employment, finance, addictions, family/peers, and personality/attitudes. A separate risk scale for each group was constructed as a mean of respective items and the scales were subsequently linearly transformed to range from 0 to 10.

In addition, overall scales of static and dynamic risks were constructed. The dynamic risk scale was designed simply as a mean of six subscales (Cronbach's alpha=0.86) and the scale was linearly transformed to allow values from 0 to 100. Similar approach is, however, not possible in case of static risk scale since the indicators have different units and therefore logistic regression was employed for the development of the overall scale (number of convictions was not included in the logistic model due to multicolinearity as it is directly related to Copas rate index). The scores were subsequently multiplied by 100 so that the scale ranges from 0 to 100. Finally, these two scales were combined into the "overall risk scale" (computed as a mean of both scales). Generally, the higher the score of any risk scale, the higher the risk of the person in the respective area. For descriptive statistics of all scales, see Table 1.

Table 1: Risk scales—descriptive statistics.

	Mean	S.D.	Min/Max	Q1/Q3
Dynamic risks/needs subscales				
Accommodation	2.9	3.4	0/10	0/6.7
Employment	4.5	3.4	0/10	1.7/6.7
Finance	6.2	3.0	0/10	4.0/10.0
Addictions	4.4	3.8	0/10	0/8.3
Family, peers	4.7	3.0	0/10	2.0/7.0
Personality and attitudes	4.3	2.6	0/10	2.0/6.0
Static risk scale	46.3	18.5	2.6/83.2	32.6/59.0
Dynamic risk scale	46.4	24.3	0/97.9	26.8/65.7
Overall risk scale	46.4	18.4	2.0/84.4	32.3/60.9

Construction of all scales except for the static risk scale was developed independently from the reincarceration measure and therefore the strength of relationships to the dependent variable is not biased. We have adopted this approach because our sample size is limited and split-half cross validation is not possible. On the other hand, static risk scale was developed by fitting a logistic regression model with reincarceration as a dependent variable and therefore the strength of the relationship between the scale and reincarceration is likely to be overestimated and should be evaluated by further research.

RESULTS

Table 2 shows the basic overview of the sample. The reincarceration rate within the 3 years following the release from prison reaches 37%. The sociodemographic profile of the sample reflects the characteristics of prison population in the Czech Republic—most offenders are young, single, or divorced and their level of education is low. The sample includes both offenders who were granted conditional release—either with supervision (17%) or without it (37%)—and offenders who served the whole sentence (47%).

Table 2: Descriptive statistics.

	n	%
Reincarceration		
Yes	105	37.2
No	177	62.8
Type of release		
Release	131	46.5
Conditional release with supervision	48	17.0
Conditional release	103	36.5
Age when released		
19–29	99	35.1
30–39	109	38.7
40+	74	26.2
Education		
Less than primary	20	7.1
Primary school	109	38.7
Vocational school	116	41.1
High school or higher	36	12.8
No answer	1	0.4
Marital status		
Married	28	9.9
Single	165	58.5
Divorced	89	31.6
Total	282	100.0

The associations between reincarceration and risk factors and scales are presented in Table 3. Out of static risk factors, the relationship to recidivism is the strongest for the age of the first conviction (r=-0.26) and crime intensity (r=0.26) and also the other risk factors are associated in the anticipated direction. All scales capturing dynamic risk factors are related to recidivism as well. The highest correlation exceeding 0.3 is found for employment, finance, and personality/attitudes scales. Consequently, both static and dynamic risk scales are substantially associated with recidivism with correlation coefficient r=0.36 and r=0.35 and, furthermore, their combination into an overall risk scale gains even a better result (r=0.42). (Unlike dynamic risk scale, static risk scale was based on post hoc analysis and, therefore, the strength of association is likely to be overestimated.)

Table 3: Risk factors and their association with reincarceration.

	M^{+} (S.E.)	M^{-} (S.E.)	Pearson
Static risks			
First conviction (age)	22.6 (0.56)	19.2 (0.47)	−0.26
Number of convictions	4.6 (0.25)	6.2 (0.34)	0.23
Crime intensity (Copas rate)	−1.8 (0.05)	−1.5 (0.05)	0.26
Seriousness of offending	0.24 (0.03)	0.38 (0.05)	0.14
Age	35.3 (0.66)	32.3 (0.85)	−0.16
Dynamic risks/needs			
Accommodation	2.4 (0.24)	3.8 (0.35)	0.19
Employment	3.7 (0.25)	5.9 (0.31)	0.32
Finance	5.5 (0.22)	7.5 (0.26)	0.32
Addictions	3.8 (0.27)	5.6 (0.37)	0.23
Family, peers	4.0 (0.21)	5.8 (0.30)	0.28
Personality and attitudes	3.7 (0.19)	5.3 (0.23)	0.31
Static risk scale	41.0 (1.4)	54.7 (1.6)	0.36
Dynamic risk scale	38.3 (1.7)	56.2 (2.6)	0.35
Overall risk scale	38.7 (1.4)	55.4 (1.6)	0.42

All three scales—static, dynamic, and overall—seem to be fairly good predictors of recidivism and can well distinguish between low-risk and high-risk offenders as can be observed in Table 4. In addition, ROC curve analysis for the overall risk scale $(AUC = 0.74)$ supports good usability of the scale as well (see Figure 2).

Table 4: Proportion of reincarceration for quartiles of the risk scales.

	Static risk	Dynamic risk	Overall risk
	Reincarceration (%)	Reincarceration (%)	Reincarceration (%)
1st quartile of the scale	18.5	17.1	11.4
2nd quartile of the scale	25.0	27.1	26.8
3rd quartile of the scale	49.2	43.7	44.3
4th quartile of the scale	63.1	60.0	66.2

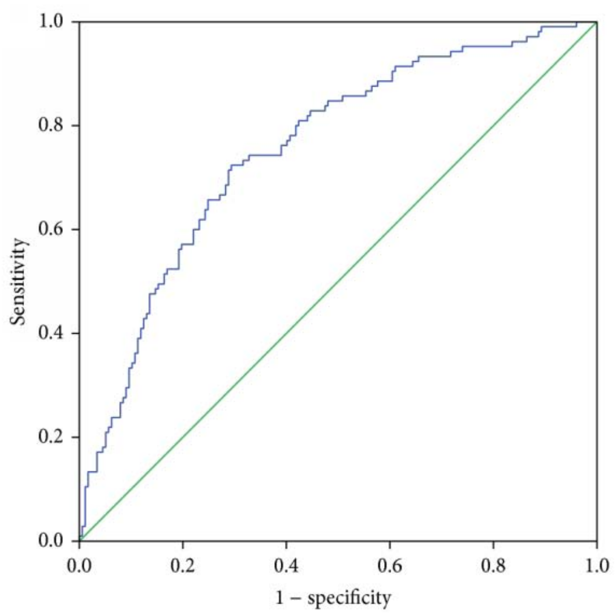

Figure 2: ROC analysis for the overall risk scale.

CONCLUSION AND DISCUSSION

The present results suggest that the instrument is well designed. It is not to expect that SARPO will accurately distinguish between those who fail from those who will commit no crime again. Therefore, we consider the current results as very good, especially as they come from a pilot study and are based on a limited sample size. The predictive ability of SARPO seems not to be much worse than analogous international tools (e.g., [8, 34]).

The results of the pilot study also clearly demonstrate the relevance of static and dynamic factors to estimate the risk of failure. On the other hand, it should be noted that this is only a pilot study based on a limited sample. Further research will be needed to evaluate the current construction of the static risk scale and to develop appropriate weights for subscales to create a more effective dynamic risk scale. It can be expected that the predictive ability of a modified tool will be even higher and will improve.

At this point we should mention why the Prison Service of the Czech Republic has decided to develop and introduce a new tool instead of implementing already established and proven international tools. Building a better tool for prediction of reoffending should not be the sole aim of risk prediction research, as it is just one link in the risk assessment—prediction-management. Risk assessment should lead to providing better treatment and continuity of care. We assume that the risk, needs, and responsivity principles provide a useful theoretical framework for interventions reducing risks of reoffending. The basic characteristics of Czech offenders do not seem to differ from populations of prisoners in other countries very much which gives support to the assumption that the majority of risk factors are similar across the developed countries. On the other hand, the tool SARPO was developed to refer to and recommend treatment solutions. Therefore a fundamental knowledge of the culture, cultural habits including drug use, kind of crime associated with the behavior of certain subcultures and ethnics, and also the legislative and socioeconomic system and social services is inevitable. Appropriate risk assessment can identify high-risk individuals in need of tailor-made management and available intervention. Using tools with dynamic risk predictors to assess risk can identify appropriate changeable treatment targets. Assessment tools with dynamic or changeable predictors, such as the HCR-20, OASys, or the LSI-R, can accomplish some of these tasks provided but are little connected with the available care options in the country.

More research involving prospective followups of large samples is clearly needed in the future. Since the tool SARPO has already been implemented into the practice of the Czech Prison Service, the number of assessments is rapidly increasing (over 9500 cases by the end of January 2014) which will soon allow us to conduct more elaborate analyses. In particular, there is a need to improve the predictive validity and to be more specific on dynamic risk scales.

Future directions and developments may lead SARPO towards assessing the difference between the risks identified by imprisonment and later on, either before applying for parole or on a regular basis. This means to develop, validate, and implement additional set of items which will be able to capture and interpret the relevant changes. This would open up completely new possibilities for evaluating the effectiveness of various interventions for various target groups of prisoners or to monitor the progress in therapy.

For the present, the Prison Service of the Czech Republic has a modern assessment tool, which has a number of advantages over simple static instruments or solely clinical tools.

CONFLICT OF INTERESTS

The authors declare that there is no conflict of interests regarding the publication of this paper.

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CHAPTER 8

STATE OF IMPRISONMENT: PRISONERS OF NSW POLITICS AND PERCEPTIONS

Long Bay Correctional Centre was dubbed the 'Long Bay Hilton' by 'tough on crime' advocates whose campaigns helped fill prison cells to overflowing.Wikimedia Commons/J Bar, CC BY

This article is part of The Conversation's series, State of Imprisonment, which provides snapshots of imprisonment trends in each state and territory. The intention is to provide a basis for informed public discussion of imprisonment policies and of the costs and consequences for Australia of rising rates of incarceration.

The defining characteristic of the recent history of imprisonment rates in New South Wales is volatility. A 2012 NSW Bureau of Crime Statistics and Research (BOCSAR) research report, 'Why is the NSW prison population falling?', was followed 18 months later by 'Why is the NSW prison population growing?'.

Are rising crime rates causing such volatility in imprisonment rates? No. Crime rates for most categories of crime, especially property crime, have been declining since the early 2000s. The current NSW murder rate is half what it was in 1988.

The simple answer to the questions about prisoner numbers is politics and perceptions. Imprisonment rates reflect the varying approaches of political parties and governments to criminal justice policy. Polices are often formulated in the lead-up to elections or in response to media and public pressure around individual cases.

A short history of recent law and order politics

The 1970s and early 1980s were a period of criminal justice and penal reform. That changed in the mid-1980s to an increasingly punitive political, public and media climate. NSW imprisonment rates dropped from 126 in 100,000 in 1970 to 84 in 100,000 in 1984, then started climbing, doubling by 1999.

Following an increase of 34% between mid-2001 and mid-2009 – mainly under a Labor government – an 8% reduction in the imprisonment rate occurred under a Liberal National government. Between September 2012 and March 2014, under the same conservative government, the prison population increased again by 13%. After a short pause, this trend has continued, to a rate of 182 per 100,000 in 2014 and climbing.

Criminal justice reform and falling imprisonment rates

The Wran Labor government elected in 1976 embarked on a program of law reform, led by the attorney-general, Frank Walker. Walker decriminalised public drunkenness, begging, vagrancy and most prostitution offences, raised the legal threshold for common public order offences such as offensive language and behaviour, abolished imprisonment for fine default and reformed bail laws. The 1978 report of the Nagle Royal Commission into Prisons ushered in a period of prison reform under Commissioner Tony Vinson.

In 1982 a short-term licence release system reduced sentence lengths. But this fell into disrepute when the minister, Rex Jackson, was convicted and imprisoned for corruption in relation to the scheme. That delegitimised executive-based release schemes and set the scene for the later rise of "truth in sentencing".

The 1983 move to take remissions (of one-third of the sentence length) off the non-parole period further reduced sentence lengths.

Backlash: the punitive turn

As a Liberal frontbencher, Michael Yabsley pioneered aggressive ‘law and order’ campaigns in the late ‘80s and early ‘90s. AAP/Tracey Nearmy

After 1986 the political, public and media climate in NSW took a markedly punitive turn, stimulated by Liberal shadow minister for corrective services Michael Yabsley in the lead-up to the 1988 state election, which his party won. Yabsley ramped up a “law and order crisis” and painted the ALP as “soft on crime”.

“Truth in sentencing” legislative changes in 1989 abolished remission altogether and increased the length of the non-parole period. The result was an increase in sentence lengths by 19% for adults and 30% for children, and a 30% increase in the prison population over the first two years of the government.

At this point Labor joined the “law and order auction”, with the Carr and subsequent ALP governments vowing not to be outflanked on the right on law and order. In 2003, in response to the Liberal National opposition’s election policy of “grid” (semi-mandatory) sentences, Labor introduced a scheme of “standard non-parole” periods (indicative but not mandatory minimum terms). This had the effect of significantly increasing sentencing tariffs across a range of serious offences.

A NSW Judicial Commission study comparing sentencing outcomes in Australian jurisdictions found that NSW had the highest proportion of sentences of imprisonment across four offences. BOCSAR found that, adjusted for population, nearly twice as many people were sent to prison in NSW as in Victoria.

Legislative hyperactivity produced 23 “punitive” changes to the Bail Act in NSW from 1992-2008. The rate of bail refusals in the District and Supreme Courts nearly doubled between 1995 and 2005. By 2014, 26% of NSW prisoners were in remand custody. A 2012 report by the NSW Law Reform Commission led to the passing of a reform-oriented Bail Act.

From prison closures to overcrowding

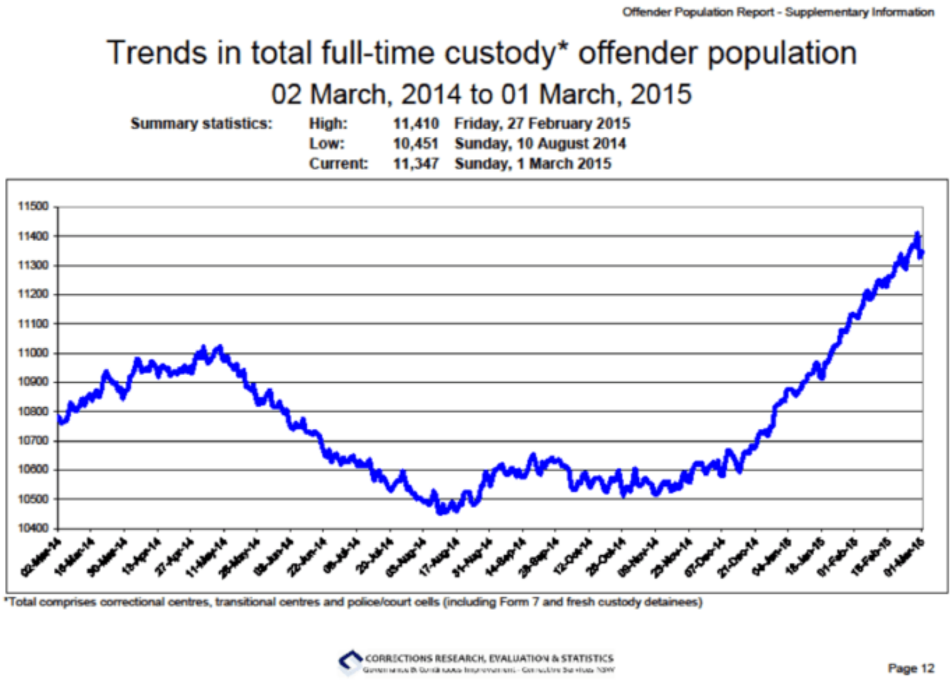
In February 2013, Corrective Services NSW held a seminar to discuss projections of continued falling crime rates and prison numbers after the Liberal National government had closed three prisons. Yet in 2013-14, “capacity utilisation” (meaning overcrowding) hit 109.4, above the national average of 104.4.

Currently, prison “modulars” (demountable cells) are being built in response to the prison population boom. Prisoners are being held in police cells as the main remand prison is full.

Shock jock Ray Hadley led a populist charge against bail law reforms. AAP/Paul Miller

The context for this reversal was the removal from office of Attorney-General Greg Smith, who had sought to reduce imprisonment rates by promoting bail reform. Smith came under constant attack from "shock jock" Ray Hadley. The 2GB radio host enjoys close links with the NSW Police Association and senior members of the NSW police hierarchy, as well as the Sydney News Corp tabloid, The Daily Telegraph.

Within one month of the introduction of Smith's reformist bail legislation, three cases where notorious accused were granted bail provided a platform for Hadley to ramp up his attacks on the reform, traducing the presumption of innocence and conflating accusation, guilt and punishment. Former Labor attorney-general John Hatzistergos, the major architect of the constant amendments restricting access to bail, was appointed to "review" the legislation. His review trashed the philosophy behind bail reform (the presumption of innocence and the right to liberty) and was used by the government to sabotage the reform through amendments introducing an additional "show cause" provision. From December 2014 to March 2015, the number of remands in full-time custody increased by a further 800.



Source: Corrections Research, Evaluation and Statistics, Corrective Services NSW, Offender Population Report Week ending 1 March 2015, CC BY

Rising punitiveness and media influence

Recent BOCSAR research on public confidence in the criminal justice system found that the majority of survey respondents continue to hold marked misperceptions of crime and justice outcomes. Most people don't recognise that there is declining property crime, overestimate the prevalence of violence in crime, and underestimate conviction and imprisonment rates. This appears to undermine confidence and exacerbate expressions of public punitiveness.

BOCSAR found that "punitiveness had intensified since 2012". Respondents were "more likely to report more punitive views if they imagine violence is prevalent, property crime is escalating, and conviction and imprisonment rates (for home burglary) are low".

In a hint at the "Ray Hadley effect", BOCSAR found that such views were common among 2GB listeners, in contrast to Sydney Morning Herald readers.

Politics and perceptions

Imprisonment rates in NSW have little connection with crime rates. Rates of crime in most categories are falling.

Both historical and recent fluctuations in rates are reflections of the over-determining influence of "law and order" politics and shifts in public punitiveness.

Such public or "popular" punitiveness is a response to the politicisation of criminal justice policy and the rise of the "public voice" in the figure of the radio shock jock, dismissive of both fundamental legal and democratic values and the role of expertise, research and evidence.

In NSW it seems we are all prisoners of the politics and perceptions that swirl around criminal justice issues, and which echo in the siren call of law and order.

CHAPTER 9 STATE OF IMPRISONMENT: TASMANIA ESCAPES 'LAW AND ORDER' INFECTION

Rob White

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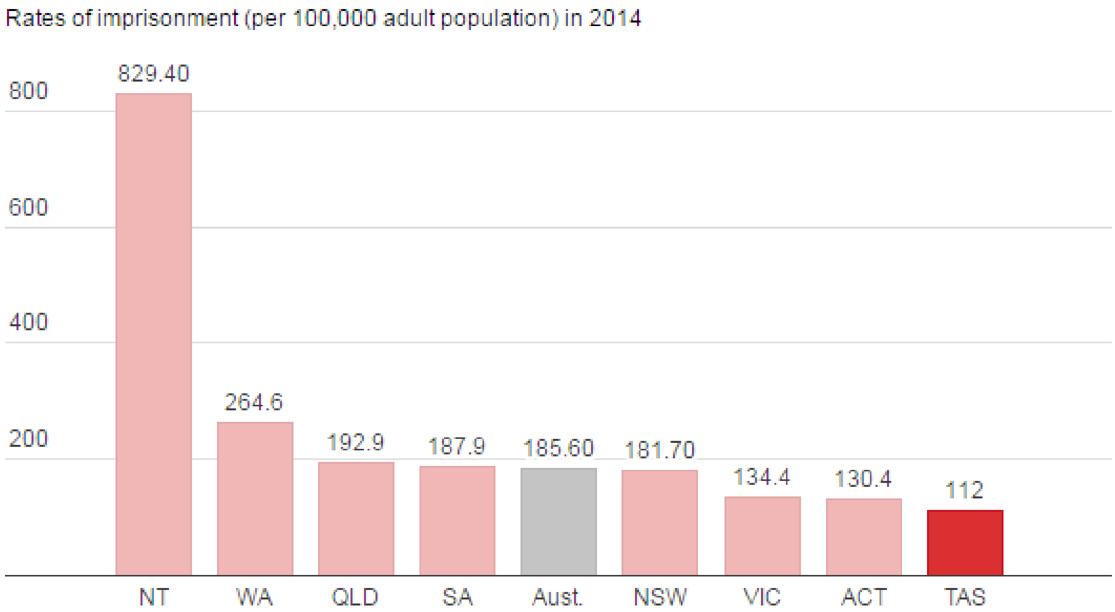
This article is part of The Conversation's series, State of Imprisonment, which provides snapshots of imprisonment trends in each state and territory. The intention is to provide a basis for informed public discussion of imprisonment policies and of the costs and consequences for Australia of rising rates of incarceration.

Citation: Rob White, State of imprisonment: Tasmania escapes 'law and order' infection, https://theconversation.com/state-of-imprisonment-tasmania-escapes-law-and-order-infection-38988

Imprisonment rates in Tasmania have steadily declined over the past decade – the only state or territory where this has happened. From a high of almost 150 prisoners per 100,000 adults in 2005, present rates are around 112 per 100,000. This translates to fewer than 500 people.

The correctional project in Tasmania is therefore quite small compared to other Australian states.



Tasmania has the lowest imprisonment rate of any state or territory.

This is reflected in the Tasmanian Corrections infrastructure: Risdon Prison Complex (which includes medium- and maximum-security units), Ron Barwick Minimum-Security Prison and Mary Hutchinson Women's Prison, all on the same general site in Hobart. Hobart Reception Prison (in the CBD) and Launceston Reception Prison also provide secure containment facilities.

Nonetheless, corrective services spending per prisoner per day, as measured by net recurrent and capital costs, is among the highest in the country. Compared with alternatives offered by community corrections, incarceration costs a lot.

This high cost, in turn, raises issues of value for money (can other sanctions reduce re-offending and do so more cheaply?) and the desirability of using imprisonment more generally (does the expenditure lead to less or more crime?).

What has Tasmania done to cut imprisonment rates?

Partly in response to these questions, the shrinking of the prison population has been accompanied by several measures:

- expansion of better support services within the corrections system
- establishment of innovative projects that engage offenders
- use of systemic measures that encourage rehabilitation ideals.

Examples of support and rehabilitation programs include:

- focused health programs to limit the spread of Hepatitis C
- tailored rehabilitation programs for prisoners convicted of sex offences
- literacy and parenting projects such as "Storybook Dads" to enable inmates to read and record stories for their children
- a community garden.

In another indication of recent enlightened penal practice, prisoners have a wide variety of opportunities to "give back" to the wider community. The Tasmanian Prison Service has consciously fostered the participation of prisoners in community-oriented activities.

In 2013-2014, over 18,900 leave permits were granted. This is a massive increase from the 589 permits granted in 2009-2010.

Some of these have involved helping local residents and farmers with bushfire recovery efforts. Other initiatives have included environmental restoration projects. Prisoners also provide a welcome and ready pool of umpires for local cricket and football games.

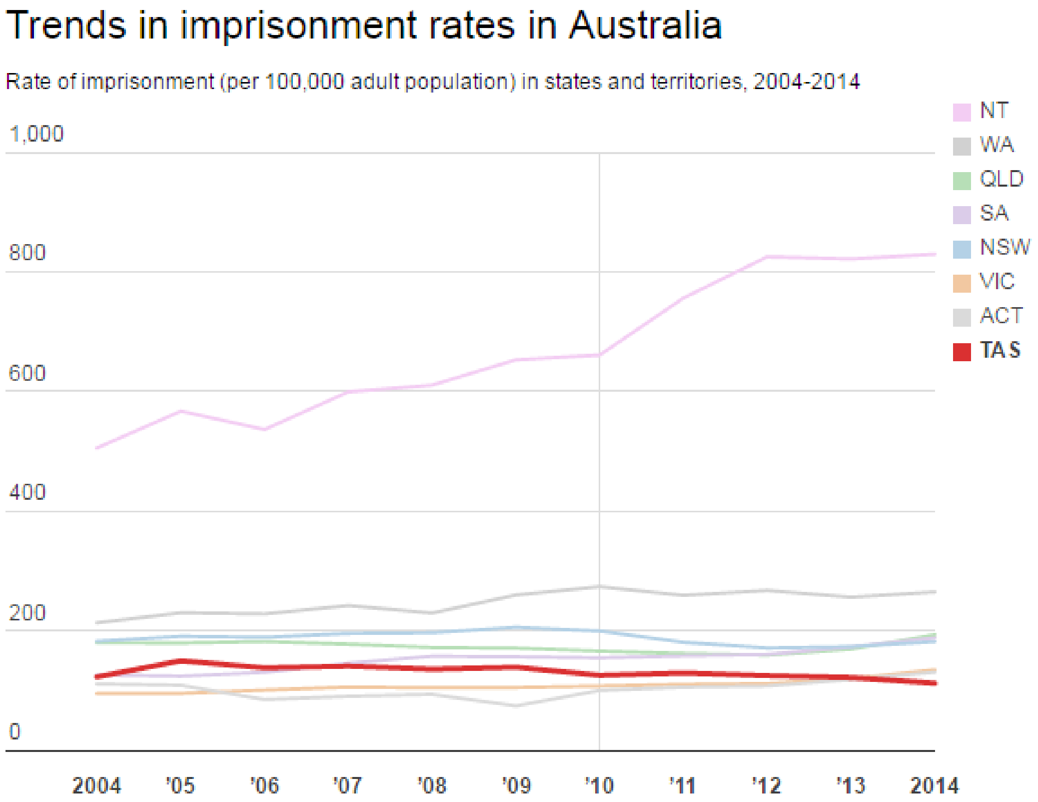
Progressive, cost-effective policy has a context

These changes in Tasmania have taken place in a particular economic, political and cultural context.

One aspect of this is that Tasmania has a population of around half a million people. The tax base is correspondingly small.

Tasmania is, not surprisingly then, a "poor" state in terms of state finances. There simply is not a lot of money to go around, so anything that constitutes a drain on the budget is problematic.

Nor is Tasmania a particularly punitive place. Most elections do not feature the "law and order auctions" characteristic of mainland states.



Tasmania's imprisonment rate has declined from a high of almost 150 prisoners per 100,000 adults in 2005, to a rate of 112 per 100,000 in 2014.

For most of the past decade there has been bipartisan support for progressive policy. Initiatives include better rehabilitative support for prisoners, an emphasis on diversion for offenders with drug and mental health issues and on greater opportunity for offenders to repair the harm. Whether a Green/ Labor or Liberal justice minister, most of the rhetoric, most of the time, has been broadly supportive of decarceration and desistance strategies.

The relatively progressive approach to matters of crime and punishment has been reinforced at important institutional points.

The general approach of the Tasmanian Police has been measured and generally appropriate to circumstance. It has incorporated aspects such as youth diversion, respectful but authoritative responses to domestic violence, and educational campaigns to reduce harmful behaviour.

The Magistrates Court has adopted measures such as court-mandated drug diversion and mental health court lists. These have incorporated therapeutic responses to problems formerly perceived in solely criminal justice terms.

Senior bureaucrats in the Department of Justice and within the prison service have gelled in terms of broad philosophical approach. They have worked with other agencies and relevant ministers to forge pathways that offer greater promise for reducing the numbers of prisoners and helping those who remain to desist from re-offending.

Across the criminal justice enterprises, staff have been carefully recruited to ensure persons of integrity, capacity and the right skill sets are employed. Recruitment processes, and the quality and quantity of pre-service and in-service training and education, remain important components of the wider cultural changes in recent years.

Making progress on inevitable problems

Any system that is based, inherently, upon coercion and containment is always going to encounter difficulties. Prison-related issues continue to bubble away.

Some problems are due to the "natural" rhythms of such institutions, such as inmate-officer conflict. The key issue here is whether such conflict is particular to specific prisoner or prison officer interactions, or endemic to the institution because of the wider occupational culture.

More can always be done to support this or that program or project. Yet by and large Tasmania has, for the moment, got things right as far as the general trend is going. Locking up fewer people, and doing something positive with those inside, is an important achievement and ongoing mission.

Attorney-General Vanessa Goodwin wants to abolish suspended sentences, but has wisely sought advice on how to avoid increasing prisoner numbers as a result. Tasmanian Government, CC BY-NC

Present endeavours and tendencies are nonetheless fragile and potentially under threat. The attorney-general, for instance, has foreshadowed the abolition of suspended sentences.

Fortunately, she has asked the Sentencing Advisory Council for advice so that prisoner numbers do not increase as a consequence. What is legislated at the end of the day remains to be seen.

Furthermore, budgetary pressures at the whole-of-government level have translated into significant fiscal bumps. At the specific institutional level, the prison service has not been immune. This is hamstringing expansion of existing initiatives and curtailing other possible rehabilitative directions.

Even so, widespread community support for prisoner leave programs continues. Thankfully, punitive politics remains muted in the Tasmanian political landscape.

CHAPTER
10

PRISONS POLICY IS TURNING AUSTRALIA INTO THE SECOND NATION OF CAPTIVES

Mirko Bagaric

Dean and Head of School of Law, Deakin University

The human and financial costs to Australia of following America's lead in imprisoning more and more people are huge.

Sometimes you don't need hindsight to identify broken social and legal policy. Such is the case with Australia's slide into following the US lead and becoming a nation of captives. A little known, but alarming, fact is that imprisonment numbers

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in Australia – both the number of offenders incarcerated and the growth in numbers – are now at record highs, and by a considerable margin.

Incarceration rates have fluctuated considerably since federation. At the turn of the 20th century, the imprisonment rate per 100,000 (adult) population was relatively high: 126 persons per 100,000 adults. This dropped to 52 per 100,000 by 1925. Following a period of moderate fluctuation, in the last two decades the prison population has more than doubled: an unprecedented occurrence in Australian history.

The number of prisoners broke through the 30,000 mark for the first time on June 30 2013, at which point the rate of imprisonment was 170 prisoners per 100,000 adults. The current imprisonment rate is 186 per 100,000 people.

In contrast to most other developed countries, this rate is palpably high. The rate in Canada is 118 per 100,000. The incarceration rate in Australia is nearly three times higher than in Scandinavian countries.

Standing apart from these trends is the world's greatest incarcerator, the United States, which imprisons more than 700 people per 100,000 - an increase of more than 400% in three decades.

While the Australian incarceration rate is low compared to the US rate, we are highly inefficient at locking up prisoners. It costs every state and territory at least A$80,000 to house each prisoner for a year, compared to around A$30,000 in the US. Hence per capita our spending on prisons is significant in relative and absolute terms.

And it is to the US where we should now be looking to ascertain the fall-out from an unabated tough (and dumb) on crime policy. The extensive use of imprisonment in the US has finally reached a tipping point. The community can no longer readily absorb the cost of a US$60 billion annual prisons budget.

Radical measures are being implemented to reduce prison numbers. The most recent is effectively opening the prison gates to release thousands of sentenced offenders.

In April 2014, the US Sentencing Commission voted to reduce the sentencing guideline level for most federal offences of drug trafficking. These changes will apply retroactively, meaning that more than 46,000 prisoners are eligible to have their cases reviewed for a penalty reduction. On average, penalties are likely to be reduced by two years and one month, resulting in savings of approximately 80,000 prison bed years.

Imprisonment isn't working

Increasing prison numbers might be tolerable if this achieved a positive community outcome. However, the evidence is to the contrary (the author analyses the Australian data in a forthcoming article for the Australian Bar Review, entitled "Jail Up, Crime Down Does Not Justify Australia Becoming an Incarceration Nation"). It does not reduce the rate of serious crime, discourage potential offenders or reduce re-offending rates.

In many cases, imprisonment is just the wanton infliction of gratuitous punishment by an unthinking legislature and a reflexive judiciary.

Sentencing is the area of law where there remains the biggest gap between what science tells us can be achieved through a social institution (criminal punishment) and what we actually do. We will continue to have a runaway incarceration rate until governments and courts start making evidenced-based policy and sentencing determinations. This would mean imprisonment is essentially reserved for the offenders we have reason to fear or who have inflicted serious suffering on others, not those that we simply dislike.

It is repugnant that more than 40% of prisoners in Australian prisons are serving sentences for non-violent or non-sexual offences. White-collar criminals, drug traffickers and social security cheats irritate us and inconvenience our lives, but they should only go the jail in the rarest of circumstances. The pains of imprisonment are normally a disproportionate response to their crimes.

Time to reverse the trend to excessive punishment

There is also a powerful normative basis for limiting prison numbers. Imprisoning offenders for a moment longer than is necessary to achieve a demonstrated (attainable) objective of sentencing constitutes a violation of one of the most universally held moral norms: the prohibition against punishing the innocent. The violation of this norm is so prevalent in Australia that it is in fact in our prisons where the greatest number of human rights infractions occur.

And this is one problem that is not the total fault of populist politicians. Our courts have considerably contributed to the crisis by unilaterally increasing sentencing tariffs for drug and white-collar offenders over the past decade. This is supposedly in order to deter other offenders.

The strategy has been a brilliant failure. To appreciate the extent of this debacle you don't need to look out of your window to see that illicit drugs are increasingly available on every street corner. You merely need to ask criminologists, who are overwhelmingly convinced about the failure of general deterrence theory.

Australian governments need to develop a strategy to reduce incarceration numbers to about 100 per 100,000 (consistent with historical trends). Without a systematic overview, the unprecedented increase in incarceration levels has the potential to contribute to a fiscal crisis and an ongoing human rights tragedy, devoid of a principled solution – as we are witnessing in the United States.

The start and endpoint to the solution is to confine jails (almost exclusively) to those we have reason to be scared of: sexual and violent offenders.

Next week The Conversation begins a series, State of Imprisonment, on the trends and policies in every state and territory. The series aims to promote an informed discussion about the costs and consequences of rising rates of imprisonment across most of the nation. You can read articles in the series here.

CHAPTER 11

THE GROWING PROBLEMS OF THE PRISON SYSTEM

Fence outside a Michigan prison

Putting prison overcrowding in perspective:

According to the Bureau for Justice Statistics, the number of adult federal and state prison inmates increased from 139 per 100,000 residents in 1980 to 502 per 100,000 in 2009 — an increase of 261 percent. Over two million Americans are now incarcerated in prisons or jails and the total number of Americans under some form of penal supervision (including jail, prison, parole and probation) is over 7.2 million.

According to the U.K.-based International Centre for Prison Studies, the U.S. has the highest incarceration rate in the world at 756 per 100,000, including juveniles as well as adults. With less than five percent of the world's population, the U.S. accounts for about a quarter of its prison population.

It was not always this way.

When Alexis de Tocqueville visited the United States in the early 1800s, he was impressed by the leniency of the young republic's system of corrections. In the opening chapter of Democracy in America, he wrote that "In no country is criminal justice administered with more mildness than in the United States."

For most of the 20th century, U.S. prison rates were fairly low and stable by comparison with contemporary levels. From 1930 to 1970, for example, the average annual rate of imprisonment was around 110 per 100,000.

But beginning in the 1970s, a number of political and economic factors gave rise to the prison boom, which was to bring the nation to the age of mass incarceration, which in turn would have far reaching and sometimes devastating impacts on those affected. Incarceration became the default setting rather than the backstop of the criminal justice system. This would most heavily impact low income, low skilled young men without high school diplomas or post-secondary education—and this was disproportionately true for young African Americans.

Contributing factors to the prison boom included fears of crime and unrest, political hysteria regarding drugs, a backlash against the gains of the civil rights movement, widening economic inequality and a decline in the demand for low-skilled labor.

The policy response around the nation included new criminal penalties, more severe sentencing and parole systems, less reliance on probation and other alternatives to incarceration, and a mushrooming prison building industry.

While drug use occurs throughout society, low income urban communities are more heavily policed, in part because more daily life occurs in public spaces and illegal activities are more difficult to hide.

According to the American Civil Liberties Union, "The racial disparities resulting from this system have been staggering. Black individuals are imprisoned at nearly six times the rate of their white counterparts — and Latinos are locked up at nearly double the white rate. Most of this racial disparity is a result of the War on Drugs. While these groups engage in drug use, possession, and sales at rates comparable to their representation in the general population, the system disparately impacts people of color. For example, black individuals comprise 13% of the U.S. population and 14% of drug users, yet they are 37% of the people arrested for drug offenses and 56% of those incarcerated for drug crimes."

When young people are incarcerated, the effects last a lifetime, impacting job quality, earnings, assets, home ownership, marriage and family life, public benefits and, in some states, voting rights. When this occurs disproportionally in low income and minority communities, the effects reach far beyond those immediately involved.

The American Friends Service Committee is trying to change this trend, not only bringing attention to the issue at a policy level, but also working with men inside the prison system, as well as young people who bear the brunt of challenges in marginalized urban settings affected by decades of over reliance on incarceration as a way to solve broader social problems.

- AFSC West Virginia Economic Justice Project Program Director Rick Wilson

CHAPTER 12

CRIME AND VIOLENCE IN BRAZIL: SYSTEMATIC REVIEW OF TIME TRENDS, PREVALENCE RATES AND RISK FACTORS

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ABSTRACT

Between 1980 and 2010 there were 1 million homicides in Brazil. Dramatic increases in homicide rates followed rises in inequality, more young men in the population, greater availability of firearms, and increased drug use. Nevertheless, disarmament legislation may have helped reduce homicide rates in recent years. Despite its very high rate of lethal violence, Brazil appears to have similar levels of general criminal victimization as several other Latin American and North American countries. Brazil has lower rates of drug use compared to other countries such as the United States, but the prevalence of youth drug use in Brazil has increased substantially in recent years. Since 1990, the growth of the Brazilian prison population has been enormous, resulting in the fourth largest prison population in the world. Through a systematic review of the literature, we identified 10 studies assessing the prevalence of self-reported offending in Brazil and 9 studies examining risk factors. Levels of self-reported offending seem quite high among school students in Brazil. Individual and family-level risk factors identified in Brazil are very similar to those found in high-income countries.

INTRODUCTION

In 2008, 535,000 people died by homicide worldwide and 95% of these deaths occurred in low and middle-income countries (LMIC) (World Health Organization, 2012). Leading criminologists have argued for more globalized research on crime and violence (Farrington, 2000; Laub & Lauritsen, 1993). However, research programs continue to focus almost exclusively on high-income countries. In a review of the most important longitudinal studies in criminology (Farrington & Welsh, 2007), only two were identified in LMIC: in Mauritius (Raine, Reynolds, Venables, Mednick, & Farrington, 1998) and China (Taylor, Friday, Ren, Weitekamp, & Kerner, 2004). The rest were conducted in North America (20 studies), Northern Europe (11 studies), and Australasia (4 studies). Basic information is often hard to obtain on the prevalence and correlates of crime in LMIC. In this article, we review epidemiological evidence on crime and violence in Brazil, a middle-income country with an extremely high homicide rate.

Brazil has the fifth largest population in the world: 197 million people (World Bank, 2012b), 30% of whom are under age 18 (Unicef, 2012). Although Brazil's gross national income is not low (US$ 11,500 per capita in 2011, World

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Bank, 2012a), it has persistently had one of the highest rates of inequality in the world: its 2012 GINI index (51.9) was the 16th highest out of 136 countries worldwide (the United States ranks 42nd, and the United Kingdom ranks 91st) (Central Intelligence Agency, 2013). In 2009, the poorest fifth of the population received just 2.9% of the nation's income compared to 58.6% received by the richest fifth (World Bank, 2012c). In the same year, 10.9% of the nation's population was poor (living on less than $2 per day;World Bank, 2012c). Nevertheless, there have been considerable improvements in health outcomes in Brazil in recent decades: between 1975 and 2007 infant mortality decreased from 114 to 19 (per 1000 live births), and life expectancy increased from 52 to 73 years between 1975 and 2008 (Paim, Travassos, Almeida, Bahia, & Macinko, 2011). Access to education also increased substantially: the proportion of people with seven or more years of formal education increased from 19% to 47% between 1976 and 2008 (Paim et al., 2011). However, ranking 85th out of 187 countries on the Human Development Index in 2011 (this index combines indicators of life expectancy, educational attainment and national income; United Nations, 2012), Brazil still has considerable challenges in meeting the whole population's needs for education, health care, and income.

Violence has grown into a major public health problem in Brazil. From the 1930s, infectious diseases accounted for an increasingly smaller proportion of deaths, while deaths caused by violence steadily increased (Barreto et al., 2011). In 2007, 12.5% of all deaths were caused by violence, mostly among young men (Reichenheim et al., 2011). Between 1997 and 2007, the prison population in Brazil grew faster than any other American country (Walmsley, 2010). By 2011, a total of 515,000 individuals were incarcerated in Brazil (270 per 100,000 population, Ministerio de Justiça, 2012), corresponding to the fourth largest prison population in the world after the United States, China, and Russia (International Centre for Prison Studies, 2012).

The social and economic costs of crime and violence in Brazil are large. Injuries (Gawryszewski & Rodrigues, 2006), fear (Cardia, 2012), and psychological health problems (Andrade et al., 2012; Lopes, Faerstein, Chor, & Werneck, 2008) have profound impacts on individuals' quality of life. Wider societal costs, including expenditure on healthcare and public and private security, can be expressed as a percentage of gross domestic product (GDP). Summing expenditure on police, prisons, private security, public health, and loss of human capital (from premature deaths caused by violence), and personal loss from robbery and theft, the total cost of crime in Brazil was estimated to be R$92 billion in 2004, or 5.1% of GDP (Cerqueira, Carvalho, Lobão, & Rodrigues, 2007). Human capital costs of homicide alone were equal to 2.3% of GDP in 2007 (Cerqueira, 2010).

According to the landmark World Report on Violence and Health (World Health Organization, 2002) the first steps needed towards violence prevention are: (i) collection of as much basic knowledge as possible on the magnitude and nature of the problem, and (ii) research identifying causes and correlates of violence which might be modified through interventions. Given its economic, cultural, and social context, it is possible that risk factors for crime identified in other contexts have different effects in Brazil, and this needs empirical testing (Rutter, 1999). For example, Villarreal and Silva (2006) found a *positive* association between levels of neighborhood social cohesion and crime rates in urban Brazil, although the relationship is generally *negative*in the United States. The positive association in Brazil might arise because the survival of poor urban settlements depend on inhabitants organizing to prevent governments removing them, as well as inhabitants having shared histories of migration from the countryside, and depending on each other to survive in the informal sector — to secure jobs and build homes (Villarreal & Silva, 2006). Therefore, although impoverished neighborhoods in Brazil do have high crime rates, they tend to have unusually high levels of social cohesion, unlike in North America. As this example shows, it cannot be taken for granted that correlates of crime identified in high-income countries will replicate in Brazil.

Homicide statistics are probably the most reliable data on violence in Brazil, and are a key resource for public debate about violence prevention. Although there is a general correlation between violence levels (including homicide) and other types of crime (Eisner, 2002), it is possible for nations with high homicide rates to have average or low crime rates and vice versa (Savolainen, Lehti, & Kivivuori, 2008; Zimring & Hawkins, 1999). Therefore, as well as examining rates and trends in homicide in Brazil, we systematically review evidence on non-lethal crime and violence. Given that discussions of macro-level correlates of crime in Brazil are available elsewhere (e.g., Cerqueira, 2010; Villarreal & Silva, 2006), we focus our review on risk factors for criminal behavior measured at the individual level. For a helpful general discussion of criminology in Brazil, see Rodrigues (2011).

Much of what we review is difficult to access by international researchers given its publication in Portuguese in national reports or journals. This issue of language may partly explain criminology's lack of focus on countries like Brazil, despite their high levels of serious violence. For example, in the enormous Handbook of Crime Correlates (Ellis, Beaver, & Wright, 2009) only three Brazilian studies are cited (two of which pertain to alcoholism rather than crime). While this is a useful start, a comprehensive review of crime and violence in Brazil requires systematic searches of local as well as international sources, in Portuguese as well as in English. We hope that the current systematic review will help bring the problems of crime and violence in countries like Brazil closer to the hub of international criminological research.

Objectives of the review

The review has the following five objectives:

1. Compare homicide rates and the overall burden of violence in Brazil with other countries worldwide.
2. Examine time trends in homicide in Brazil.
3. Examine rates of non-lethal criminal victimization in Brazil over time and in comparison with other countries.
4. Systematically review community based studies on the prevalence of offenders in Brazil.
5. Systematically review community based studies of risk factors for crime in Brazil.

METHODS: PRIMARY DATA SOURCES

Homicides in WHO member states

Homicide rates (per 100,000 people) for member states of the World Health Organization (WHO) in 2008 were extracted from the Global Burden Disease 2004 Update (World Health Organization, 2008).1 Homicide rates for member states are based on vital registration data classified using the codes X85 to Y09 and Y87.1 in the International Classification of Diseases 10th Edition (ICD-10).

Disability-Adjusted Life Years in WHO member states

We use Disability-Adjusted Life Years (DALY) to measure the total burden of life years lost to violence in Brazil and other WHO member states. One DALY can be thought of as one year of "healthy" life lost because of premature mortality or morbidity (injury or ill health) caused by violence. DALYs caused by violence for WHO member states in 2004 (the most recent year available) are examined in this article. As described by the WHO, DALYs "are calculated as the sum of the years of life lost due to premature mortality (YLL) in the population and the years lost due to disability (YLD) for incident cases of the disease or injury" (for further details, see World Health Organization, 2008, p. 3).

National population of Brazil

National population estimates for 1980–2010 (used to express crime rates in terms of 100,000 people) were taken from the Brazilian Department of Public Health Information (DATASUS). Population counts between 1980 and 2010 are based on censuses carried out by the Brazilian Institute of Geography and Statistics (IBGE) in 1980, 1991, 1996, 2000, and 2010, with intervening years imputed using age and sex stratifications.

Homicides in Brazil

We use data on homicides from the Brazilian System of Death Registration (SIM) maintained by the Brazilian Ministry of Health (Ministério da Saúde). Data were extracted from the Department of Public Health Information (DATASUS). This is widely regarded as the most reliable information source on homicides in Brazil, even though unregistered deaths and deaths with unknown causes are still problematic (Cerqueira, 2012; de Souza, de Lima, & Bezerra, 2010). For the years 1979–1995, all deaths with codes E960–E969 in the International Classification of Diseases 9th Edition (ICD-9) were counted as homicides. For the years 1996–2010, all deaths with codes X85 to Y09 and Y87.1 in ICD-10 were counted as homicides. This corresponds with the coding of violent deaths in the Global Burden Disease 2004 Update (World Health Organization, 2008). We also report estimated homicide rates that account for deaths by external causes that have unknown intent. These estimates are based on models of the probability that violent deaths with unknown intent (which are high in some Brazilian states) are actually homicides, taking into account recorded individual characteristics and situational aspects of the death (see Cerqueira, 2012, for methodological details).

Non-lethal hospitalizations caused by violence in Brazil

The Brazilian System of Information on Public Hospitals (SIH-SUS) maintains data on admissions to public hospitals in Brazil, with causes of admission coded using ICD-9 until 1996 and using ICD-10 afterwards. We examine rates of public hospital admissions caused by violence not resulting in death in hospital per 100,000 people. Admissions caused by violence were identified as ICD-9 codes E960–E969 and ICD-10 codes X85 to Y09. Ideally, data on violence-related treatment in hospital emergency departments would also be used to examine rates of violence in Brazil. However, Brazilian emergency department information systems are currently inadequate to provide comprehensive national data (Gawryszewski et al., 2008).

Criminal justice data in Brazil

State police force data on numbers of crimes and offenders are compiled to produce national statistics by the Brazilian Ministry of Justice (Secretaria Nacional de Segurança Pública, Ministério da Justiça). However, many states provide very incomplete data. The Brazilian Forum on Public Security (Fórum Brasileiro de Segurança Pública, 2011) classifies each state as having low, medium, or high quality data, according to the extent of its data coverage and the proportion of deaths with undetermined causes. We examine statistics both for all states and separately for those states classified as having high quality data. Data on the number of offenders recorded by the police in Brazil in 2009 were provided by the Brazilian Ministry of Justice (Secretaria Nacional de Segurança Pública, Ministério da Justiça, personal communication, 2011).

The Prison Department of the Brazilian Ministry of Justice (Informações do Departamento Penitenciário Nacional, Ministério da Justiça) collects state prison data to produce national statistics on the number of people incarcerated in adult prisons, crimes committed by the incarcerated population, and basic demographics of the population.

METHODS: SYSTEMATIC REVIEW OF LITERATURE

We systematically searched for community based studies in Brazil reporting the prevalence of criminal offending, or associations between risk factors and offending. We report on a similar synthesis of evidence about childhood conduct problems in Brazil in Murray, Anselmi, Gallo, Fleitlich-Bilyk, and Bordin (2013). To be eligible for the current review, the study must have met all four of the following criteria:

1. The study used a community based sample with random, stratified probability, or total sampling in households, schools, or maternity hospitals (in the case of birth cohort studies). Studies that recruited samples entirely in an institutionalized setting, for example a drug addiction center, were excluded.
2. The study had at least 100 participants.
3. The study measured criminal behavior at the individual level using self-reports, other reports, or criminal records. Studies of domestic violence and suicide were not included.

4. The study reported either the prevalence of crime or the association between at least one risk factor and crime.

Studies could be reported in English or on Portuguese. Published and unpublished studies were eligible. We searched the following electronic databases for eligible studies in May 2012: Social Science Citation Index, PubMed, and Lilacs. Lilacs is the largest database of scientific literature in Latin America and the Caribbean. The following keywords were used (and they were also translated and entered into Lilacs separately in Portuguese): [ODD OR Oppositional Defiant Disorder OR CD OR Conduct disorder OR Conduct problems OR Externalizing OR Crime OR Violence OR Delinquency OR Illicit Drug* OR Substance use OR Substance abuse] AND [Cohort OR Longitudinal OR Prospective OR Cross sectional OR Case control OR Population] AND [Prevalence OR Rate OR Incidence OR Frequency OR Risk factor] AND Brazil. To the list of references retrieved from electronic searches, we also added documents from our own archives, internet searches, recommendations from Brazilian researchers, and articles in references lists of retrieved reports. A flow chart of the search and screening process is shown in Fig. 1.

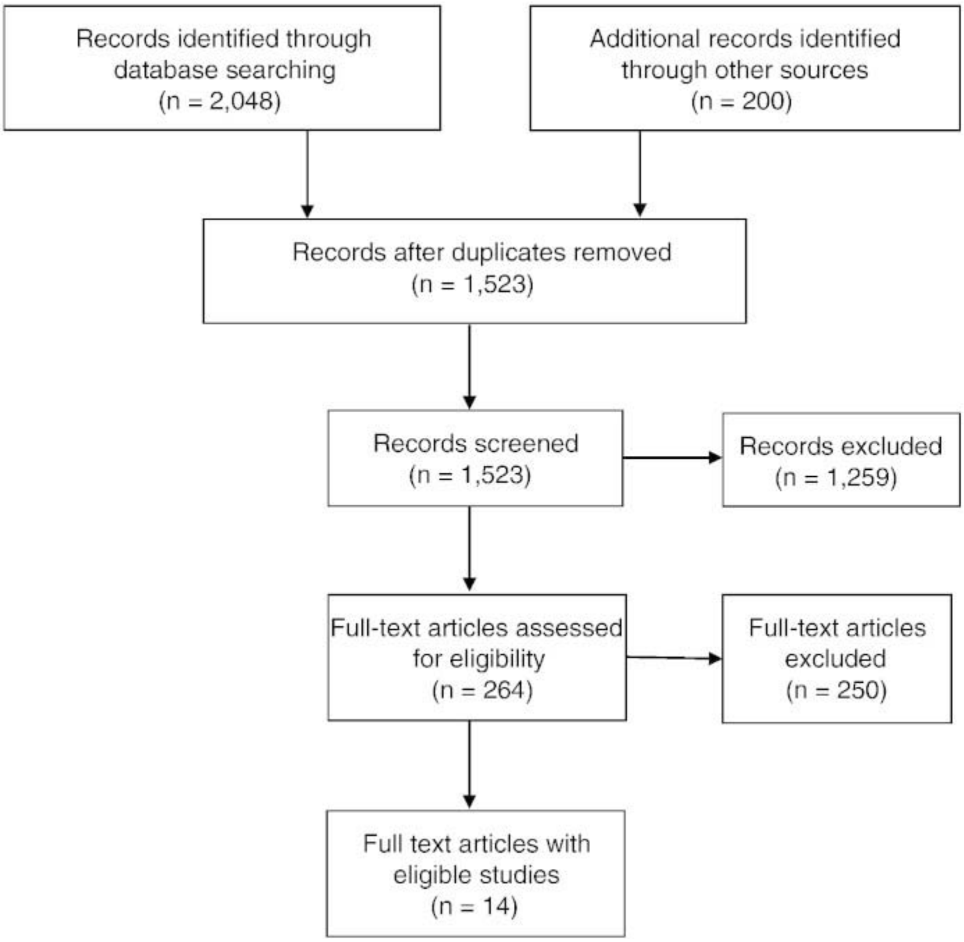

Fig. 1 Flowchart of screening process to identify eligible studies for the review.

Two researchers independently assessed the full texts for eligibility. On first assessment there was 88% agreement on the studies that should be included and excluded; remaining studies were re-examined and discussed to agree on inclusion or exclusion.

RESULTS

Homicide trends and cross-national comparisons

LMIC in Africa and the Americas have the highest homicide rates in the world and bear the greatest burden of violence in terms of Disability Adjusted Life Years (see Table 1). In 2008, the average homicide rate worldwide was 7.9 per 100,000 people. The rate of 29.6 in Brazil was the 13th highest rate out of all 193 WHO member states. Between 1980 and 2010, there were a total of 1.09 million homicides in Brazil. In 2004, an estimated 2.5 million healthy life years were lost due to violence (2,488,000 DALYs) in Brazil. This was the highest burden of life years lost to violence in any WHO member state in that year.

Table 1: Worldwide homicide rates in 2008 and Disability Adjusted Life Years (DALY) caused by violence in 2004.

		Homicides (per 100,000)	DALY (thousands)
World		7.9	21,701,428
High income countries		2.7	886,297
Low–middle income countries	Africa	20.1	6,333,294
	The Americas	24.1	6,024,751
	Eastern Mediterranean	3.9	1,346,008
	Europe	9.8	1,826,177
	South-East Asia	5.8	3,444,677
	Western Pacific	2.8	1,775,947
Guatemala (1)		61.3	175
El Salvador (2)		54.9	113
Côte d'Ivoire (3)		52.5	324
Brazil (13)		29.6	2488
South Africa (17)		27.3	1006
Russian Federation (39)		18.4	1276
Mexico (43)		17.9	415
Indonesia (76)		8.3	611
United States of America (93)		6.2	599
India (102)		4.4	1866
Pakistan (108)		3.4	174
Turkey (113)		2.8	67
China (142)		1.6	993
Iran (150)		1.4	89
France (152)		1.4	17
United Kingdom (162)		1.1	33
Italy (163)		1.1	15
Germany (178)		0.8	19
Egypt (185)		0.6	27
Japan (189)		0.5	21

Two researchers independently assessed the full texts for eligibility. On first assessment there was 88% agreement on the studies that should be included and excluded; remaining studies were re-examined and discussed to agree on inclusion or exclusion.

Fig. 2 shows the enormous escalation in recorded homicide rates in Brazil over the last three decades. Homicides per 100,000 increased from 11.7 in 1980 to a peak of 28.9 in 2003, followed by a slight decline thereafter to 26.2 in 2010. There were 50,000 homicides in Brazil in 2010. The increase in homicide rates has occurred almost entirely among young men (Waiselfisz, 2010). Between 1980 and 2010, the rate of youth (under 20 years old) homicide increased by 346% (Waiselfisz, 2012).

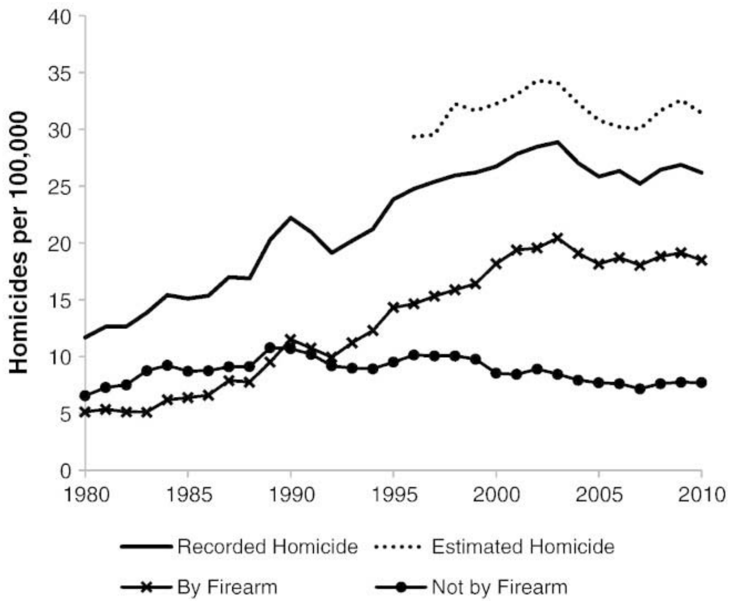

Fig. 2: Homicide trends in Brazil 1980–2010.

Modeled data, accounting for deaths by external causes with unknown intent, show that actual homicide rates in Brazil may be significantly higher than recorded figures (see years 1996–2010 in Fig. 2). The estimated homicide rate in 2010 was 31.5 homicides per 100,000 people (compared to the recorded rate of 26.2).

Fig. 2 also shows that changes in the total homicide rate followed in lock step with changes in the rate of homicide caused by firearms. Notably, after a steady increase in homicide rates during the 1990s and early 2000s there was a downturn from 2004 onwards, after disarmament legislation in 2003. In contrast, the rate of homicide not involving firearms remained relatively stable from the mid-1980s onwards.

Two studies evaluated longer-term trends in deaths by violence in Brazil. Vermelho and Jorge (1996) examined causes of death among 15–24 year olds in Rio de Janeiro and São Paulo between 1930 and 1991. From the 1930s youth mortality rates fell as infectious diseases were controlled (infectious diseases had been the leading cause of death). However, from the 1960s, youth mortality rates actually increased again, with violence becoming the leading cause of death among 15–24 year olds. Barreto et al. (2011) also showed that the proportion of all deaths caused by violence in the whole of Brazil grew steadily from 1930 to 2007, while the proportion of deaths caused by infectious diseases decreased dramatically.

In Brazil, homicide victims are most likely to be young, male, Black, and with few years of education, as shown in the following statistics. In 2009, the male homicide rate (51.1 per 100,000) was over 10 times the female rate (4.3 per 100,000). The homicide rate was highest for black people (34.6), then indigenous (32.5), white (16.3) and people of Asian descent (6.8). By age group, rates were: 24.0 (10–19 years); 62.5 (20–29 years); 40.3 (30–39 years); 25.5 (40–49 years); 14.3 (50–59 years); and 9.2 (60 + years). Homicide rates by number of school years completed were: 30.3 (1–3 years) 36.1 (4–7 years), 13.1 (8–11 years), and 7.8 (12 + years).

A series of careful examinations of the geography of Brazilian homicides shows that there are large regional variations in rates and trends (Waiselfisz, 2007, 2008, 2010). Until 1999, the highest rates of homicide were concentrated in state capitals and metropolitan regions; however, thereafter, rates stabilized in those areas (mainly in São Paulo) in contrast to a persistent upturn in interior and countryside regions.

In addition to homicides by civilians, there were 1829 persons killed by military or civil police in 17 states with available data[2] in 2010 (Fórum Brasileiro de Segurança Pública, 2011). This is equivalent to a rate of 1.6 persons killed by the police per 100,000 people in those states, higher than the homicide rate in England and Wales (1.2 per 100,000 in 2010–11, Smith, Osborne, Lau & Britton, 2012).

Non-lethal criminal victimization

Non-lethal violence recorded in the health system

Fig. 3 shows an overall decline in rates of admission to public hospitals for assault (not resulting in death) between 1984 and 2010.[3] Although one must consider that admissions to private hospitals are not included (equal to 30% of all hospital admissions in Brazil in 2008), the downward trend in public hospital admissions for violence since the late 1990s is not explained by increases in private hospital admissions. In fact, the proportion of all people admitted to hospital who were admitted to private hospitals was 39% in 1998, 37% in 2003 and 30% in 2008.[4]

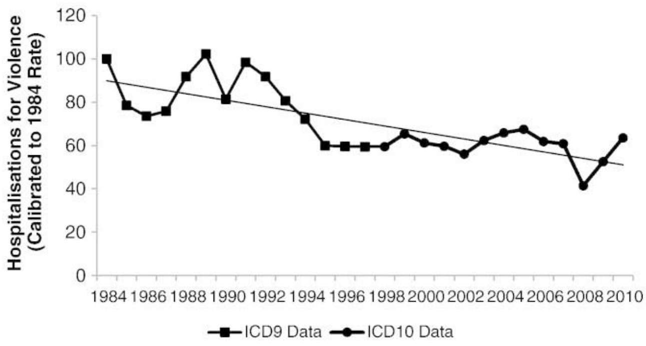

Fig. 3: Trends in hospitalizations for non-lethal violence 1984–2010.

Gawryszewski and Rodrigues (2006, p. 210) found that men were five times more likely to be hospitalized because of assault than women and the highest rate of admission for assault was among 15–34 year olds, in 2003. Assaults were the only type of injury cause for which the number of fatalities was greater than the number of nonfatal victims, which Gawryszewski and Rodrigues suggested was because of the high proportion of firearms used in assaults (71% in all homicides and 30% in non-fatal assaults).

Two studies examined injuries caused by violence in a survey of 65 hospital emergency departments between September and November 2006 (Gawryszewski et al., 2008; Mascarenhas et al., 2009). Among victims of aggression, 31% were admitted to hospital (67% were treated and released and 1% died). Thirty-six percent of victims had been injured by a stranger. An overwhelming majority of aggressors (72%) were identified as male (9.4% female, 2.3% both male and female, and 16.3% without information).

Police recorded crimes

In 2009, the rate of non-lethal crimes recorded by the police in Brazil was (per 100,000 people): 19 attempted homicides, 538 robberies, 340 assaults, 13 rapes, 29 crimes of drug possession, 38 crimes of drug trafficking, and 16 crimes of firearm possession.[5] Comparing rates of non-lethal assault (340 per 100,000) and homicide (26.9 per 100,000) in 2009, it is clear that mortality represents only "the tip of the iceberg of Brazilian violence" (de Souza & de Lima, 2006, p. 365). It is also likely that police statistics greatly underestimate true levels of crime in Brazil. In the Brazilian National Household Survey 2009 (PNAD, Instituto Brasileiro de Geografia e Estatística, 2010b), under half of crime victims reported the incident to the police: 48% for robbery, 38% for theft, and 44% for assault. Note that these reporting rates are similar to those in other countries in the International Crime Victim Survey 2004–05, in which average reporting rates were: 46% for robbery, 46% for theft of personal property, 33% for assault and threat (Dijk, Kesteren, & Smit, 2007, p. 267).

Victimization survey: Brazilian National Household Survey

The fact that many crime victims do not report crimes to the police emphasizes the importance of victimization surveys for assessing the prevalence of non-lethal crime. We review results from Brazilian victimization studies that used nationally representative samples, repeated surveys to examine time trends, or comparable data from other countries.

The largest surveys to have assessed criminal victimization in Brazil are the Brazilian National Household Surveys (PNAD, Instituto Brasileiro de Geografia e Estatística, 2010b). These surveys are conducted annually (except in census years) and cover a wide range of social and economic topics. In 1988 and 2009, several identical questions were included about crime victimization (referring to the previous 12 months), which we examine for respondents aged 10 years and above. In 2009, 7.4% of respondents reported being a victim of robbery or theft compared to 5.4% in 1988 (representing a 37% increase). In 2009, 1.6% reported being a victim of physical aggression compared to 1.0% in 1988 (60% increase). Rates of attempted robbery or theft were 5.4% in 2009 and 1.6% in 1988 (237% increase). Thus, on all three indicators of victimization there were substantial increases between 1988 and 2009.

In the 2009 PNAD survey, victims of robbery, theft, and physical aggression were more likely to be male than female, and were most likely to be young (16–24 years old) (Instituto Brasileiro de Geografia e Estatística, 2010b). Although being victim of robbery or theft was more likely among rich people (11.6% victimization rate for people with 5 + minimum wages; 4.7% for people with up to 1/4 minimum wage), physical aggression was more likely among poor people (1.0% for people with 5 + minimum wages; 2.2% for people with up to 1/4 minimum wage). Robbery and physical aggression were most likely to occur on the street, while theft was most likely to occur at home.

Victimization survey: Núcleo de Estudos da Violência

The Núcleo de Estudos da Violência (Universidade de São Paulo) surveyed 1600 people (aged over 15 years) in 10 Brazilian state capitals in 1999, and 4205 people in the same cities (and also in Fortaleza) in 2010 (Cardia, 2012). Rates of 12-month victimization in 2010 and 1999 were, respectively: 4.2% and 5.8% for physical aggression; 0.6% and 0.7% injury by firearm; 7.2% and 5.8% threatened with a gun during a robbery; 2.6% and 4.0% threatened with a knife during a robbery; 7.7% and 7.5% offered drugs; 2.1% and 3.1% threatened by police to extract money.

Victimization survey: AmericasBarometer

AmericasBarometer is one of the largest surveys of public opinion in the Americas, including national probability samples of adults in 26 countries. In 2010, 2482 voting-age adult Brazilians were included in the face-to-face survey. The core questionnaire included the following question on crime victimization "Have you been a victim of any type of crime in the past 12 months? That is, have you been a victim of robbery, burglary, assault, fraud, blackmail, extortion, violent threats or any other type of crime in the past 12 months?" Overall in the Americas, 19.3% of people responded positively to this question (Seligson & Smith, 2010). The highest rates of victimization were in Peru and Ecuador (31.1% and 29.1% respectively) and the lowest rates were in Guyana and Jamaica (9.0% and 10.1% respectively). Brazil had the 18th highest level of crime victimization (15.8%). Other countries with similar rates to Brazil were Canada (15.3%) the United States (16.4%), the Dominican Republic (16.5%) and Chile (16.7%). Brazil had the fifth highest rate of corruption (being asked to pay a bribe in the year prior to the survey). In Brazil, 23.6% of respondents said that they had been asked to pay a bribe, compared to 53.6% in Haiti (the country with the highest rate) and 4.2% in Canada (the country with the lowest rate).

Victimization survey: Latinobarómetro

Latinobarómetro is an annual public opinion survey using stratified samples of between 1000 and 1200 people in 18 different Latin American countries. In Brazil, sampling was designed to be representative of all persons aged 16 and over in surveys since 2001.[6] Each year, the survey included the following question on crime victimization: "Have you, or someone in your family, been assaulted, attacked, or been the victim of a crime in the last 12 months?" According to this survey, victimization among households in Latin America in 2001 was much more common than in Spain: 36% in Brazil, 43% in the rest of South America, 44% in Central America and Mexico, and 17% in Spain (our calculations: Latinbarómetro, 2012). Trends in criminal victimization between 2001 and 2010 were similar in Brazil to those in the rest of South and Central America (see Fig. 4). Notwithstanding year-on-year variation, which may reflect sampling error, rates of overall household victimization appear relatively stable through this period.

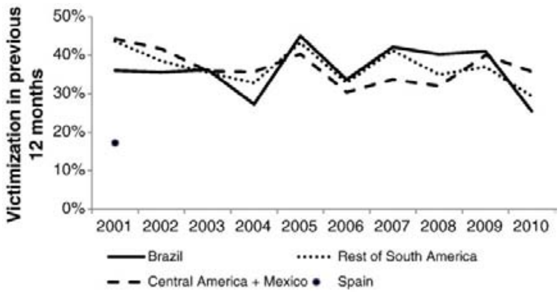

Fig. 4: Trends in non-lethal criminal victimization in Brazil and Latin America: 2001–2010.

International Crime Victim Survey

The International Crime Victims Survey (ICVS) is a program of surveys about crime victimization using standardized questionnaires designed to maximize comparability between countries. Brazil has not conducted national crime victimization surveys as part of this program, but in 2002, the standardized questionnaire was applied to samples in the cities of São Paulo, Rio de Janeiro, Recife and Vitória. Probabilistic sampling was used to select 700 participants in each city. Kahn, Besen, and Custódio (2002) compared average rates of victimization in these four Brazilian cities with average rates in 17 European and North American countries in 2000. Victimization rates in the previous 12 months were higher in Brazil than in Europe and North America for the following types of crime: theft of car (6.2% versus 1.0%), theft of motorbike (9.8% versus 0.3%) theft of bicycle (8.1% versus 3.2%), theft from car (6.4% versus 4.6%), robbery (5.5% versus 0.8%), and attempted burglary (2.2% versus 1.8%) (Kahn et al., 2002, p. 7).[7] Rates of victimization were lower in Brazil than in Europe and North America for the following crimes: theft of personal property (3.0% versus 3.9%), physical assault (2.5% versus 3.5%), burglary (1.5% versus 1.8%), and sexual crimes (1.4% versus 1.7%). Similar patterns of results are apparent comparing victimization rates in São Paulo and Rio de Janeiro (in the 2002 survey) with the main cities in the 2004–2005 International Crime Victims Survey (see Dijk et al., 2007, pp. 241–242).

Prevalence of criminal offenders in Brazil

In Sections 4.1 and 4.2, we reviewed data on the frequency of lethal and non-lethal criminal *victimization* in Brazil. In this section, we review evidence on the prevalence of criminal *offenders* in Brazil.

Number of offenders recorded by the police

The total number of offenders recorded by the police in Brazil in 2009 was 714,185 (373 offenders per 100,000 people). However, seven states contributed no data to this national statistic, and the data coverage in many other states is believed to be poor. Considering only the nine states with data classified as high quality,[8] 245,000 offenders were recorded in 2009 (989 offenders per 100,000 people).

Number of incarcerated offenders

In the last two decades, the Brazilian adult prison population grew enormously. The number of incarcerated men (per 100,000 over 18 years old) was: 129.3 in 1989, 176.3 in 1995, 275.7 in 2000, and 466.4 in 2009 (Fórum Brasileiro de Segurança Pública, 2011). The number of incarcerated women (per 100,000 over 18 years old) was: 4.5 in 1989, 6.6 in 1995, 12.0 in 2000, and 33.2 in 2009. The number of juvenile offenders (12–17 year olds detained in young offenders' institutions) increased from 4245 in 1996 to 17,703 in 2010 (equivalent to 88 per 100,000 in 2010) (Secretaria de Direitos Humanos, 2011).

Prevalence of self-reported offenders in community based studies

In a systematic review of the literature, we located 10 Brazilian studies that used self-report questionnaires to assess the prevalence of offenders in community based samples. These studies are summarized in Table 2. Seven were surveys of school children (7–19 years old), one was a household survey of adolescents (15–18 years old) and two were household surveys of adults (18–70 years old). Although the studies used different instruments and questionnaires, the results can be broadly summarized as follows. In three studies of school children, prevalence of any offending (measured using 6 or more questionnaire items) was 39% (Guadalupe, 2007), 45% (Assis, Avanci, Santos, Malaquias, & Oliveira, 2004) and 69% (Kahn et al., 1999). In four studies of school children and one study of adolescents in the community, the prevalence of involvement in fights ranged from 15.2% to 22.8% (Abramovay, 2012; Baggio, Palazzo, & Aerts, 2009; Carlini-Cotrim, Gazal-Carvalho, & Gouveia, 2000: samples A&B; da Silva et al., 2009). Prevalence rates of school children carrying firearms were: 1% (Abramovay, 2012), 2.8% (Carlini-Cotrim et al., 2000: sample B) and 4.8% (Carlini-Cotrim et al., 2000: sample A). Among adolescents in households, 9.6% reported carrying any weapon in the previous year (da Silva et al., 2009). The only study examining theft reported a 5% prevalence of stealing at school in the previous year (Abramovay, 2012). In two household surveys of adults (18–70 year olds), the prevalence of hitting a non-family member in the previous year was 5.6% and 2.5% (Orpinas, 1999: samples A and B).

Table 2: Self-report offending studies with prevalence estimates in Brazil.

tudy	Location	Sample	Number of participants (% response)	Age range	% Male	Questionnaire items	**Reference period**	**Outcome**	**Prevalence**
Abramovay (2012) See alsoAbramovay and Rua (2006)	Urban: Belém, PA; Porto Alegre, RS; Salvador, BA; São Paulo, SP; Distrito Federal	Students in random selection of classes in random selection of 113 public schools	10,069 (~ 75%)	~ 6–17	~ 45%	3 questions on: theft at school, fights (hit someone at school), carried weapons into school	1 year 1 year Lifetime	Any theft Fights Carried firearm	5% 16% 1%
Assis et al. (2004)	Urban: São Gonçalo, RJ	Students in random selection of 44 classes in 38 schools	1685 (100%)	11–19	56%	7 questions on: falsification of documents, destruction of property, bullying, fighting, weapon carrying, theft/robbery	Not reported	Any offending	45%

Baggio et al. (2009)	Urban: Porto Alegre, RS	Students in random selection of school classes	1170 (86%)	12–18	47%	Involvement in fights	Not reported	Fights	19%
Carlini-Cotrim et al. (2000) Sample A	Urban: São Paulo, SP	Students in 4 classes in random selection of 10 public schools	871 (72%)	12–18	47%	Involvement in fights (twice or more); carrying a firearm	12 months 12 months	Fights Carried firearm	15.2% 4.8%
Carlini-Cotrim et al. (2000) Sample B	Urban: São Paulo, SP	Students in 7 private schools with high monthly fees	804 (90% in participating schools: 7 out of 9)	12–18	49%	Involvement in fights (twice or more); carrying a firearm	12 months 12 months	Fights Carried firearm	20.3% 2.8%
da Silva et al. (2009)	Urban: Pelotas, RS	All adolescents in 86 households in 90 randomly selected census districts	960 (92%)	15–18	48%	Involvement in fights; carrying weapons	12 months 12 months	Fights Carried weapon	22.8% 9.6%
Guadalupe (2007)	Urban: Belo Horizonte, Contagem, Betim, Ibirité, Ribeirão das Neves, Santa Luzia, MG	Random sample of students in 65 public and private schools	3637 (N.R.)	7–18	N.R.	6 questions on: taking weapons to school, fights in school, theft in school, robbery, gang membership	Lifetime to current	Any offending	39%
Kahn et al. (1999)	Urban: São Paulo, SPP	Students in 4 participating public schools and 3 private schools	710 (67% in participating schools: 7 out of 40)	~ 13–19	53%	11 questions on delinquency in school: falsification of documents, destruction of property, fights, aggression, harassment, theft, weapon carrying	Lifetime	Any offending	69.4%
Orpinas (1999) Sample A	Urban: Salvador, BA	Adults in clustered samples of households	1384 (N.R.)	18–70	46%	3 questions on aggression against non-family member	12 months	Hit non-family member	5.6%
Orpinas (1999) Sample B	Urban: Rio de Janeiro, RJ	Adults in clustered samples of households	1114 (N.R.)	18–70	43%	3 questions on aggression against non-family member	12 months	Hit non-family member	2.5%

Drug use in national household surveys

Instead of systematically reviewing small-scale studies of drug use in Brazil, we summarize results from several nationwide surveys. The most recent national survey of adult drug use (in 2005) included 7939 respondents in 108 cities with over 200,000 inhabitants, and applied a questionnaire originally developed by the U.S. Substance Abuse and Mental Health Services Administration (Carlini et al., 2006). The prevalence of lifetime use of any drug (excluding tobacco, alcohol and drugs for medical use) among Brazilian adults was 22.8% in 2005, compared to 19.4% in a similar survey in 2001, and compared to 45.4% in the United States in 2004. The prevalence of lifetime use of marijuana in Brazil (8.8%) was slightly higher than in Colombia (5.4%), but much lower than in the United States (40.2%) and in the United Kingdom (30.8%). The prevalence of lifetime use of cocaine was 2.9% (Carlini et al., 2006), similar to the United Kingdom (3.0%), higher than in Colombia (1.6%), but well below the United States (11.2%) (Galduróz, Noto, Nappo, & Carlini, 2005). Lifetime use of crack was reported by 0.7% of Brazilians (Carlini et al., 2006). Lifetime abuse of solvents was 6.1% in Brazil, compared to 1.4% in Colombia and 9.5% in the United States (Carlini et al., 2006). Only 0.1% (7 people) responded that they had used heroin in their lifetime, compared to 1.2% in the USA and 1.5% in Colombia.

Galduróz, Noto, Nappo, and Carlini (2004) examined trends in drug use between 1987, 1989, 1993 and 2007, among 10–18 years old students in Brazil's 10 largest state capital cities (average N = 15,000 in each survey). They concluded that there were significant increases in lifetime use, frequent use and heavy use of many drugs among Brazilian youth. Lifetime use of marijuana increased from 2.8% in 1987 to 7.6% in 1997, and cocaine use increased from 0.5% to 2.0%. In another recent national survey of 761 adolescents (14 to 19 years old) 2.8% reported use of any illicit drug in the previous 12 months (Madruga et al., 2012).

In a national study of 2807 street children in Brazil in 2003, prevalence of lifetime drug use was much higher than in household and student surveys: solvents 44.4%, marijuana 40.4%, cocaine and derivatives 24.5% (Noto et al., 2004).

Risk factors for criminal offending

Characteristics of offenders

Of police-recorded offenders in Brazil in 2009, 87% were male[9]; however, other information on offender characteristics is lacking in national police records. Prison statistics provide more detailed information about characteristics of incarcerated offenders in Brazil. In 2011, 471,000 adults (aged 18 and over) were held in Brazil's prisons, 94% of whom were male (Ministerio de Justiça, 2012). Most prisoners were young: 55% were under 30 years old. Thirty seven percent of prisoners were white, 17% were black, 44% mixed race and 2% other race. Most prisoners had low educational qualifications: 63% had completed less than 10 years of education (*educação fundamental*). Of the 494,000 crimes for which prisoners were incarcerated, 15% were homicides (including theft following homicide: *latrocinio*), 27% were robberies, 18% were other types of property crimes (primarily theft), 25% drugs crimes, 4% sex crimes, 6% weapons crimes, 1% kidnappings, and 35% other crimes.

Risk factors for crime

In a systematic review of the literature, we found nine community based studies that examined individual, family or community risk factors for criminal behavior in Brazil. We summarize the results from these studies that are significant at the $p < .05$ level (unless stated otherwise). We report strength of associations between risk factors and offending in terms of odds ratios wherever possible. The odds of criminal behavior is equal to the number of offenders divided by the number of non-offenders. The odds ratio (OR) equals the odds among people who have a risk factor divided by the odds for people without the risk factor. The OR thus represents how more or less likely people with a risk factor are to commit crime compared to people without the risk factor. An OR larger than 1.0 shows an increased probability of risk whereas an OR smaller than 1.0 shows a reduced probability of risk; an OR of 2.0 or larger indicates strong prediction (Cohen, 1996). If studies did not report odds ratios, we calculated them based on 2 × 2 tables wherever possible.

Assis et al. (2004) (see Table 2) examined rates of offending according to whether or not school students (11–19 years old) had experienced maltreatment (severe physical aggression by parent/carer, psychological maltreatment by significant other, or sexual maltreatment by parents) in São Gonçalo (RJ). Among those maltreated, 58% self-reported offending compared to 30% among the control group (equivalent to a significant odds ratio of 3.2).

Avanci, Assis, Oliveira, Ferreira, and Pesce (2007) examined the association between mental health problems and delinquency in a sample of 1923 students (aged 10–19 years old) recruited in public and private schools in São Gonçalo (RJ). The association was significant in univariate analysis (no further information reported), but not significant in multivariate models that accounted for additional individual, family and school risk factors.

Caicedo, Gonçalves, González, and Victora (2010) examined early bio-social risk factors (measured between birth and age 4) for conviction for violence between ages 12–25, in a prospective birth cohort study of 5228 children born in Pelotas (RS) in 1982. Males were more likely (3.0%) than females (1.0%) to be convicted for violence at least once (OR = 3.1). For both males and females, conviction was associated with maternal black or mixed skin color (males OR = 1.8, females OR = 2.4) and lower family income, in both bivariate and multivariate models. Being in the lowest family income group carried about 10 times the risk of violent conviction compared with being in the highest income group. For males only, a higher number of younger siblings also predicted violent conviction. For females only, having a teenage mother was predictive (OR = 3.9). The following variables were not significantly predictive for either sex: maternal smoking in pregnancy, obstetric complications, low birthweight, duration of breastfeeding, mother's marital status, and number of older siblings.

Carlini-Cotrim et al. (2000) (see Table 2) investigated rates of weapon carrying and fighting among 871 12–18 year-old students in public schools and 804 students in private schools with high fees in the city of São Paulo (SP). Males were more likely than females to be involved in fights (OR = 2.9 public schools; 4.4 private schools) and to carry guns (OR = 7.2 public schools; OR = 27.9 private schools). In public schools, older students (15–18 years old) were more likely to carry guns than younger students (12–14 years old; OR = 2.1), but there was no difference in their rates of fighting. In private schools, older students were less likely to be involved in fights than younger students (OR = 0.7), but there was no significant difference in gun carrying.

In da Silva et al.'s (2009) (see Table 2) study of 960 adolescents (15–19 years old) in Pelotas (RS), males were more likely than females to fight (32.7% versus 13.7%; OR = 4.6) and to carry a weapon (15.8% versus 3.9%; OR = 3.0). Fighting and carrying a weapon were also associated with: working (OR fight = 1.6; OR weapon = 2.8), not practicing religion (OR fight = 1.6; OR weapon = 1.7), using drugs (OR fight = 3.3; OR weapon = 3.3), drinking alcohol (OR fight = 2.9; OR weapon = 3.0), and smoking tobacco (OR fight = 1.9; OR weapon = 2.5). Fighting (but not weapon carrying) was associated with mental health problems (OR = 1.5) and not currently studying (OR = 1.8). Variables not significantly associated (in bivariate tests) with either fighting or carrying weapons were: age, socioeconomic position, and not living with both parents.[10] In multivariate models, fighting was associated with male sex, use of drugs, drinking alcohol, and mental health problems. In separate multivariate models, weapon carrying was associated with male sex, low socioeconomic class, not studying, working, drug use, drinking alcohol, and mental health problems.

In Guadalupe's (2007) (see Table 2) study of 3637 school children (7–18 years old) in the Belo Horizonte metropolitan area (MG), predictors of self-reported delinquency were assessed in a multivariate logistic regression model. Delinquency was associated with male sex (OR = 3.6), lacking religious belief (OR = 1.6), lower age, lower school attachment, earlier expected age for leaving school, school friendships, lower family wealth, family or friends arrested, and victimization. Delinquency was not significantly associated with race, involvement in school activities, school discipline, physical disorder of the school area, social disorder in the school, or type of school.

In Kahn et al.'s (1999) (see Table 2) study of 710 school students (about 13–19 years old) in São Paulo (SP), boys were significantly more likely than girls to participate in each of 10 (out of 11) different types of delinquent acts. Smoking cigarettes, drinking alcohol, and using marijuana were all significantly associated with students committing more delinquent acts.

In Orpinas' (1999) (see Table 2, Sample A) household survey of 1384 adults in Salvador (BA), men were significantly more likely than women to have hit a non-family member (OR = 1.9). There was no significant difference between men and women among 1114 adults in Rio de Janeiro (Orpinas, 1999; see Table 2, Sample B).

Pacheco (2004) conducted a case–control study of familial risk factors for juvenile delinquency in the city of Porto Alegre (RS). She compared characteristics of 148 male adolescents in juvenile justice institutions with 163 controls recruited from nine schools in the same city. Offenders were less likely than non-offenders to live with their mother (71% versus 87%; OR = 0.4) or father (37% versus 57%; OR = 0.4). Offenders had more siblings on average (mean = 4.3) than non-offenders (mean = 2.6). Offenders were more likely to have used drugs (87% versus 31%, OR = 14.9). They were also more likely to report that family members used alcohol (63% versus 46%; OR = 2.0) and drugs (42% versus 15%; OR = 4.1). Offenders were also more likely to report that family members were involved in crime (55% versus 22%; OR = 4.3) and had relationships characterized by conflict (45% versus 29%; OR = 2.0). Rates of authoritarian, authoritative, indulgent and negligent parenting were also compared between offenders and non-offenders, but there were no significant differences on these variables.

DISCUSSION

Summary of findings

Key findings from this review on crime and violence in Brazil are as follows. There has been an enormous rise in homicides in Brazil over the last three decades. Brazil has the highest years of life lost to violence out of any WHO member state. Victims of homicide in Brazil are most likely to be young, male, and black. Time trends in non-lethal criminal victimization are complex: hospital admissions data suggest a decline in serious non-lethal assault over the last two decades, but reported physical aggression increased between 1988 and 2009, as did robbery and theft. Brazil appears to have similar levels of overall criminal victimization as several other Latin American and North American countries, but higher rates than Spain. The number of incarcerated juveniles and adults in Brazil has grown substantially in the last two decades. However, Brazilian criminal justice data do not provide for a detailed analysis of the flow of offenders through the system. Self-reported offending studies are in their infancy in Brazil, but indicate quite high levels of offending among school students. National surveys suggest lower rates of drug use in Brazil compared to other countries such as the United States, but there is evidence of significant increases in drug use among Brazilian youth in recent years. Individual and family-level risk factors for crime identified in Brazil are similar to those in high-income countries.

Explaining homicide trends in Brazil

Homicide rates in Brazil are historically high: 26.2 per 100,000 people in 2010, compared to an estimated average of 19 per 100,000 in Europe the 16th century (Eisner, 2003), and 7.9 worldwide in 2008. The number of homicides in Brazil between 1997 and 2007 were more than the number of deaths in numerous recent wars and civil wars in other countries (Waiselfisz, 2010, p. 145).

Many possible causes of the high homicide rate in Brazil have been considered in the literature. Imbusch, Misse, and Carrión (2011) discuss the historical context in Latin America, including the cultures of the Mayas, Incas and Aztecs, colonization by the Portuguese and Spanish, slavery, military dictatorships, and transitions to democracy in the context of economic instability in the late 20th century. They suggest that the increase in homicide rates in Brazil since democratization in the 1980s was caused by a combination of increased inequality, disorganized urbanization, availability of firearms, weak social institutions, and drug trafficking, together with cultural characteristics and a democracy that guarantees political but not social rights. Briceno-Leon, Villaveces, and Concha-Eastman (2008) also emphasize the significance of increases in inequality in many Latin America countries during the 1980s, as well as rises in youth unemployment, increasing consumer aspirations, and loss of traditional mechanisms of social control — particularly within the family and religious institutions. Reichenheim et al. (2011) additionally cite issues of land conflicts, turf wars between gangs, police violence, and an unprecedented growth in the youth population following the baby boom in the 1960s (see also Peres et al., 2011).

Probably the most comprehensive empirical analysis of homicide trends in Brazil was conducted byCerqueira (2010). He developed seven national indicators of socioeconomic changes between 1980 and 2007 and related them to homicide trends through those years. The seven indicators were: national income, inequality levels (Gini index), the proportion of young males (15–24 years old) in the population, firearm availability, use of illegal drugs, police numbers, and rates of incarceration. Changes in these variables explained about two thirds of the variation in homicide rates between 1980 and 2007. The most important factors explaining homicide increases in the 1980s were the growth in inequality, the increased availability of weapons, and the rise in drug use. During the 1990s, in which incomes generally rose in Brazil, increases in homicide rates were not explained by socioeconomic factors, but rather by the increased proportion of young men in the population (many of whom were unemployed) and the proliferation of firearms (coinciding with a massive growth in the private security industry). Between 2001 and 2007, homicide rates in Brazil declined in line with reductions in inequality, increases in income, a smaller proportion of young-males in the population, and increases in incarceration rates.

In addition, in 2003, national legislation in Brazil criminalized ownership of unregistered guns and carrying of guns on the street, increased prison time for violations of firearm laws, and further restricted the importation of firearms. The downturn in homicide rates after 2003 provoked some optimism about the effects of this legislation (Cerqueira, 2010; de Souza, Macinko, Alencar, Malta, & Neto, 2007). However, the overall reduction in firearm mortality in Brazil between 2003 and 2004 mainly reflected a very sharp drop in homicides in São Paulo state, which accounts for about 25% of national firearm deaths (Goertzel & Kahn, 2009). In other states, rates of firearm death actually increased from 2003 to 2004, leading Goertzel and Kahn (2009, p. 405) to suggest that "The most important factor does not seem to be the passing of national [disarmament] legislation but the vigor with which the legislation is enforced at the state level".

Patterns of non-lethal crime and violence

According to two large cross-national surveys, overall levels of criminal victimization in Brazil are similar to other countries in the Americas. Thus, the characterization of the United States as having a homicide problem not a crime problem (Zimring & Hawkins, 1999) might also apply Brazil — the important difference being that homicide levels in Brazil are even higher than in the United States (see Table 1). However, specific types of non-lethal crime (e.g., vehicle theft and robbery) may be more common in Brazil than elsewhere, and some types of crime may be less common (e.g., physical assault). This was suggested by one victimization study in four large Brazilian cities. However, without more detailed, national-level victimization data that are comparable with other countries, it is not clear whether Brazil's crime problem is limited to homicide or whether other types of crime are also higher than in other countries.

The rate of hospitalization for non-lethal violence in Brazil declined from the mid-1980s through 2010. One possible explanation for this trend is that, as firearm availability increased and homicide rates went up, fewer victims survived serious assaults. Consistent with this hypothesis, national survey evidence suggests that overall physical aggression increased between 1988 and 2009. More detailed survey information on trends in different types of assault (less and more serious assault) would be required to confirm whether serious *non-lethal* violence declined only because more victims died from assault.

Brazil has not participated in comparative research such as the International Self-Report Delinquency Study (Junger-Tas et al., 2010) making it hard to compare levels of self-reported offending in Brazil with other countries. However, rates of general offending by school children appear high in Brazilian studies: ranging between 39% and 69% in three surveys. The following risk factors for offending were replicated in at least two Brazilian studies in this review: male sex, cigarette use, alcohol use, drug use, mental health problems, lacking religious belief/practice, low family income, large family (many siblings), and family or friends involved in crime. All of these risk factors have been found in numerous studies in high-income countries (Ellis et al., 2009; Murray & Farrington, 2010; Rutter, Giller, & Hagell, 1998). Therefore, the evidence to date does not suggest that individual or family level risk factors are different in Brazil compared to high-income countries (unlike some community factors: Villarreal & Silva, 2006). Nonetheless, the range of risk factors that have been examined in Brazil is limited, and new larger studies encompassing other risk factors might reveal differences not identified to date. In a systematic review about the prevalence of and risk factors for childhood conduct disorder in Brazil, a similar conclusion was reached about future research needs (Murray et al., 2013).

A critical issue for research is identifying which risk factors actually cause increases in crime, as opposed to merely mark genetic transmission or other environmental risk mechanisms (Jaffee, Strait, & Odgers, 2012; Rutter, 2003). Several Brazilian studies used regression models to statistically control for confounding factors, but we found no research using other methods to investigate causal risk effects. There is a need for new research to establish which risk factors are actually causes of crime in Brazil, including studies with genetically sensitive designs (e.g., twin studies), natural experiments, propensity score matching, and analyses of within individual change over time (Jaffee et al., 2012; Murray, Farrington, & Eisner, 2009; Rutter, 2003). Risk mechanisms should also be investigated in Brazil that have not been extensively studied in high-income countries, for example effects of malnutrition. In a prospective cohort study in Mauritius, malnutrition at age three years was predictive of aggression up to age 18 independently of psychosocial adversity (Liu, Raine, Venables, & Mednick, 2004). No similar Brazilian studies were found, and future research on crime in Brazil should include such risk factors, which are more common there than in high-income countries.

LIMITATIONS

The available data in Brazil and the number of primary studies of course limited our review. Although vital statistics on homicide are perhaps a reasonably trustworthy source of information, there is no doubt that Brazilian police data are not very reliable or complete. Additionally, the fact that Brazil has not participated in major international programs of research on victimization or self-report delinquency means that conclusive evidence is lacking on how rates of non-lethal crime and violence compare between Brazil and other countries. Within the studies that we did assess, heterogeneous samples and measures meant that we could not conduct a meta-analysis of their results. Existing studies focused almost exclusively on psychosocial risk factors, and we were unable to consider biological mechanisms that may interact with environmental factors to cause crime and violence in Brazil.

FUTURE RESEARCH NEEDS

A key conclusion of this review is that there is great need for more systematic data collection on crime and violence in

Brazil. In particular, police recording of offenses and offenders needs to be conducted systematically across the country, and records compiled nationally to monitor numbers of officially recorded crimes and offenders, and characteristics of offenders in Brazil. Progress is being made to monitor injuries presented at Brazilian public hospital emergency departments (Malta et al., 2012). If all hospitals participated in such a system, this would provide invaluable additional information on violence in Brazil, and the resulting data could be used in collaboration with police as part of violence prevention programs (Shepherd, 2007).

There is also an urgent need to mount regular national victimization surveys in Brazil to provide reliable estimates of crime frequency and time trends that can be compared with official statistics and with other countries. In 2010, Brazil conducted its first national victimization survey using the standardized instrument from the International Crime Victimization Survey (results still unavailable). Given that reducing violence is one of the main challenges facing Brazil today, it is imperative to continue collecting this basic information to monitor progress made. Improved victimization data should also be supplemented by large-scale research on self-reported delinquency, ideally as part of the International Self-Reported Delinquency Studies. Longitudinal studies should be conducted to examine risk factors for crime from childhood onwards. Large-scale birth cohort studies focusing on public health outcomes exist in several LMIC, including several in Brazil (Batty, Alves, Correia, & Lawlor, 2007). Although public health problems have been and continue to be major challenges, the enormous costs of crime and violence also necessitate investment in longitudinal research on these topics in Brazil and other LMIC.

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Footnotes

[1]Homicide and DALY data from the World Health Organization were downloaded fromhttp://www.who.int/topics/global_burden_of_disease/en/ on 9 March 2012 and might include updated information compared to the report Global Burden of Disease 2004 Update (World Health Organization, 2008).

[2]Either civil or military or both types of police data available in Acre, Amazonas, Bahia, Distrito Federal, Espírito Santo, Goiás, Mato Grosso, Mato Grosso do Sul, Paraíba, Piauí, Rio de Janeiro, Rio Grande do Norte, Rondônia, Santa Catarina, São Paulo, Sergipe, and Tocantins.

[3]Because coding changed from ICD9 to ICD10 in 1998, data prior to 1998 are standardized to the 1997 rate. Data after 1998 are standardized to the 1998 rate.

[4]Also, the proportion of the population with private health insurance was 25% in 1998, 25% in 2003 and 26% in 2008 (Instituto Brasileiro de Geografia e Estatística, 2010a).

[5]In states classified as having the best quality police data rates were slightly higher: 21 attempted homicides, 567 robberies, 421 assaults, 16 rapes, 46 crimes of drug possession, 48 crimes of drug trafficking, and 20 crimes of firearm possession. These states include Distrito Federal, Goiás, Maranhão, Mato Grosso, Mato Grosso do Sul, Paraíba, Piauí, Rio Grande do Sul, Rondônia, Roraima, Santa Catarina, São Paulo, Sergipe, Tocantins, with total population of 90.8 million. Ceara and Paraná were excluded because they returned too little information on specific crime types.

[6]We do not examine data from previous years which had different sampling frames: between 31 and 33% of the national population in 1995–1997 and 11.6% of urban residents in 1998–2000.

[7]For vehicle related crime (theft of car, theft of motorbike, theft of bike, theft from car) results pertain only to respondents who owned relevant vehicles.

[8]Distrito Federal, Goiás, Mato Grosso, Mato Gross do Sul, Paraíba, Piauí, Rondônia, Roraima, Sergipe (total population = 24.8 million).

[9]Among 93% of cases for whom sex was recorded.

[10]In separate analyses of the same study, Horta, Horta, Pinheiro, and Krindges (2010) showed that living with *neither*biological parent was associated with increased risk of weapon carrying.

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CHAPTER 13

THE VERDICT IS IN: THE IMPACT OF CRIME ON PUBLIC TRUST IN CENTRAL AMERICAN JUSTICE SYSTEMS

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ABSTRACT

Over the past two decades, the countries of Central America have confronted soaring crime rates. Justice systems of dubious quality provide thin shields against this crime crisis, despite substantial international and domestic investment in justice reform. Indeed, there is growing concern that crime will undermine justice reform efforts. Scholars and practitioners have pointed out that public frustration with crime, coupled with dissatisfaction with justice institutions, can lead citizens to reject reform efforts. Still, the micro-level relationships between crime and public support of the justice system have been understudied. Using public opinion data from the Latin American Public Opinion Project (LAPOP), this study aims to add to the literature by examining the effects of victimization and fear of crime on public trust in the justice system. The results indicate that crime can erode public support for the justice system, but the mechanics of this relationship vary according to national context.

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INTRODUCTION

In the early 1990s, democracy advocates were optimistic when appraising political developments in Central America. After decades of civil war, insurgencies, and dictatorship, countries turned to peace accords and new constitutions to lay the foundations for democratic governance. Indeed, Costa Rica was no longer the region's exception, as its neighbors also began to settle disputes through the ballot box instead of the battlefield. Given the intensity of political violence in prior decades, Guatemala, El Salvador, Nicaragua, Panama, and Honduras established competitive elections with relative ease. Many observers hoped that these elections would be the foundation for a new era of political development in the region. More than a decade has passed since the last of the peace accords ended the political violence. Democratization has faced difficult challenges, but at the very least free and fair elections have become the norm. Still, the enthusiasm of the

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1990s has waned considerably. Democratic institutions and procedures prevail, but these fixtures are hollow, or devoid of democratic principles (O'Donnell 1998; Smith and Ziegler 2009). Diamond (1999) refers to such countries as "illiberal democracies," as democratic institutions mask undemocratic practices. Perhaps the most glaring example of the hollowness of several Central American democracies is the weakness of the rule of law (Stotsky and Nino 1993; Alvarez 1996; Holston and Caldeira 1998; Prillaman 2000; Ungar 2002). Scholars, practitioners, politicians, and the public have noted the problems with the rule of law, bemoaning the poor state of justice institutions, the inability to curb abuses of power, as well as the uneven application of the law across the citizenry. Indeed, O'Donnell (1998) coined a new phrase, "the unrule of law," to describe the poor state of justice in the region. Given the centrality of the rule of law to both democracy and economic development, the 1990s and the first decade of the new century were marked by efforts to reform this status quo (Carothers 2006; Correa 1999). Domestic governments and the international community poured substantial amounts of money into justice reform; however, the results of these endeavors are mixed (Hammergren 2007; Finkel 2008). Escalating crime rates have further hampered reform efforts, as in many cases crime has replaced civil war as the key detriment to citizens' security (Seligson 2005; Córdova, Cruz, and Seligson 2007). Not only have crime rates risen, as measured by national homicide rates, but under new democratic regimes crimes feature more prominently in media with less fear of censorship (Seligson and Azpuru 2001; Pérez 2003). Consequently, as justice institutions strive to polish their tarnished images through reforms, the crime epidemic has led many citizens to dismiss them as hopelessly ineffective, corrupt, and unfair (Cruz 2000, 2003; Pérez 2003). Justice institu- tions of questionable legitimacy find themselves in quicksand as their attempts to pull themselves out of their authoritarian legacies are mired by their perceived inability to address the growing crime wave. Even Costa Rica has not escaped unscathed, as recent years have witnessed a precipitous decline in public trust in the justice system (Walker 2009). Will the current crime crisis jeopardize reforms? This article answers this question from the perspective of citizens, assessing the impact of crime on public support for the justice system. To this end, this paper examines public support for the justice system as a whole, as well as two of its primary institutions, the courts and the police. A third institution of increasing prominence is also included – the human rights ombudsmen. This analysis of public attitudes towards the justice system as a whole, as well as its separate institutions, aims to capture the varied nature of the justice system, as the term "justice system" is a broad umbrella for many diverse components. Justice institutions include a wide array of actors involved in various stages of the justice process, including inter alia: police officers, detectives, defense lawyers, prosecutors, judges, legal aides, and judicial councils.1 The courts and the police are the institutions that feature most prominently, but they are also joined by less visible institutions such as human rights ombudsmen. Thus, this analysis assesses public attitudes towards several important actors at diverse stages of the justice system. This focus on public support is unique in the literature on Latin American justice systems. Many studies expertly evaluate the quality of justice systems by performance outcomes, such as case resolution rates and rulings against incumbent governments. Such judgments are undoubtedly valuable, as they can identify the strengths and weaknesses of institutional performance. For example, the Justice Studies Center of the Americas (CEJA-JSCA) the World Bank, United Nations, and Freedom House organization compile indicators of justice system performance, providing valuable tools for public policy. This article recognizes the importance of such measures, but seeks to complement them with citizens' evaluations. The assessments of the international community, Central American political elites, and scholars have been well-documented, yet public evaluations of the justice system are understudied. It is unlikely that the average citizen would be aware of the exact percentage change in the judicial budget, or be able to quote the case resolution rate of a given year. Still, citizens do have reactions to the perceived efficiency and fairness of the justice system, either from their own personal experiences, second-hand accounts of the experiences of others, or impressions from the media. Recent work underscores the importance of supplementing institutional measures of performance with public evaluations. For example, Hammergren (2007) notes a disjuncture between reforms and public demand, pointing out that citizens prioritize outcomes such as lowering crime and improving the quality of judicial services, while reform efforts tend to target different components of the judicial process like due process (DeShazo and Vargas 2006: 11). The United States Agency for International Development (USAID) echoes this concern, cautioning that: Difficult economic conditions and increasing crime are diminishing the security of person and property that the rule of law is intended to protect and are contributing to dissatisfaction with reforms that seek to safeguard civil liberties, protect political rights, and ensure due process (USAID 2002: 10). With such statements, policy makers caution that reforms might not translate into greater public support for the justice system, given current crime conditions. Easton's (1965, 1975) seminal work provides an important theoretical backdrop for understanding how crime has the potential to jeopardize justice reform. Easton (1975) differentiates between diffuse support (a durable, generalized attachment to political objects) and specific support (support for particular policy outcomes). According to Easton, diffuse support is an evaluation of "what an object is or represents [...] not of what it does," comprising: a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed. [...] outputs and beneficial performance may rise and fall while this support, in the form of a generalized attachment, continues (1975: 444). Thus, if reform efforts succeed in bolstering generalized trust in the justice system, this reservoir of goodwill can insulate the justice system from more short-term dissatisfaction with specific outputs and/or performance, such as an inability to curb crime. Still, Easton does caution that if discontent with specific outputs continues over a long period of time, "it may gradually erode even the strongest underlying bonds of attachment" (1975: 445). While Easton (1975) argues that generalized trust is separate from support for specific policies and outcomes, there is reason to suspect that in newer regimes this is not the case. Newer systems have not had enough time to build up a sufficient amount of diffuse support to comprise a reservoir of goodwill. In these cases, citizens' general support of the political system and its components can be quite malleable, shaped by evaluations of specific policies –

particularly salient policies such as public security. As Costa Rica is the only Central American democracy with longevity, there is reason to suspect that in the remaining countries, diffuse support for the justice system will become the latest fatality of the growing crime wave. Therefore, while diffuse support is more durable, it is not necessarily immune to short-term pressures such as those created by the current crime crisis in Central America. Particularly in newer regimes without a deep well of good will, poor performance in highly salient areas can potentially chip away at public support for the justice system. This is troubling given the importance of the public in conferring legitimacy on the justice system. Scholars have long noted that the courts find themselves particularly vulnerable, as they are "uncommonly dependent upon the goodwill of their constituents for both support and compliance" (Gibson, Caldeira, and Baird 1998). Lacking the power of the purse or sword, the judiciary relies upon a deep reservoir of goodwill for its decisions to be respected (Caldeira 1986). Legitimacy is also crucial for other components of the justice system. For example, if public trust in the police is low, citizens will hesitate to turn to the law to solve problems, registering reluctance to report crime and cooperate with police investigations. In many cases the justice system cannot act until a crime is reported. Typically police officers are the first officials to respond to reported crimes, but in Central America citizens can also turn to other justice institutions to initiate legal proceedings, such as human rights ombudsmen. The justice system includes many potential actors, but the power of these actors is constrained by public legitimacy. If the public does not trust these institutions, it is unlikely that they will be transformed into pillars for the rule of law. To determine the impact of crime on diffuse support for the justice system and its key institutions, this analysis relies upon public opinion data gathered through the Latin American Public Opinion Project (LAPOP) in 2008. For more than two decades, LAPOP has gauged public attitudes towards local and national government, support for democracy, experiences and perceptions of crime and corruption, voting behavior, and civil society participation, among other things. Consequently, LAPOP's data are particularly valuable for the purposes of this study, using identical questions to measure public trust in the justice system across the nations of Central America, throughout the process of democratic consolidation.

This article proceeds in four sections. The first section provides a theoretical overview of the relationship between specific outcomes (e.g., crime control policy) and diffuse attitudes towards the justice system. The second section points to the importance of examining the linkages between specific outcomes and diffuse support in different national settings. To contextualize public attitudes, this section examines the distinct national settings of the justice systems of Central America, which vary in terms of their overall quality, efforts to reform, and the extent to which they are challenged by crime. The third section relies upon survey data to analyze the relationship between crime and support for the justice system, noting whether this individual-level relationship varies according to national context. This empirical analysis examines public trust in the justice system more broadly, as well as levels of confidence in three key institutions: the courts, the police, and human rights ombudsmen. The paper concludes with a discussion of the empirical findings and their implications.

The Public and the Justice System Building upon Easton's (1975) distinction between diffuse and specific support, scholars of industrialized democracies have examined the linkage between public support for specific justice outputs (such as harsh sentences for convicted criminals) and diffuse support for the justice system. Much of this research has focused narrowly on the courts, particularly in the United States. For example, Caldeira and Gibson (1992) examine the relationship between specific outputs and diffuse support for the US Supreme Court, and conclude that specific outputs have little impact on diffuse support for the institution as a whole. Still, these authors do caution later that "prolonged dissatisfaction would erode levels of diffuse support" (Gibson, Caldeira, and Baird 1998: 351). Additional research has noted a reciprocal relationship between support for specific policy areas and diffuse support for justice institutions more generally (Mondak 1992; Mondak and Smithey 1997). Gibson, Caldeira, and Baird (1998) extend the study of specific and diffuse support cross-nationally, examining diffuse support for high courts in 17 European countries and the United States. The authors find that the relationship between specific outputs and generalized support varies considerably according to national context. For example, in Russia there was no relationship between these two concepts, yet in Greece there was a strong, significant connection. Such findings underscore the need to examine the linkage between specific and diffuse support in different national contexts. For instance, it is likely that the institutions of older democracies have had sufficient time to establish their legitimacy, so that even when citizens dislike a particular out- come, they do not penalize the institution as a whole with negative evaluations. It is not clear that this same relationship will exist in newer democracies that have not had the opportunity to establish long track records of satisfactory performance. With this incomplete track record, specific outputs could carry greater immediate consequences for diffuse support. In the context of Central America, public security has emerged as one of the most salient specific outputs of the justice system. When the 2008 LAPOP poll asked respondents to identify the most pressing problem facing their countries, crime ranked first in Guatemala, Honduras, Costa Rica, and Panama. In El Salvador citizens ranked crime second (behind economic problems), while in Nicaragua crime placed a distant sixth.3 Increasingly, scholars have scrutinized the impact of crime on public attitudes and political behavior. In a study of Guatemala, Seligson and Azpuru (2001) find that victims of crime register significantly lower levels of support for political institutions, less interpersonal trust, and a tendency to prefer radical change (Seligson and Azpuru 2001). Cruz (2000) documents a similar trend in El Salvador, finding that both fear of crime and personal victimization reduce public confidence in the judicial system's ability to punish criminals. Still, Cruz's later work indicates that the political consequences of crime are not uniform. In an analysis of post-conflict Central American democracies, Cruz (2003) finds that crime had an impact on satisfaction with democracy in Guatemala and El Salvador, but not Nicaragua. This finding underscores the importance of embedding individual-level analyses into the appropriate national contexts.

Measuring the Impact of Crime To capture the different ways crime might sway trust in the justice system, this article focuses on actual experiences with crime as well as public perceptions. To this end, this analysis contains items measuring personal victimization, as well as respondents' perceptions of crime in their neighborhoods and in the country as a whole. Finally, it also includes a measure gauging perceptions of crime control performance. To measure personal victimization, this paper relies upon the following survey item: "Were you the victim of a type of crime in the past twelve months?" Respondents were coded as (1) yes and (0) no. This measure tests the following hypothesis:

H1: Victims will register less support for the justice system and its key institutions than non-victims.

While personal victimization is obviously an important component to examine, so is fear of crime. Fear of crime is somewhat related to victimization and objective crime rates, but is also heavily influenced by things such as socioeconomic status, trust in law enforcement, media exposure, and economic and political insecurities (Bautista 2008; Dammert and Malone 2006; Pain 2000; Walklate 2001). Fear of crime, especially in terms of personal vulnerability to violence, tends to be greater than actual risk assessment would justify (Bailey 2009). This logic may explain the high levels of fear of crime in Costa Rica despite its comparatively lower crime rate (Cruz 2008). Several scholars note that fear of crime can reduce support for democracy; therefore it is reasonable to expect that this variable would influence support for institutions so closely tied with the prosecution of crime (Ortega Hegg, Castillo Venerio, and Seligson 2007; Pérez and Seligson 2007). This analysis includes two measures of fear of crime. The first indicator asks respondents to estimate the likelihood of their own victimization by two common types of crime: "Speaking of the neighborhood in which you live and thinking about the possibility of being the victim of an assault or robbery, do you feel (1) very safe, (2) somewhat safe, (3) somewhat unsafe, or (4) very unsafe?" This measure is a cognitive one, tapping into respondents' personal assessments of future victimization in their immediate environment. The second indicator captures respondents' emotive reaction to the problem of crime in the country: "Now speaking of the country as a whole, how much do you think that the level of crime we have currently represents a threat to our well-being in the future?" Responses included: (1) not at all; (2) very little; (3) somewhat; (4) a great deal. This latter question focuses on the national context, and gauges respondents' worry about crime in general terms, not the chances of their own personal victimization. To test the relationship between fear of crime and trust in the justice system, this paper relies upon the following two hypotheses:

H2: As fear of crime in the neighborhood increases, support for the justice system and its key institutions decreases.

H3: As fear of crime in the country increases, support for the justice system and its key institutions decreases.

In addition to examining respondents' personal experiences with crime and their perceptions, it is also imperative to include an indicator of institutional performance. It could be that victimization and fear of crime are not enough to affect respondents' trust in the justice system. Rather, one must take into account whether respondents will penalize the justice system for perceived failures to deal with the problem of crime decisively, instead of blaming some other institution or even the underlying causes of crime (e.g., poverty). Indeed, Bautista (2008) argues that security is an inseparable combination of facts – facts that include not just the act of delinquency itself, but also institutional responses to delinquency and perceptions of institutional capability. To address the issue of institutional performance in the area of public security, LAPOP included two questions: "If you were the victim of a robbery or assault, how much would you trust the judicial system to punish the guilty party? (1) not at all; (2) very little; (3) somewhat; (4) very much." This question was then repeated for the police.4 H4: As specific support for justice system performance increases, diffuse support for the justice system and its key institutions will also increase.

Accounting for the Influence of the Media

To understand how these varied measures of crime can affect diffuse support, it is imperative to take into account the influence of the media. Indeed, in Gibson, Caldeira, and Baird's (1998) seminal work, the authors note that citizens who are more politically aware are more likely to perceive the justice system as neutral and objective, and register higher levels of support. Gibson, Caldiera, and Baird (1998) argue that politically aware citizens are more likely to be exposed to what they call "legitimizing symbols." According to these authors, the judiciary in particular has great discretion in how much and what type of its proceedings are made public, and thus can portray itself as legitimate and impartial – an apolitical fixture above the political squabbling of so many other institutions. Thus, more politically attentive citizens tend to be more exposed to these selective "legitimizing images" of the court in the media, increasing their support for the judiciary. While the literature links political awareness to higher levels of support for the justice system, there is reason to suspect that this relationship will unfold differently in the context of Central America. In place of the legitimizing symbols typically found in industrialized democracies, in many Central American countries the media often portray the justice system and its key institutions as inefficient and corrupt. Such delegitimizing images are frequently juxtaposed with sensationalist coverage of crime. In an analysis of the Guatemalan media, Krause (2009) notes that the media treat murder as entertainment, taking "advantage of the morbid and play[ing] on the public's attraction to voyeurism" (Krause 2009: 10). This trend creates "a lucrative business practice that has shifted both print and broadcast media towards more violent and sensationalist news reporting" (Krause 2009: 10). Consequently, it is doubtful that the relationship between the media and diffuse support will follow the same trajectory as that identified in prior studies of Europe and the United States. Sensationalist accounts of violence mixed with images of corrupt and inefficient officials send very different signals to citizens. To measure the impact of media exposure on diffuse support for the justice system, this analysis utilizes three survey items that gauge respondents' media exposure. The first question asked, "How often do you listen to the news on the radio? (1) never; (2) rarely; (3) one or two times a week; (4) every day." This question was repeated for "watching the news on television" and "reading the news in the paper." Due to the low inter-item correlation of these questions, they cannot be combined into a single measure and are entered separately in the regression analysis. The following hypotheses test the impact of media exposure:

H5: As attentiveness to television news increases, diffuse support for the justice system and its key institutions will decrease.

H6: As attentiveness to radio news increases, diffuse support for the justice system and its key institutions will decrease.

H7: As attentiveness to the newspaper increases, diffuse support for the justice system and its key institutions will decrease.

Additional Individual

Level Factors Finally, this analysis follows the customary practice of controlling for individual-level attributes that survey researchers find typically influence people's political attitudes. Particularly in the field of psychology, scholars have noted that individual-level characteristics are strongly tied to attitudes towards crime (Pantazis 2000; Tulloch 2000; Mesch 2000; Saldívar, RamosLira, and Saltijeral 1998). Therefore, it stands to reason that these characteristics could influence attitudes towards institutions linked to crime prevention. In general, women and the elderly tend to be more concerned about crime, and therefore are theoretically more likely to penalize justice institutions for gaps in public security provision. Indeed, Walker (2008) notes that in some instances, women in Costa Rica, El Salvador, and Nicaragua are more likely to view the justice system negatively. In a different vein, in Cen- tral America respondents with higher levels of education and income are more critical of political institutions (Córdova, Cruz, and Seligson 2007), and by extension are hypothesized to have less support for the justice system as well. To test the impact of these variables, this analysis includes variables measuring gender (men = 1; women =0), age (in years), education (number of years of formal schooling) and income.5 Furthermore, due to the discrepancies of justice system performance between urban and rural areas (Dodson and Jackson 2001) as well as varying rates of violent crime (Bautista 2008), this analysis also incorporates a variable measuring the size of respondents' municipalities.6 Based upon the relationships typically found with these socioeconomic variables, the hypotheses for each are as follows:

H8: Men will be more supportive of the justice system and its key institutions than women.

H9: As age increases, support for the justice system and its key institutions will increase.

H10: As education increases, support for the justice system and its key institutions will decrease.

H11: As income increases, support for the justice system and its key institutions will decrease.

H12: As the size of respondents' municipalities increases, support for the justice system and its key institutions will decrease.

Measuring the Dependent Variables

This article examines the impact of crime on diffuse trust in the justice system as a whole, as well as in three key institutions: the courts, police, and human rights ombudsmen. In doing so, this paper aims to capture the diverse nature of the justice system. Within the justice system, the courts and the police feature most prominently, and they are the institutions with which citizens tend to have the most contact. Human rights ombudsmen feature less prominently, but they are increasingly important as they provide citizens with a venue to voice grievances on a variety of matters, including problems with obtaining justice. Indeed, in a recent study documenting complaints addressed to ombudsmen, complaints pertaining to justice delays, due process, access to justice, and crime were at the top of the list (Pegram 2008: 6-7). It is important to note that these institutional actors represent distinct stages of the justice process. For example, the police are most visible in the stage of prevention, apprehension, and investigation. The courts are naturally the cornerstone of a different stage of the justice process – detention, trial, and appeals. The human rights ombudsmen are involved at various stages of these processes, as they respond to citizens' grievances. To measure diffuse trust in the justice system and its key institutions, this paper relies upon four survey items, all of which were part of a battery of questions designed to measure institutional legitimacy. This battery of questions was preceded by the following introduction: Now we are going to use a card. This card has a scale of seven points; each one indicates a range that goes from one (that means none) through seven (much). For example, if you were to ask you how much you trusted the news on television, if you did not trust it at all you would choose the number one. If on the contrary you trusted it a lot, you would choose number seven. If your opinion was between none at all and a lot, you would select an intermediate point.

Respondents then answered a series questions, including:

- How much do you think the courts of justice in [country] guarantee a fair trial?
- How much do you trust the system of justice?
- How much do you trust the police?
- How much do you trust the Office for Human Rights Protection?

These four measures of trust were analyzed separately in order to discern the impact of crime on the justice system as a whole, as well its primary components.

The questions targeting the system of justice, police, and human rights ombudsmen clearly measure diffuse support, as they evaluate respondents' generalized attachment to these political objects. The question measuring trust in the courts is a bit different, as it asks respondents to indicate their views on the fairness of trials. LAPOP developed this wording as part of its measure of "political support/alignment," and it has been widely used in cross-national and longitudinal comparative research (Córdova, Cruz, and Seligson 2007: 43- 44). While the format of this question differs from the others, it still measures public views of the primary function of the court system. These measures of crime, media exposure, individual attributes, and diffuse support are concentrated at the individual level of measurement. However, to ascertain the impact of crime on public support of the justice system, it is important to ground these individual level factors in their respective national contexts, as these countries vary tremendously in terms of level of the crime crisis and quality of justice system. The next section provides an overview of the national trends in crime and justice in these countries.

The Importance of National Context

It is important to embed the relationship between specific and diffuse support in the appropriate national context, as this linkage can be mediated by a variety of national level factors, including the state of a country's justice institutions, extent of the crime wave, and longevity of the democratic system. For example, Diamond (1999) notes that crime can have a different impact in new democracies as opposed to older ones, arguing that in weaker, nascent states the problem of crime could be of an "entirely different order of magnitude from that in the established democracies" (Diamond 1999: 90). Crime can be far more serious particularly in new regimes emerging after civil wars in which "the country is awash with small arms and demobilized soldiers […] looking for a means to survive" (Diamond 1999: 90). This description aptly captures the democratic transitions of Guatemala, El Salvador, and Nicaragua. Bermeo cites additional reasons for the varying effects of crime, pointing out that newer democracies have had less time "to develop more effective institutions facilitating civic order," and also tend to have fewer resources at their disposal to confront disorder (1997: 19). Since they are not well-equipped to maintain order, it is easy for social unrest and violence to escalate beyond state capacity (Chinchilla 2003). These scholars highlight the importance of three factors: the longevity of the democratic regime, the level of crime, and the state of justice institutions. With the exception of Costa Rica, the Central American democracies do not vary substantially in terms of age. They do differ considerably according to the other two indicators, however. Relying upon national homicide rates, Figure 1 compares violent crime across the six countries. As a point of comparison, in 2007, the homicide rate in the United States was approximately 5.9 murders per 100,000 inhabitants, and the rates of European countries tend to hover at around one per 100,000.8 As Figure 1 illustrates, Costa Rica, Nicaragua, and Panama have comparatively low homicide rates for the region, yet levels of violence are on the rise. Also, these countries have encountered problems with less violent types of crime (Ortega Hegg, Castillo, and Seligson, 2007; Pérez and Seligson 2007). According to LAPOP respondents, rates of victimization by these less violent crimes, such as burglary and robbery without physical aggression, are comparable across the Central American nations (Cruz and Argueta 2006). In the cases of Guatemala, El Salvador, and Honduras violent crime has soared, ranking these countries among the most violent in the world. In these latter countries, much of the violent crime has been related to gang activity (UNDP 2009). The problem of crime has been compounded by the state of contemporary justice systems. With the advent of democratization, fledgling institutions have struggled to rebuild themselves while simultaneously confronting skyrocketing crime rates (Frühling, Tulchin, and Golding 2003; Lafree and Tseloni 2006). Some observers have noted that such efforts are akin to "fixing a broken army in the midst of a war" (Ellingwood 2008: 1). To be sure, substantial resources and effort have been invested to fix these broken armies.9 With the impending collapse of authoritarian governments in the mid 1980s, reformers recognized the importance of transforming authoritarian justice systems to provide strong foundations for new democratic governments (Salomón 1996; Belton 2005). In Central America, there was a pressing need to write new constitutions and legal codes and/or reform existing ones, as well as train judges, lawyers, police detectives, and other legal professionals to uphold these new features (Carothers 2006). Reform of the criminal justice system was a top priority, leading to the overhaul of the penal codes throughout the region (Chinchilla 2003; Hammergren 2007). Institutions like the courts and police required extensive updates to both their infrastructures as well as procedures, as an exclusive reliance on written proceedings created extreme backlogs and delays, and opened the door for corruption and the abuse of civil liberties. Indeed, Ungar (2002: 35) notes the region's large number of unsentenced prisoners, some of whom spend more time in pretrial detention than they would if convicted of their crimes.

To rectify such problems reformers introduced oral proceedings, replacing the inquisitorial model with adversarial or mixed models (Chinchilla 2003). Police systems also required extensive overhaul, as reformers strived to combine the modernization of police practices with demilitarization and depoliticization (Call 2003; Chinchilla 2003).

By the mid 1990s, justice reform had become part of a broader movement promoting good governance. International financial institutions aimed to foster independent and effective judiciaries that would be capable of promoting democracy, as well as protecting property rights and enforcing contracts (Finkel 2008). Despite the resources and attention justice reform has garnered from a variety of actors, the track record of reform has been mixed. Critics cite many reasons for the problems justice reform has encountered. Failure to coordinate reform efforts with other foreign governments, international organizations, domestic governments and civil society groups ranks at the top of the list (Sarles 2001). Since international actors engage, and occasionally compete, with domestic civil society groups, justice reform has sometimes been diluted, uncoordinated, and occasionally in conflict with the agendas of other actors (Dakolias 2001). Others critique the practice of reforming just one institution at a time, instead of pursuing comprehensive or holistic reforms (Prillaman 2000). Furthermore, some types of justice reform have been prioritized over others. Prison reform is one area that has certainly languished, for example. Hammergren (2007) also points to an "excessive emphasis" on the introduction of oral trials, which can lead to the neglect of other crucial areas of reform. Finally, there is concern that efforts have not recognized that reform requires extensive cultural change as well (Belton 2005). Figure 2 provides an overview of the performance of Central American justice systems, based upon the World Bank's Rule of Law Rankings (a component of the Governance Indicators).11 Hammergren (2007) notes the many problems inherent in measuring the quality of justice systems, advising that such rankings must be interpreted cautiously. Still, the World Bank rankings have the advantage of relying upon numerous sources in each country for each annual score, and do provide a valuable overview (Kaufmann, Kraay, and Mastruzzi 2009). As Figure 2 indicates, the Costa Rican system performs far better than its regional counterparts, on par with European countries. Still, contemporary performance has dipped from that of the mid 1990s. Panama falls in the intermediate range; its performance has remained steady from the mid 1990s to the present, and is well above the remaining countries. Of these latter poor performing countries, only El Salvador has witnessed some improvement from the 1990s to the present.

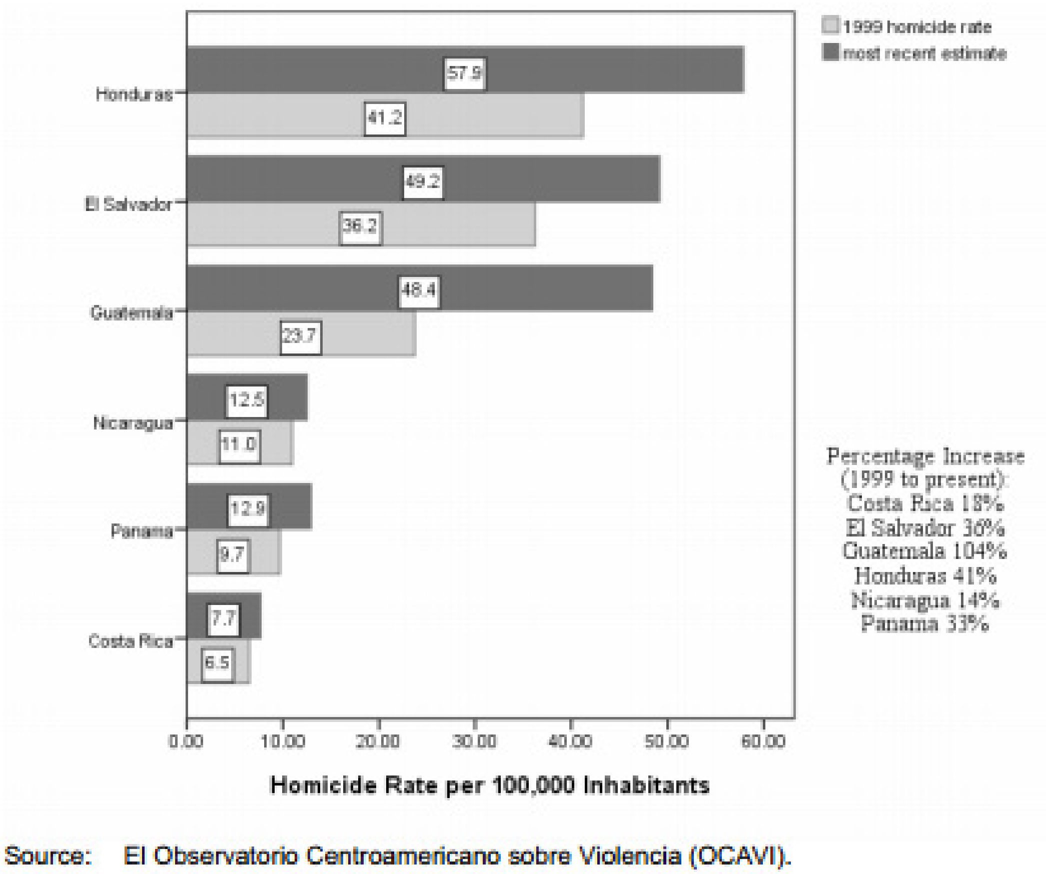

Figure 1: Homicide Trends (1999-present).

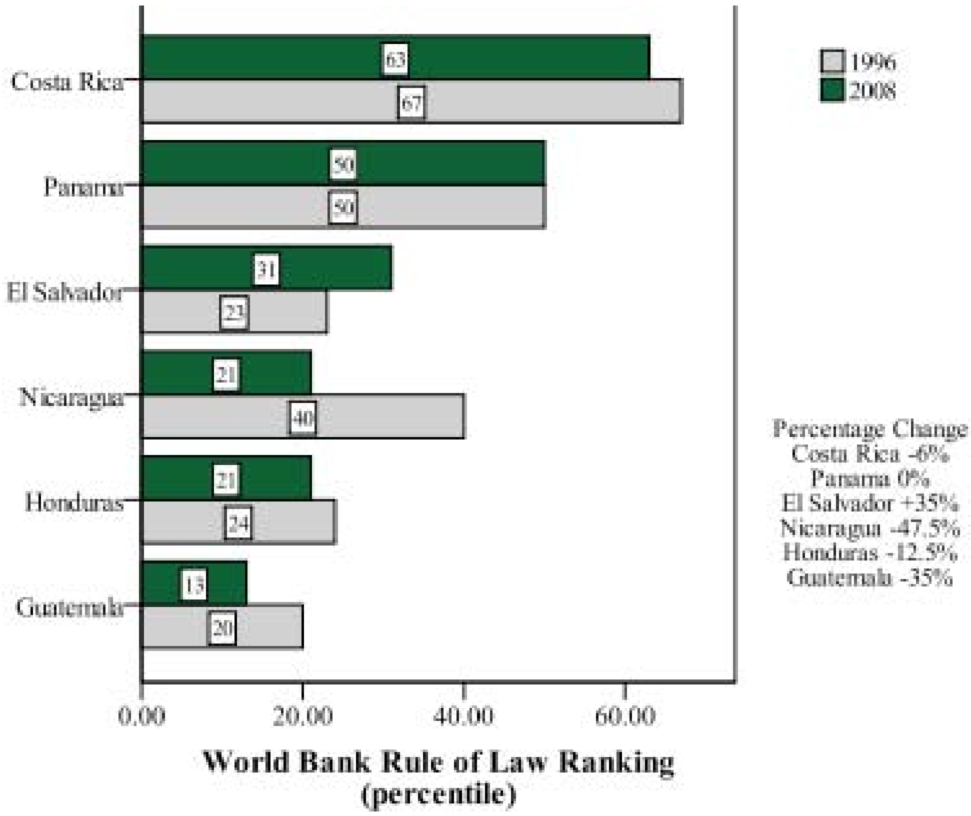

Figure 2: World Bank Rule of Law Rankings (1996-2008).

Based upon this overview, the Central American countries can be classified into three groups. With low levels of violent crime and a justice system that performs well above its neighbors, the Costa Rican system emerges as the success story of the region. In contrast, the justice systems of Nicaragua and Panama rank far below that of Costa Rica, but have not faced the stiff challenge of exceedingly high rates of violent crime. In the last category are the countries confronting the twin challenges of high homicide rates and poor performing justice institutions: Guatemala, El Salvador, and Honduras.

DATA ANALYSIS

With these national differences in mind, this analysis builds upon prior work by examining the linkage of a particularly salient specific output (crime) to diffuse support in different national contexts, across distinct components of the justice system. To this end, the analysis proceeds in three parts. First, it examines the relationship between specific and diffuse support in the high crime, low performance countries of Guatemala, El Salvador, and Honduras. It then assesses this linkage in a different national context – the low performance, low crime countries of Panama and Nicaragua. Finally, the analysis turns to Costa Rica, the country with comparatively high performance and low crime. Table 1 reports the results of the data analysis of the high crime, poor performance countries, listing ordinal logistic coefficients with standard errors in parentheses. In addition to assessing the relationship between specific and diffuse support, the analysis also tests the additional hypotheses concerning the media and individual-level factors. Given the theoretical import of these factors, it is essential to control for their impact in the multivariate analysis. Dummy variables are also included to control for countryspecific effects. As Table 1 indicates, there are several ways in which crime chips away at diffuse support. Most importantly, there is a strong significant relationship between evaluations of crime control performance and the four indicators of diffuse support. When respondents believe that the justice system can catch and prosecute criminals, they register higher levels of diffuse support for the courts (by 0.437), the police (by 0.715), human rights ombudsmen (by 0.558), and justice system more broadly (by 0.737). Fear of crime in the neighborhood is also important, as it is closely tied to all four measures of diffuse support in these countries.

Table 1: Regression Results for High Crime Countries with Poor Justice Institutions

Independent Variables	Trust in Justice System	Courts Guarantee Fair Trial	Trust in Police	Trust in Human Rights Ombudsman
Personal Victimization	-0.076 (0.076)	-0.083 (0.077)	-0.175* (0.076)	-0.055 (0.077)
Fear of Crime in the Neighborhood	-0.146*** (0.030)	-0.097** (0.031)	-0.165*** (0.030)	-0.091** (0.031)
Fear of Crime in the Country	-0.061 (0.040)	-0.154*** (0.040)	-0.031 (0.039)	0.009 (0.040)
Attention to Radio News	0.038 (0.027)	-0.015 (0.028)	0.004 (0.027)	-0.011 (0.028)
Attention to Television News	0.020 (0.031)	0.044 (0.031)	-0.065* (0.030)	0.052 (0.031)
Attention to the Newspaper	-0.015 (0.032)	-0.015 (0.032)	-0.012 (0.031)	0.032 (0.032)
Evaluation of Institutional Performance	0.737*** (0.035)	0.437*** (0.031)	0.715*** (0.031)	0.558*** (0.034)
Gender (1=Men)	-0.047 (0.056)	-0.037 (0.057)	-0.139* (0.056)	-0.148** (0.057)
Age	-0.004* (0.002)	-0.003 (0.002)	0.001 (0.002)	-0.005* (0.002)
Education	-0.008 (0.008)	-0.006 (0.008)	-0.004 (0.008)	0.010 (0.008)
Income	-0.158 (0.146)	0.134 (0.147)	-0.267 (0.144)	-0.171 (0.147)
Size of Municipality	-0.052* (0.022)	-0.019 (0.023)	-0.063** (0.022)	-0.046* (0.023)
Guatemala Dummy Variable	0.464*** (0.075)	-0.218** (0.078)	-0.139 (0.074)	0.466*** (0.077)
El Salvador Dummy Variable	0.431*** (0.074)	-0.317*** (0.076)	0.395*** (0.073)	1.311*** (0.078)
Nagelkerke Pseudo R Squared	0.137	0.072	0.174	0.161
N	4079	3959	4208	3970

Note: *p<.05; **p<.01; ***p<.001.

As respondents grow more fearful of victimization in their immediate environments, they are significantly less likely to support the justice system more broadly (by 0.146), as well as the courts (by 0.097), the police (by 0.165), and human rights ombudsmen (by 0.091). While fear of crime is important, local perceptions matter far more than national ones. Fear of crime in the neighborhood is significantly tied to all four measures of diffuse support, but fear of crime in the country is significant only in the model predicting support for the courts. In this case, as fear of crime in the country increased, respondents are 0.154 less likely to think that the courts guaranteed a fair trial, holding all other variables constant. Table 1 indicates that crime can erode public support for the justice system and its key institutions. However, what matters most are public perceptions of local crime and institutional performance, not necessarily personal experiences with victimization. Victims register significantly lower levels of trust in the police, but not in the courts, human rights ombudsmen, or justice system.12 This is likely due to the fact that crime prevention is the principal task of the police. In contrast, courts, human rights ombudsmen, and justice systems have wider responsibilities, such as the protection of property rights and mediation of labor disputes. Consequently, victims of crime are more prone to blame the police, the most visible face of public service provision.

Surprisingly, the media exposure variables have little impact. Attention to the radio and newspaper are not significant, and exposure to television news is significant only in the model predicting support for the police. Once again, the most prominent component of crime prevention is penalized. As attention to television news increases, trust in the police decreases by 0.065, holding all other variables constant. The relationship between media exposure and the police holds only for television news, the most visual medium for graphic depictions of crime. Most of the social identity variables also have little influence. Education and income are insignificant across all four models, and gender and age perform inconsistently. Municipality size did attain statistical significance in three models, however. As the size of the municipality increased, respondents were less likely to trust the justice system (by 0.052), police (by 0.063), and human rights ombudsmen (by 0.046). The country dummy variables indicate that compared to Honduras, support for the justice system and human rights ombudsmen is significantly higher in El Salvador and Guatemala, but trust in the courts is significantly lower.13 Trust in the police is in a statistical tie in Honduras and Guatemala, but significantly higher in El Salvador. Table 2 examines these same relationships in Panama and Nicaragua, two countries with low rates of violent crime, but weak justice institutions. Despite some similarities, the relationship between specific and diffuse support differs in these national contexts. Overall, evaluations of crime control performance are far more important than victimization or fear of crime. As crime fighting efficacy increases, all four measures of diffuse support significantly increase. The magnitude of this boost ranges from a 0.324 for the human rights ombudsman to 0.585 for the justice system as a whole. In contrast, victimization and fear of crime in the neighborhood are significant only in the model predicting trust in the police. In this group of countries, both personal victimization and local fear of victimization reduce support again only for the most visible face of crime prevention, the police. The last measure of crime, fear of crime in the country, yields similar results in Tables 1 and 2. In both cases, this national measure is significant only in the case of the courts. As fear of crime in the country increases, belief that the courts guarantee fair trials decreases by 0.149, holding all other variables constant. In this group of countries, the media exposure variables are far more important. Attention to television news is insignificant, but heightened attention to the newspaper corresponds to decreases in trust in the justice system (by 0.091), the courts (by 0.119), the police (by 0.092) and human rights ombudsman (by 0.129). A different trend emerges for attention to radio news, however. As attention to radio news increases, trust in the justice system significantly increases by 0.078, and in the human rights om- budsman by 0.112, holding all other independent variables constant. Thus, the impact of media exposure varies tremendously across countries, as well as across media. The study of crime coverage in Central America is quite new, but appears to be a fascinating venue for future research.

The social identity variables have little impact in this group of countries. Gender is insignificant across the four models, and age, education, income, and size of municipality have isolated and sporadic effects. The Nicaragua dummy variable indicates that compared to Panama, Nicaraguans are less likely to trust the justice system (by 0.285) and the courts (by 0.782), but more likely to trust the police (by 0.295). Table 3 examines the impact of crime on diffuse support in Costa Rica, the region's exception. Compared to the other cases, violent crime is low and justice performance is high. Still, it is important to remember that within this case, crime rates have risen and justice performance has declined. The national context of Costa Rica is far above the regional average, but Costa Ricans might compare contemporary crime and justice performance in terms of their own past experience and trends, not to that of their Central American neighbors. Table 3 indicates that Costa Rica diverges from the region in some interesting ways. Evaluations of crime control performance remain strong and significant predictors of all four measures of diffuse support. However, the other crime variables follow different trajectories. Fear of crime in the country emerges as much more important in the case of Costa Rica. In the models predicting support for the justice system and courts, as fear of crime in the country increases respondents are less likely to support the justice system (by 0.256) and the courts (by 0.338). In contrast, as fear of crime increases respondents are 0.183 more likely to support the human rights ombudsman. The impact of fear of crime in the country is nuanced. These findings indicate that fear of crime can erode support for the courts and the justice system as a whole, but Costa Ricans are willing to turn to other institutions in their place. Fear of crime in the neighborhood had a more moderate impact, significant only in the models predicting trust in the police and trust in the justice system. Personal victimization exhibits a very different pattern. Victimization is significant only in the model predicting support for the courts, yet its sign is positive. Victims of crime are 0.321 more likely to believe that courts guarantee fair trials than non-victims. To explain this puzzling finding, it is helpful to examine the attitudes of crime victims in more detail.

Table 2: Regression Results for Low Crime Countries with Weak Justice Institutions

Independent Variables	Trust in Justice System	Courts Guarantee Fair Trial	Trust in Police	Trust in Human Rights Ombudsman (Panama Only)
Personal Victimization	0.017 (0.105)	-0.135 (0.106)	-0.222* (0.104)	0.232 (0.178)
Fear of Crime in the Neighborhood	-0.070 (0.039)	0.017 (0.039)	-0.238*** (0.039)	0.014 (0.060)
Fear of Crime in the Country	-0.066 (0.051)	-0.149** (0.052)	-0.024 (0.051)	0.008 (0.073)
Attention to Radio News	0.078** (0.030)	0.036 (0.030)	0.056 (0.029)	0.112* (0.045)
Attention to Television News	-0.042 (0.039)	0.001 (0.040)	0.017 (0.038)	-0.110 (0.067)
Attention to the Newspaper	-0.091* (0.037)	-0.119** (0.037)	-0.092* (0.036)	-0.129* (0.051)
Evaluation of Institu-tional Performance	0.585*** (0.041)	0.361*** (0.037)	0.567*** (0.038)	0.324*** (0.061)
Gender (1=Men)	-0.040 (0.068)	0.057 (0.069)	0.032 (0.067)	0.073 (0.098)
Age	-0.005 (0.002)	-0.001 (0.002)	0.007** (0.002)	-0.005 (0.003)
Education	-0.002 (0.010)	0.027* (0.010)	0.012 (0.010)	-0.011 (0.016)
Income	0.046 (0.174)	0.122 (0.175)	0.037 (0.172)	0.512* (0.244)
Size of Municipality	-0.048 (0.025)	-0.087*** (0.025)	-0.014 (0.024)	-0.040 (0.036)
Nicaragua Dummy Variable	-0.285*** (0.081)	-0.782*** (0.082)	0.295*** (0.080)	---
Nagelkerke Pseudo R Squared	0.093	0.096	0.120	0.038
N	2763	2715	2810	1362

Note: *p<.05; **p<.01; ***p<.001.

Closer examination of other LAPOP questions reveals that victims report that they are significantly more satisfied with their personal interactions with the courts than non-victims. This counter-intuitive finding provides good news for the Costa Rican courts, as it indicates that victims who have personal experience with the courts register more positive evaluations. The effects of media exposure are small, but in the two cases where these variables are significant, increases in media attention (to radio and Public Trust in Central American Justice Systems television news) correspond to more diffuse support (in justice system and police respectively). Social identity characteristics also have very little impact. Gender, income, and size of municipality are insignificant across all the models, while age and education are significant only in isolated cases.

Table 3: Regression Results for Costa Rica

Independent Variables	Trust in Justice System	Courts Guarantee Fair Trial	Trust in Police	Trust in Human Rights Ombudsman
Personal Victimization	-0.069 (0.136)	0.321** (0.138)	-0.045 (0.136)	0.140 (0.144)
Fear of Crime in the Neighborhood	-0.124* (0.057)	-0.034 (0.057)	-0.236*** (0.056)	-0.083 (0.059)
Fear of Crime in the Country	-0.256** (0.076)	-0.338*** (0.077)	-0.098 (0.074)	0.183* (0.078)
Attention to Radio News	0.094* (0.039)	0.049 (0.040)	0.076 (0.039)	0.072 (0.041)
Attention to Television News	0.115 (0.076)	0.077 (0.076)	0.172* (0.076)	0.036 (0.078)
Attention to the Newspaper	-0.003 (0.044)	-0.010 (0.045)	-0.027 (0.044)	-0.023 (0.047)
Evaluation of Institu-tional Performance	0.730*** (0.061)	0.538*** (0.053)	0.690*** (0.053)	0.490*** (0.063)
Gender (1=Men)	0.093 (0.099)	0.012 (0.100)	0.124 (0.098)	-0.147 (0.104)
Age	0.010** (0.003)	0.003 (0.003)	0.010** (0.003)	0.004 (0.003)
Education	0.018 (0.014)	-0.001 (0.014)	0.016 (0.014)	0.036* (0.015)
Income	-0.465 (0.302)	0.488 (0.305)	0.212 (0.301)	-0.471 (0.316)
Size of Municipality	-0.003 (0.031)	0.012 (0.031)	-0.025 (0.031)	-0.014 (0.032)
Nagelkerke Pseudo R Squared	0.152	0.101	0.166	0.069
N	1349	1322	1369	1243

Note: *p<.05; **p<.01; ***p<.001.

Conclusion Across the Central American countries, crime control performance is significantly linked to diffuse support for the justice system as a whole, as well as its key institutions. This relationship holds regardless of democratic longevity, justice system performance, and violent crime rates. The exact mechanism by which crime affects diffuse support varies considerably according to national context, though. In countries with lackluster justice systems, personal experience with crime erodes diffuse support only for the police. In contrast, public fear of crime has much larger effects. In the poor-performing, high crime countries of Guatemala, El Salvador, and Honduras, fear of crime in the neighborhood has a consistent negative relationship to all measures of diffuse support. The impact of local fear of crime diminishes as the nature of the crime crisis changes, however. Fear of crime in the neighborhood has much smaller effects in the low crime countries of Nicaragua, Panama, and Costa Rica. Indeed, in Costa Rica support for the justice system and its institutions is tied more closely to fear of crime in the country, as public concerns about the national context trump those of local environments. Still, across all the countries and measures of diffuse support, institutional performance is a significant and powerful predictor. If citizens perceive justice institutions as performing poorly in the specific area of crime control, their legitimacy as a whole will suffer. Chinchilla cautions that crime's erosion of legitimacy can make repressive measures more popular, despite the fact that they show "little effectiveness in containing the problem" (2002: 23). To counter such trends, Chinchilla advocates more comprehensive policy innovations. In particular, she argues that community security and community policing are well-suited to address the complexity of public insecurity, as such programs: […] emphasize the citizen as beneficiary of and participant in the design, implementation, and control of security policies. From this perspective both the objective behavior of crime and citizens' fear of crime are matters of concern, and balanced actions are proposed not only with respect to the offenders but also with respect to the victims (Chinchilla 2002: 17). Current trends towards decentralization facilitate such programming, creating space for citizen participation in crime control while offering mechanisms to tailor strategies to meet the needs of specific communities. Such innovations offer insights into the ways in which the rule of law can coexist with effective responses to insecurity (Chinchilla 2003).

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66. Walklate, Sandra L. (2001), Fearful communities?, in: Urban Studies, 38, 5-6, 929-939. 128 Mary Fran T. Malone El impacto de delincuencia sobre la confianza pública en el Sistema de justicia en Centroamérica

El impacto de delincuencia sobre la confianza pública en el sistema de justicia en Centroamérica

Resumen: Durante las últimas dos décadas, los países de América Central se ven enfrentados con altos niveles de delincuencia. La capacidad de los gobiernos para contrarrestar esta crisis es comprometida por las debilidades severas de los sistemas de justicia, a pesar de la inversión internacional y domestica en reformas de la justicia. De hecho, existe la preocupación que la delincuencia frustrará los esfuerzos de reforma judicial. Gente cansada de altos niveles de delincuencia y frustrada con las instituciones de justicia

puede rechazar esfuerzos de reforma. No obstante, las relaciones individuales entre delincuencia y apoyo público para el sistema de justicia no han sido estudiadas de forma suficiente. Por lo cual, este estudio usa los datos del Latin American Public Opinion Project (LAPOP) para examinar las reacciones públicas a la delincuencia. Los resultados indican que la delincuencia puede erosionar el apoyo para el sistema de justicia, pero los mecanismos de esta relación dependen del contexto nacional.

Palabras clave: América Central, Confianza, Sistema judicial/poder judicial, crímenes, Percepción de amenaza (sociedad), Reforma judicial

CHAPTER 14

'NECESSITY' IN CRIMINAL AND MEDICAL JURISPRUDENCE: A COMPARISON OF COMMON LAW AND ISLAMIC LAW CONCEPTS

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ABSTRACT

The jurisprudential concept of 'necessity,' which had its origins in the criminal aspects of both Common Law and Islamic Law, is becoming increasingly important in medical law, especially in relation to organ transplantation, therapeutic cloning, and in vitro fertilisation techniques. Criminal aspects remain closely related to the further concept of 'duress' (vitiation of free will) and civil/medical aspects to that of 'proportionality' (that the deviation from a norm must be related to the benefit obtained). This paper attempts to examine attitudes of Common Law and Islamic Law to these issues, after some preliminary remarks as to the difficulties and dangers of generalisation. However it may be confidently affirmed that the concepts of necessity and proportionality are well embedded in both systems. Notably also, in both systems there is an abhorrence of commercial transactions involving body parts. There are divergences however - Common Law, broadly, allows any sort of transplantation, for example for cosmetic reasons, whereas as Islam regards this as essential only for the saving of life. In respect of therapeutic cloning there appears to be little divergence of views. In respect of in vitro fertilization, in all Common Law jurisdictions non-spousal sperm donors, anonymous or otherwise, are freely available, and may indeed be paid, whereas in Islam the spousal father must also be the biological father. It is a novelty of the modern world, however, that in almost all countries, even those with a majority Muslem population (like Malaysia) secular law allows freedom of choice so that involvement in these modern medical techniques devolves on personal morality.

INTRODUCTION

'Common Law' is usually taken to mean the set of rules originating in England, and to some extent in other countries of AngloSaxon provenance, and based upon the reasoning of judges, which in turn is heavily dependent upon decisions arrived at in previous decided court cases, that is, precedents. As might be expected, however, evolutionary pressures have generated considerable diversity among the various adherents.[1] Islamic Law too consists of several schools[2] and among countries with an Islamic majority there is considerable variation in its application.[3] Before entering my substantive theme it is apposite to make note of some general features of the two systems. In common law litigation, quotations from previous judgements, especially those of the superior courts, are used extensively (thanks to formalized legal reporting) and applied to the facts of the extant case, with statute being interpreted as necessary. Islamic jurisprudence or fiqh looks to the writings of scholars, who are obliged to base their

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conclusions on the precepts of the Qur'Én, the Sunnah, and the ×adÊths. This being the case, there is no a priori place for any civil/criminal dichotomy. To anybody schooled in the Common Law system, the lack of court-based precedents in Islamic Law texts (and indeed statute law as one understands it) is very striking. That is not to say, however, that there is no such thing as precedent in Islamic Law, and the gulf may not be as wide as it appears at first sight. In Common Law the judges and the drafters of statutes seldom have the last word, for hosts of practising and academic lawyers make haste to dispute or extend interpretation. Moreover common law judges are not above quoting from established works of reference by scholars rather than submit to a priori reasoning.[4]

In addition, while keeping in mind that the basis of Islamic Law is divine revelation, one must remember that a principle source of Common Law is Judeo-Christian theology, as well as 'natural law,' which if not divine is at least founded on morality.[5] In addition many crimes are ingrained in the conscience of humanity as a whole - murder, as opposed to sanctions against it, has never been legislated against as such - it has always been an abomination in both systems.Both systems, moreover, have perforce had to adapt to changing conditions. It would be idle to pretend that laws regulating motorised traffic specifically have a basis in the books of authority, sacred or otherwise. (Whether traffic laws are somehow derived from natural law fostering the common good in Common Law systems and equally, maÎlaÍah or consideration of the public interest in Islamic Law, would need extensive argument in another paper). Nonetheless it seems that in Saudi Arabia, arguably the most Islamic of all states, for example, regulations regarding, let us say, the emplacement of fire extinguishers in cars, are dealt with by separate (secular) administrative tribunals. Common Law systems have not shown this flexibility - in England driving with under inflated tyres, is a criminal offence, like murder in that respect. In Malaysia too, for example, these major and minor transgressions are conflated and distanced from any aspects of SharÊÑah Law

Origins of Necessity in Criminal Law: Murder and Cannibalism

In an early US case the captain of a wrecked steamer found himself with eight seamen and 32 passengers in an overcrowded lifeboat. To prevent the boat swamping he threw 16 passengers overboard, ordering the crew not to separate husband and wife, nor sacrifice any woman (in other words only single men were drowned, that is, murdered). The judge observed that the crew should have been sacrificed first as they were bound to protect the passengers.[6] The jury found the captain guilty but the sentence was light, a theme which will recur. Similarly, as a student of English criminal law, one learns at an early stage about necessity through the case of R v Dudley and Stevens. [7] The two defendants were sailors aboard a yacht which was shipwrecked in 1884. After sixteen days in the lifeboat the captain took a penknife and slit the jugular vein of the cabin boy, catching the blood in the chronometer case. This apparently kept the crew alive till they were picked up by a passing German vessel. In court the defendants adduced the 'law of the sea' (one facet of which was apparently that if there were two cabin boys, they should ideally be put in separate boats!) and it was said that the seafaring communities up and down the coasts had every sympathy with them. They were found guilty and sentenced to death but this was then commuted to six months hard labour. Thus the necessity defence was not accepted in respect of murder, although presumably it went to mitigation, via the commuted sentence. The interest in the present context is whether morality entered into the decision. In his judgement Lord Coleridge said: 'Though law and morality are not the same and though many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence….' He did not quote any religious text, however. Cases like this led to the creation of one of the fictitious legal persons which adorn Common Law, the 'person of reasonable fortitude.' That is, actions are judged against what a normal person, not a hero, would be reasonably expected to endure without breaking the law.[8] The concept of the fictitious legal person is difficult to find in the Islamic law texts, but perhaps he appears in another guise, in relation to ÌarËrah. A Íukum (rule) may be broken in the face of ÌarËrah, usually translated simply as 'necessity,' but undoubtedly, on a commonsense basis, reasonable fortitude is expected to be displayed before that drastic step is taken. ÖarËrah is not extensively discussed even in the standard texts on Islamic jurisprudence such as that of Professor Mohamed Hashim Kamali[9] but it is important for my purposes here to understand what the term means. On p. 424 of his learned treatment Dr. Hashim writes that ÍarÉm li-dhÉtih (that which is forbidden for its own sake) is not permissible save in cases of 'dire necessity' [my italics] which seems to imply that challenges less than dire should be countered with a degree of fortitude. Unfortunately, as mentioned above, one cannot readily compare the concepts of necessity and reasonable fortitude in Common Law with ÌarËrah by looking at respective case reports. However there is an interesting nexus to the above seafaring scenarios in that, according to Dr Sayed Sikandar Shah Haneef, in Islamic Law, duress is not a defence to murder. Punishment however is to be reduced from qiÎÉÎ to diyah – which is very reminiscent of the commutation of sentences in the English /US cases cited above.[10] The same prohibition of killing for necessity holds, according to Dr Sayed, but some schools are said to accept this in a shipwreck situation (throwing some of the passengers overboard to save the rest). What is interesting is the apparent degree of unease or uncertainty in both systems as to the correct approach to defendants. According to Dr SaÑÊd RamaÌÉn one cardinal principle is that what the Qur'Én and the Sunnah have prohibited become permissible whenever ÌarËrah arises, for example eating carrion or drinking alcohol to save life, but he does not mention murder.[11] One can perceive the similarity of approach in the two systems.

Turning again to England and USA, more recent criminal cases in which a defence of necessity was pleaded have generally involved defendants who drove sick relatives to hospital while not being in possession of a driving licence or otherwise banned from driving. The leading case in England is R v Martin[12] in which a wife threatened suicide if the defendant, who was disqualified from driving, did not drive her son to work. The judge laid out the principles of the necessity defence: 'The principles may be summarised thus: first, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure on the accused will from the wrongful threats of another. Equally it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called "duress of circumstances." Secondly, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately [my italics] in order to avoid a threat of death or serious injury.' In the actual case the appeal was allowed because the above was not put to the jury. In the case of US v Randal[13] the defendant illegally consumed marijuana to relieve his glaucoma, and his defence of necessity was upheld on the basis of three maxims:

1 the defendant did not intentionally bring about the circumstances which precipitated the unlawful act.
2 the defendant could not accomplish the same object using a less offensive alternative.
3 the evil sought to be avoided was more heinous than the unlawful act perpetrated to avoid i

Perhaps the principles are most clearly expressed in a Canadian case, Perka v The Queen.[14] The necessity defence is allowable under the following (conjoined) conditions:

1 the accused must be in imminent peril.
2 the accused must have no reasonable legal alternative.
3 the harm inflicted by the accused must be proportional to the harm avoided by the accused.

The third point in the above two cases would seem to be restatement of the proportionality provision of Martin and so it would appear to be a well-established concept - put as a question, does the violation of the norm bear a proportionate benefit to any of the parties involved? But again, referring to Perka, we see the persistent difficulty of jurisprudential interpretation. What do the words 'imminent,' 'reasonable' and 'proportional' actually mean? In the Common Law system one would say that guilt or innocence would turn on the facts of the case, in relation to the principles enunciated. What of proportionality in Islamic Law? Dr Khaled Abou El Fadl writes that: 'There should be a proportional relationship between the social implications of a ÍadÊth and the burden of proof it should satisfy.'[15] Dr Hashim Kamali writes, in the context of maÎlaÍah: 'There must be a reasonable probability that the benefits of enacting a Íukum… outweigh the harms that might accrue from it.'[16] This is clearly a proportionality principle, and no doubt other quotations could be garnered. Where the two systems seem to be at variance, however, is in the application of proportionality to sanctions. In the sense that amputation of a limb can be the penalty for theft (in some jurisdictions, indeed very few), Western writers fail to see proportionality. The retort by Islamic Law scholars in general is that such a severe punishment acts by its deterrent effect to diminish the rate of theft overall. One would need a statistical analysis of crime rates under some sort of controlled conditions to make an evaluation of this.

MEDICAL LAW IN GENERAL

Interesting as the criminal cases are, in this century medical law will be more important in adumbrating the principles of necessity and proportionality. The problem for the courts is that what might look like necessity to judge A and/or defendant B might be considered by judge C to be rather the luxury of choice in terms of inflated expectations. The 62 year old woman who in England who is at this moment expecting a child, thanks to massive endocrine manipulation, can be regarded as either fulfilling her biological imperative/necessity, for motherhood, or alternatively exerting an unnatural greed at the expense both of healthcare resources and the psychological state and well being of the desired child. In the Common Law world such expectations can be legally fulfilled. Can the adoption of children by same sex couples be regarded as a necessity? No norm can be adduced for an answer. Recently in England and some states of the USA same sex marriages have been legalised. They have been condoned on the basis of the necessity of safeguarding the financial status of a partner in a long-standing relationship. These matters remain controversial, and if not regarded by much of the population in the West as an authorisation of sin, they are widely regarded with distaste. After reading the literature it is difficult, within the general tenor of Islamic law, to see any of this being tolerated at any time. In the context of health matters as such Islamic Law appears to have no difficulty with the concept of necessity, for example in allowing a female patient to be examined by a male doctor, in that a priori, in a vast body of Islamic thought (I take this as so well-known as not to require citation) an unrelated male is permitted to see only the face and hands of another woman. The male doctor, obviously, might be the only help available or the only one who can exercise a particular skill. Reading the various commentaries, it appears clear that in the twentieth century there were a number of developments which called for ijtihÉd, or new legal solutions. According to SaÑÊd RamaÌÉn[17] this means 'to exert oneself.' Consequently Islamic jurisprudentialists adopted what is called maÎlaÍah, (welfare, benefit, utility) coupled to ÌarËrah in their approach to novelties, including those in the medical field. On the other hand other scholars regard public interest, or maÎlaÍah/ÌarËrah, as a source of law to be more or less reducing the position of Divine Law to that of man-made law, that is, completely unacceptable.

SAVING AND PRESERVATION OF LIFE

It is hoary old oft-quoted principle of Common Law that one is under no legal obligation to rescue someone who (for example) is drowning, even if one is put in no danger by attempting this. The principle is said to be that freedom is only to be restricted when it is necessary to prevent persons doing harm to others – otherwise individual liberty and autonomy prevail.18 Thus there is no obligation to prevent a person committing suicide. It is a criminal offence to assist, however. In the Common Law system, there are no circumstances wherein a life may be actively terminated. This is not to say that an individual may not be allowed to die. In Re J (1990) a case before the English Court of Appeal, the court had to consider a premature baby born with very severe defects, including loss of brain tissue, quadriplegia, and blindness and deafness. He could experience pain, however. The medical staff wished for a ruling on whether they should reventilate him if he had a respiratory collapse or, in effect, let him die should this happen. At of first instance the judge had stated the latter to be permissible, but the judgement was opposed by the Official Solicitor (whose function is to safeguard in every possible way a ward of court). The Master of the Rolls (the head of the civil justice system) said:

'What is in issue is …not a right to impose death, but a right to choose a course of action which will fail to avert death…' and '…there is a balancing exercise to be performed in assessing the course to be adopted in the best interests of the child.'[19]

There was a declaratory judgement in effect allowing the baby to die. Whether one agrees, or not, with the decision, the balancing, or proportionality principle is evident. In Airedale NHS v Bland (1993)[20] the hospital applied to the court for permission to switch off the life support system of a young man who had been rendered into a persistent vegetative state by being crushed at the Hillsborough football disaster. The jurisprudence was enunciated by the Court of Appeal and the House of Lords gave this its imprimatur. The various rationales, over three courts, for termination of the treatment, are complicated, but in the end boiled down to the question: was the continuance of the life-support proportional to the benefit to the patient? Clearly, the decision was that it was not. In Re S a woman in labour refused to have a caesarian because she said that God would provide for both herself and the baby. The baby was on a transverse lie, and medical opinion was that unless the procedure was performed the baby would die and there was a palpable risk to the mother also.[21] The judge allowed the caesarian to go ahead against the wishes of S, thereupon violating the hallowed principle that a conscious adult individual of sound mind is entirely autonomous in deciding the disposal of her own body. The foetus died and the mother survived. (There was a happy ending of sorts in that the mother, who had two other children, came to the conclusion that the judge in any case probably represented divine will). The judge was clearly balancing the autonomy principle against the interests of the mother and the foetus. According to Dr Sayed Sikandar, 'Human life can be taken away in a truthful cause. In respect of euthanasia, there is no obligation to keep such a person alive in such a manner. But to take the life of a person, out of mercy or compassion, to end his sufferings is undoubtedly ÍarÉm in Islam.'[22] This appears to be almost exactly the position of the English court in In re J. It is difficult to find parallels to the circumstances in Islamic Law. In a country like Malaysia these matters are taken out of the hands of the SharÊÑah courts, although it is possible that the secular courts would take note of religious views. A fully Islamic country like Saudi Arabia, as far as I know, does not furnish reports on such matters, interesting as those would be.

ORGAN TRANSPLANTATION

The great concordance between the two systems, and others, is the prohibition of the commercial traffic in bodily organs (in Malaysia by an amendment to the Human Tissue Act of 1974). In Common Law countries the abhorrence must have its origins ultimately in, if not religion, ancient perceptions of morality. (See Lord Coleridge's speech above). In Islam too there is the precept that the body belongs to God and that to trade parts of it is anathema. In respect of organ donation, the meaning and definition of death (thus the meaning of 'brain dead') is important. Kidney donations to relatives are practiced all over the Islamic world, but the removal of organs from the dead for transplantation seems to be causing more difficulty. This is because of the concept of Íurma or sanctity of the human body. Some authorities attach such great significance to this that they disapprove of corneal removal, for example, from the dead. Others argue from traditional cases which allow of necessity, and this would appear to be the attitude of most of the Islamic authorities in countries like Malaysia and Singapore. Moreover postmortems are allowed in Islamic law - but only in the interests of detecting the cause of death, investigating criminality, and for the education of medical students - necessity once again.[23] This aspect of necessity is indirectly related to the saving of lives, like the consumption of carrion or parts of the dead human body. All the same, the object of transplantation must be to save life, not to prolong it or improve it, to qualify under ÌarËrah. (Artificially prolonging life appears to be forbidden under the doctrine that the inevitability of death must be recognised). Moreover the concept of ÌarËrah cannot, it seems, be carried over to organ or tissue banks.

THERAPEUTIC CLONING

herapeutic cloning was given the go ahead at an important conference of the Islamic Organisation for Medical Sciences held in Cairo in December 2004, although apparently the motion allowing it was not unanimous. Dr Abdul Aziz Sachedina states that human embryos lack the same sanctity in Islam as they do in Christianity, and are not regarded as people in any sense.[24] It is the opinion of Professor Omar Kasule that the use of zygotes for medical research could be allowed under the law that states that necessities permit the prohibited.[25] Therapeutic cloning is limited in USA apparently due to a predominant belief that a human being is created at conception. The restrictions were however advanced by president Bush as executive order rather than by the courts. In the United Kingdom there is no such restrictive view and procedures are readily licenced by the Human Fertilisation and Embryology Authority. Singapore is reputed to possess the most enabling of all administrations in respect of therapeutic cloning as well as stem cell research and has even attracted eminent scientists from the West to advance its ambitions in this direction. The Islamic authorities therein seem not to have objected.

IN VITRO FERTILISATION

In vitro fertilization, sometimes quaintly latinised as fecundatio ab extra (and in times when reproductive technology was slightly less advanced, to 'artificial insemination by donor' or AID) presents no difficulties for secularized Common Law as such, disputes centering round ownership rather than morality. (Thus, does the property in the sperm of a former partner vest with him, or can the other partner use it for fertilisation against his wishes? These complexities are still being worked out). Islamic Law differs radically, however. According to Dr Gamal Serour, writing in the medical journal Lancet,[26] the social father or mother of a child must be the genetic father or mother, so sperm and egg donation, embryo donation and surrogacy are unacceptable in Islam. Professor Kasule agrees. Necessity has strict limits, as might be anticipated in the context of Islamic ethics per se. Logically, the same precepts must be applied AID. As I was completing this paper, there came a note of the following legal imbroglio with artificial insemination as a backdrop. It is from the Court of Appeal (Civil Division) in England, and I quote:

'J [the appellant] had in law been a female when he purportedly married the first respondent (C) who was E's mother. J and C had lived together as husband and wife although C had not been aware of J's sex [!]. E had been conceived by means of artificial insemination by donor. In due course the relationship between J and C broke down and their marriage was declared void.'[27]

J was appealing against the decision of the trial court that he (she?) was not child's father. (As an aside, how could this absurdity reach the Court of Appeal? Clearly the 'marriage' was void, not only because the parties were of the same sex but also for non-consumation. How could a court even entertain an application by a woman claiming to be a 'father'?) Nonetheless, having had the matter brought to its notice, the Court of Appeal had no hesitation in dismissing the fatherhood claim; it opined that the real issue was the welfare of the child E, and how she was to be informed about her origin. I have no parallel case to go on, but one would guess that a SharÊÑah court would deal with matter in much the same way, if perhaps more summarily.

CONCLUSION

As would be expected, there are similarities and differences between Common Law and Islamic Law attitudes to the matters which have been discussed above. Notably, though, both have an inherent flexibility to deal with modern scientific and social changes. Necessity and proportionality are useful bases for reasoning in both. Some commentators have argued that the flexibility of Islamic law has been most apparent in international law (not however the subject of this paper), in respect of Article 6(2) of the International Covenant on Civil and Political Rights for example, if not in respect of punishments.[28] The salutary aspect of many modern states with an Islamic majority is that SharÊÑah law is largely overridden by statute and/or Common Law, secular law at any rate, which can be roughly equated to the government. As Dr Hashim Kamali has written 'The history of Islamic jurisprudence is marred by a polarization of interests between the government and the ulema. The ulema's disaffection with the government did not encourage the latter's participation and involvement in the development of juristic thought and institutions.'[29] The religious authorities in most Common Law countries became accustomed to being ignored a long time ago.

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1. Common Law jurisdictions may be listed, non-exhaustively, as England, Canada, Australia, New Zealand, U.S.A., India, Singapore, Malaysia, Ireland, and numerous smaller nations. Scotland's legal system was preserved as Roman-based after union with England but has both contributed to the Common Law precepts and been influenced by them. Recently there have been comments by senior judiciary in Malaysia that the country should move away from the Common Law system.
2. A study of the differing approaches of the various schools of Islamic law, including the ×anafÊ, MÉlikÊ, and ShÉfiÑÊ would need a large book and probably a lifetime's study. I found helpful the brief Explanation/summary of the various schools in a paper on website File:///A:/ Islamic%20Law.htm. From the 'outsider's point of view, the difficulty is knowing who is a real authority on Islamic Law and who is not. I have for this paper consulted authors who are established faculty in recognized universities and books which appear to have the marks of scholarship about them.
3. According to the International Review of the Red Cross no. 858 (2005) (The Strength of Customary Law), 50 states in the world have a Moslem majority, of which 15 have proclaimed Islam as the state religion. Saudi Arabia for example would appear to operate SharÊÑah Law exclusively (but see text). Turkey on the other has been legally secular since the presidency of Kemal Ataturk. Although by the constitution Malaysia is an Islamic State, with a body of SharÊÑah law, any serious offence, and most of civil law, falls under the statutory and Common Law corpus, and the judges freely quote English, Canadian and Australian decisions (not so many from the US) without bothering to mention that they are extraterritorial. East Malaysia (Sarawak and Sabah) is different yet again. A separate paper if not a book would be necessary for full exploration of these matters.
4. Just to take one random example, in R v Maloney [1985] A.C. 905 (HL), a murder case, Lord Bridge quoted from Archbold's Criminal Pleading Evidence and Practice, 1982. It is clear though that the judges prefer to quote from precedent, not textbooks.
5. Natural law precepts are said to extend from as long ago as Magna Carta, still in force. There are many examples of the influence of religion per se in Common Law. There is even a view from Blackstone that much of English law is based on divine revelation. For many centuries non-Christians were not allowed to give evidence - evidently this affected mainly Jews. Until recently, or perhaps even today, an Anglican clergyman recites a prayer before the House of Lords delivers a judgement. Ecclesiastical courts still operate in limited spheres; for example they can debar a clergyman from his living – in that sense they more akin to a sort of private employment law; there is however appeal to secular courts. Whatever its origins, Common Law is now strictly secular
6. US v Holmes, 26 Fed. Cas. 360 (1842).
7. Dudley and Stevens is discussed by Clarkson C.M.V. and Keating H.M. Criminal Law: Text and Materials, 2nd ed. (1990), London, Sweet and Maxwell, p. 333. See also Simpson A.W.B. Cannibalism and the Common Law, University of Chicago Press, 1984.
8. R v Howe [1987] 1 A.C. 417 (HL).
9. Mohammad Hashim Kamali. Principles of Islamic Jurisprudence. 2nd edn. Islamic Texts Society, Cambridge, 2003.
10. Sayed Sikandar Shah Haneef. Homicide in Islam. A. Nordeen, Kuala Lumpur, 2000, p. 133. This is stated however not to be the view of the ×anafiyyah.
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12. [1989] 88 Cr. App. R. 343.
13. 65923-75 D.C. Superior Court [1976].
14. [1984] 2, S.C.R. 232.
15. Khaled Abou El Fadl. The Authoritative and Authoritarian in Islamic Discourses. Quill Publishers, Austin (1997).
16. See note 9
17. See note 11
18. There is a discussion of killing by omission in Clarkson and Keating note 7, p. 137.
19. [1991] Fam 33.

20. 1 All E.R. 858 HL.
21. [1992] 3 W L R 806.
22. See note 10.
23. Krawietz B. ÖarËrah in modern Islamic Law: the case of organ transplantation. In: Islamic Law, Gleave R. and Kermeli E, eds. I.B. Taurus, London, 2001, p. 79.
24. File:///A:Muslim%20states%20urged%20to%20 back%20therapeutic accessed 24/5/06.
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CHAPTER 15

IS VIOLENT CRIME INCREASING OR DECREASING? A NEW METHODOLOGY TO MEASURE REPEAT ATTACKS MAKING VISIBLE THE SIGNIFICANCE OF GENDER AND DOMESTIC RELATIONS

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ABSTRACT

The fall in the rate of violent crime has stopped. This is a finding of an investigation using the Crime Survey for England and Wales, 1994–2014, and an improved methodology to include the experiences of high-frequency victims. The cap on the number of crimes included has been removed. We prevent overall volatility from rising by using three-year moving averages and regression techniques that take account of all the data points rather than point to point analysis. The difference between our findings and official statistics is driven by violent crime committed against women and by domestic perpetrators. The timing of the turning point in the trajectory of violent crime corresponds with the economic crisis in 2008/09.

INTRODUCTION

Is violent crime increasing or decreasing? From the 1960s, crime has increased in Europe and North America; but since the mid-1990s, crime dropped (Blumstein and Wallman 2006; van Dijk et al. 2012); indeed, there are claims of a long-run fall in violence in Europe (Elias 1994 [1939]; Pinker 2011; Eisner 2014). Numerous theories have been applied to the crime drop and found wanting (Farrell et al. 2014). There are exceptions to the crime drop; some of these have been linked to gender and domestic relations. There are questions as to whether the crime drop has been resilient to the financial and economic crisis starting in 2008 since many of the studies of the crime drop do not include this most recent period. So, taking into account the most recent evidence, and differentiating by gender and domestic relations, the question this paper addresses is whether the rate of violent crime is rising or falling. The analysis of the gender dimension of violent crime has largely taken place in a specialist field relatively separate from that of mainstream criminology (Walklate 2004). Much criminology that addressed the crime drop has written little about gender (Sharp 2006); analyses of gender-based violence or violence against women have rarely addressed changes over time, though with important exceptions. However, since several of the empirical caveats to the crime drop are gendered, so too might be its theoretical implications. We consider the implications of mainstreaming gender into the analysis of violent crime, rather than treating it as a separate field of domestic violence or violence against women.

In this context, we investigate the changes in the rate of violent crime captured by the Crime Survey for England and

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Wales (CSEW) (covering 89 per cent of the UK population) and disaggregate these by the gender of the victim and the relationship between the perpetrator and victim. We use survey data rather than police recorded crime data since so many people do not report their violent victimization to the police. We draw data from the CSEW, a world-leading survey in its quality, long runs of data, large sample size and national representativeness. CSEW data can also be disaggregated by gender and domestic relations. Investigating changes in the rate of violent crime is methodologically challenging. The repeat nature of domestic violence makes it hard to measure (Ellingworth et al. 1995; Farrell and Pease 2007; Farrell and Pease 2010), especially the experiences of those relatively few people who suffer large numbers of repeat offences. Small numbers of individuals who experience high frequencies of victimization are particularly problematic because of the volatility this can introduce when assessing changes over time. The conventional approach has been to ignore or 'cap' the frequency of victimizations of this group in order to avoid this problem. However, this is unsatisfactory because it omits a significant aspect of victimization. Thus, there appears to be a tension in the production of official crime statistics between two goals: accurately assessing the year on year changes in the rate of crime and accurately reporting the extent and distribution of violent crime victimization. This paper offers rigorous empirical investigation of changes in violent crime. We use data from the CSEW Victim Form module over the period 1994–2014. This is more recent than most of the studies that have addressed the crime drop. We offer a resolution to the methodological challenge of simultaneously analysing the full extent of violent crime reported to the survey to model the underlying trend by using three-year moving averages of all reported crimes to deal with volatility, rejecting the current methodology that arbitrarily caps the number of crimes reported by each respondent that count towards estimated crimes rates at five, thereby improving on the current (2015) Office for National Statistics (ONS) methodology for estimating violent crime (under review ONS 2015d). We present new analysis of changes in the rate of violent crime since 1994. We identify the subsets of the victimized population that are most affected by these changes. By making visible the high frequency of violent crime against some victims, we make visible the gender and domestic relations in changes in violent crime. We provide a comparative analysis of changes in the rate of violent crime against women and men and by perpetrators that are domestic relations rather than acquaintances or strangers. These new analyses challenge the ubiquity of the drop in violent crime, with implications for the theoretical link between economic inequality and crime, the security hypothesis and the integration of gender into mainstream criminology.

CHANGES IN VIOLENT CRIME: SUBSTANTIVE, THEORETICAL AND METHODOLOGICAL ISSUES

Rising and Falling Crime Rates

Is crime rising or falling? There are accounts of both decreases and increases in crime and with different levels of generality. Exceptions to general trends have been identified, concerning particular countries, categories of victims and perpetrators and sources of data. Crime (both property and violent crime) has appeared to be falling since the mid- 1990s. This 'crime drop' was identified in the United States (Blumstein and Wallman 2006), the United Kingdom and elsewhere in North America and Europe (van Dijk et al. 2012; Humphreys et al. 2014). The crime drop was a surprise to many criminologists, accustomed to a rising crime rate from the 1960s to the early 1990s. Grove et al. (2012: 183) noted: 'The crime drop in England and Wales was unexpected and unprecedented'. The ONS (2014a) commented on the CSEW in 2014: 'This latest estimate is the lowest since the survey began in 1981. . . . and is 60% lower than its peak level in 1995'. However, to some historical sociologists, the fall in violent crime was not unexpected, but a reversion back to a long-term trend of falling violence over several centuries in Europe (Eisner 2014). From this perspective, the 1960s–1980s was a historically brief interruption to the decline (Pinker 2011). There are exceptions to the crime drop in particular countries. Within the EU, while police recorded rates of crime between 2003 and 2012 fell in the majority of Member States, police recorded crime increased in Luxembourg, Slovakia, Italy, Hungary, Sweden, Spain and Belgium, and police recorded violent crime increased in Estonia, Luxembourg, Sweden, Denmark and Finland (Eurostat 2014). Within the United Kingdom, while crime dropped in Scotland and in England and Wales, the rate in Northern Ireland was flat (Eurostat 2014). There are also indications that the crime drop might apply to some social categories of victims and perpetrators rather than others, though these vary by data source. According to the CSEW self-completion module (ONS 2014b), there are no significant changes since 2004 in the prevalence rate of 'intimate violence' (domestic violence, sexual assault and stalking). But according to the published findings of the CSEW Victim Form module (ONS 2013b: Table A1), a fall in domestic violence, from 1,166,000 violent crimes in 1993 to 289,000 in 2010, has ceased, being replaced by a flat or upward trend (398,000 in 2013). Further, the number of police recorded rapes (29,265) and other sexual offences (58,954) in 2014/15 reached the highest level since 2002/03 (ONS 2015a). Though it is hard to disentangle a 'real' increase from an increase in reporting or recording (Home Office, Ministry of Justice and ONS 2013; ONS 2015b), survey data are generally regarded as more reliable because these are less influenced by changes in police administrative practices.

Theoretical Issues

The changing rate of violent crime has implications for theories of violence, including: crime increases with inequality; violent crime decreases with the long-term pacification of society; variations in crime are linked to situational factors. Each of these theoretical frameworks can be informed by gender issues but often has not been. Crime theory needs to be able to address two challenges: the timing of changes (Farrell et al. 2014) and the exceptions including divergences in gendered rates. Increased inequality generates higher rates of violent crime. This thesis, drawing on the heritage of Merton (1938) concerning structural strain, developed by writers from Agnew (1992) to Young (1999) and supported by empirical evidence from many studies (Chiricos 1987; Hsieh and Pugh 1993; Pratt and Cullen 2000), is a major framework within which variations in violent crime are theorized. The timing of the drop in crime in Europe and North America during a period of rising inequality appears to challenge this thesis. There has been speculation as to whether the economic crisis, starting in a financial crisis in 2007 and cascading through the real economy, unemployment and austerity, has affected the rate of crime. Since most of the published studies on changes in the rate of crime use data from before the economic crisis, this remains a question yet to be fully addressed. The gendered pattern of the perpetration of violent crime, in which the more advantaged assault the more disadvantaged (Johnson 1995), also challenges the conventional direction of the thesis. However, gendered inequalities may be intricately linked to gendered violence in ways that might support a revised version of the thesis linking inequality to violence. The long-term pacification of society means lower rates of violent crime. This thesis, drawing on the heritage of Elias (1994 [1939]), links a long-term decline in the rate of violence to the development of the state and modernity that leads to an increase in self-control, which is associated with less violence. The thesis is rearticulated in revised form by Pinker (2011) and supported with evidence on the development of European society over several centuries (Eisner 2001; 2014). The long-term decline is potentially consistent with a range of criminological theories, including those that focus on the importance of self-control in reducing crime (Gottfredson and Hirschi 1990), those that emphasize the significance of a strong criminal justice system (Durlauf and Nagin 2011), as well as those that focus on justice and economic development (Fajnzylber et al. 2002). The thesis is challenged by the increase in violent crime from the 1960s though 1990s, though Pinker argues this is due to reduced self-control due to permissiveness. The thesis neglects the gender dimension of violence, despite the empirical variation in gender-specific rates of perpetration of violence. As Pratt et al. (2014: 90) note, unless intimate partner violence can be included, ‘self-control theory cannot assume the flavour of generality for which it was originally intended’. Rates of crime vary with situations and the structuring of routine activities (Cohen and Felson 1979). This thesis links higher rates of crime with the repeated confluence of three elements—a motivated potential offender, a suitable target and the absence of a capable guardian. The thesis can be used to underpin analysis of the repetition of offences, which can be an important component of the total amount of crime and of its changing rate (Farrell et al. 1995; Farrell and Pease 2007). Once a person has been victimized, repeat victimization may follow from the situational characteristics of the victim (flags) or from the increased knowledge of the perpetrator of vulnerability (boosts) (Tseloni and Pease 2003; Hope and Trickett 2008). While in the first two frameworks, the explanatory force focuses on perpetrators rather than victims in this third framework the focus equally concerns the security of victims, thereby opening a theoretical route to including the social position of victims within explanations of variations in rates of violent crime. The thesis is challenged to move beyond local variations to account for larger trends in the rate of crime, although Farrell et al. (2011) develop this approach into a theory of the crime drop centred on the significance of the increased securitization of cars for other crimes. There is little work explicitly within this tradition that adequately encompasses gender. Gender is rarely profiled within major criminological frameworks (Sharp 2006), despite the significance of this work (Johnson 1996; Walklate 2004). Gender-based violence is sometimes constructed as a separate field of enquiry, though the notion that gendered violence has a distinctive aetiology (Felson and Lane 2010) is contested. The theoretical framework focused on the implications of economic inequality for violent crime can be gendered in different ways, including linking: variations in gender inequality to variations in violence against women (Brush 2011; Khalifeh et al. 2013); variations in intra-household inequality to variations in domestic violence (Kalmuss and Straus 1982); and variations in gender-specific unemployment rates to variations in domestic violence (Anderberg et al. 2014). Some studies suggest that declines in gender inequality reduce domestic violence (Farmer and Tiefenthaler 2003) by reducing domesticity and increasing women’s status and resources (Dugan et al. 1999), though others find complex and divergent effects (Pridemore and Frelich 2005; Kangaspunta and Haen Marshall 2012). The analysis of the gender dimension needs to be more nuanced than a simple claim about a link between gender inequality and gender-based violence against women. It needs to specify the precise forms of inequality, the gendered groups affected, the situations, contexts, practices and mechanisms involved. It needs to distinguish between the gender of the victim and the gender-saturated contexts, such as domestic relations, in which gender-based violence occurs. The theoretical framework focused on situational factors and routine activities can be gendered. Leaving violent households can reduce domestic violence, although some perpetrators continue to pursue their victim. Whether victims leave after a single incident or only after many generate different patterns of domestic violence (Johnson 1995). Different levels of access to the resources necessary to leave a household and set up another are a source of variance, which depends on wider gender inequalities and specific contextual factors. During adverse economic circumstances, violent relationships may be slower to break up than when there is easier access to the resources to establish a new household (Kneal et al. 2014). It is possible that gender intersects with economic inequality to generate increased situational vulnerability to violent crime, especially domestic violent crime. The financial crisis of 2007/08 led to a crisis in the ‘real economy’ by 2009: this increased unemployment and decreased income levels. While employment had recuperated to pre-crisis levels by 2012, income levels had not (ONS 2013d). From 2010 there were cuts to government public expenditure, which disproportionately reduced the income to women compared to men as a consequence of changes in taxes and benefits (House of Commons Library 2010). Cuts to public expenditure led to reductions in national and local budgets for some domestic and sexual violence services and for financial support in accessing legal advice (Walby and Towers 2012). Reductions in income for women and households and in specialized services may reduce the ability of women to exit violent households with consequences for the rate of domestic violent crime.

Measurement Challenges

There are challenges in the methodology and measurement of violent crime. There are different units of measurement, including ‘victims’ and ‘crimes’. There are different sources of data, including survey and administrative data. There are relatively few people who experience a large number of repeat victimizations, so including them in estimates from survey data without introducing bias is challenging. There is tension between the two goals of official crime statistics: accurately reporting the extent, nature and distribution of crime victimization and accurately assessing changes in the rate of crime.

What is violent crime?

Violent crime is conventionally addressed using the official definition of 'violence against the person' that focuses on assaults with and without injury (Home Office 2015). ONS (2014b: 2) analysis of the CSEW uses this definition of violence against the person (and excludes threats, robbery and homicide). While sexual offences are not included in this official category of 'violence against the person', many domestic violence researchers use a broader definition of violence, which includes sexual crimes. Sexual crimes (rape, attempted rape and sexual assault) are therefore included, following Walby et al. (2014). There is an issue as to whether threats and other non-physical forms of coercion are to be included in the category of violent crime. These acts are not included in ONS counts of 'violence against the person' in its reporting on the CSEW. They are not included here because the mainstream category of 'violent crime' is the focus of this paper and our main point of comparison is ONS published findings from the CSEW. There is simultaneously in use a definition of 'domestic violence' that includes nonphysical forms of abuse. For example, the UK Government defines domestic violence as including both violence and abuse (non-physical actions, including emotional and psychological abuse) and sexual violence, honour violence and female genital mutilation (Home Office 2013). There is incompatibility between the definitions of 'violence' in the mainstream category of 'violence against the person' and the specialized field of 'domestic violence'. Because our focus in this paper concerns mainstream analysis of serious violent crime rather than the specialized field of domestic abuse, we use the definition of violence used in 'violence against the person'. The implications of using the broader definition of violence that includes additional forms of coercion should be explored.

Sources of data

Sources of data on the extent of violent crime include police recorded crime statistics and population sample surveys. There are three reasons for selecting surveys: the under-reporting of violent crime to the police; the unrepresentative nature of the violent crimes reported; and the quality of the process of recording data. The majority of victims of violent crime do not report to the police and, further, this is even less likely when those crimes are committed by persons known to the victim. Hence, they are both a serious undercount and not representative of the crimes committed. Further, in the United Kingdom, the police recorded crime statistics have recently (2014) failed to reach ONS quality standards (UK Statistics Authority 2014). Crime victimization surveys have been developed to provide better estimates of crime victimization than police recorded crimes. This means the CSEW is the best source of data on violent crime (ONS 2015a). The CSEW interviews one eligible individual from each selected household. Only permanent members of residential households are included. Temporary visitors to households, individuals in institutions such as refuges and those who are homeless are not included in the sampling frame. The CSEW asks questions about crime victimization in two ways: face-to-face via the main questionnaire and the Victim Form module and by self-completion in special modules, including one on intimate violence (domestic violence, sexual assault and stalking). The confidential nature of the self-completion methodology produces greater disclosure of intimate violence than does the face-to-face section of the survey. Taking prevalence of domestic violent crime (violence against the person and sexual offences), the disclosure rate is estimated to be 3.8 times higher via the self-completion than face-to-face method (Walby et al. 2014). However, unlike the original 2001 version of the self-completion survey (Walby and Allen 2004), recent versions only measure the frequency of intimate partner violence across all abusive acts of whatever kind, including emotional and psychological acts. This makes the separation of the violent crime events impossible. In addition, the self-completion module makes no assessment of the number of non-intimate partner perpetrated violent crime such as by non-intimate family member, acquaintance or stranger. Thus, the self-completion module does not provide data from which estimates of the number of violent crimes can be made. Data on both the number of violent crimes and the number of victims are only available from the main questionnaire Victim Form module.

Victims and crimes

There are alternative units of measurement: 'victims' and 'crimes'. This matters since domestic violence is often a repeat crime (Ellingworth et al. 1995; Farrell et al. 1995). If there were one crime per victim, there would be no difference in the measures. But where the perpetrator is a domestic relation (or acquaintance) there can be multiple crimes per victim (Walby et al. 2014), so there is often a difference between the number of victims and the number of crimes for domestic violent crime. Temporal changes in the number of crimes may involve changes in the number of victims or changes in the number of crimes per victim, or some combination of the two (Hope 1995). In order to understand changes in the rate of violent crime that include multiple crimes against the same person, it is important to measure the number of crimes as well as the number of victims. The reasons underpinning the choice of the unit of measurement are not only methodological but also conceptual and theoretical. While mainstream criminology (Ellingworth et al. 1995; Farrell et al. 1995; Hope 1995) follows the police practice of counting the number of crimes, this approach is disputed by some within the domestic violence field who prefer to count the number of victims (Stark 2007). This focus on victims is linked to the concept of 'a course of coercive control', in which the individual incidents are considered less important than the course of conduct as a whole. Some specialized 'Violence against Women' surveys give priority to victims rather than incidents as the unit of measurement (WHO 2013; FRA 2014). We consider it important to include the number of crimes since this is the category within which violent crime is debated in the mainstream policy and theoretical literature and in order to make visible the repeated nature of domestic violent crime and violent crime against women. Our analysis includes both victims and crimes as units of measurement and compares the outcomes.

High-frequency victims

Measuring the extent of repeat victimization of high-frequency victims of violence is challenging. Not only is repeat victimization (especially by the same perpetrator of the same victim) different from single victimization, some victims suffer many such crimes (Farrell et al. 1995; Johnson 1995; 1996). High-frequency victimization is relevant to the distribution of the risk of experiencing crime, which can be concentrated or dispersed (Hope 1995). If concentrated, it would indicate a more extreme form of victimization, with greater adverse consequences for these victims. The challenge of measuring the very high numbers of crimes committed against some victims has been previously identified, but not yet satisfactorily met (Ellingworth et al. 1995; Farrell et al. 1995; Farrell and Pease 2007; 2010). The difficulties in measuring repeat victimization lead to underestimates of not only the extent of violent crime but also of its concentration. In the United Kingdom, crime frequency in the CSEW Victim Form module is assessed through the completion of up to six Victim Forms, which record the most serious crime incidents that happened to the respondent or household over the last 12 months. These incidents can either be one-off incidents or series incidents, which are defined as 'the same thing, done under the same circumstances and probably by the same people' (ONS 2013a: 15). On a series Victim Form, respondents can record any number of crimes in that series between 2 and 96 or 'more than 96/too many to count'. In the United States, there is a similar process. In the early National Crime Victimization Survey (NCVS), a series form was completed if there were three or more similar incidents in a six-month reference period, being raised to six or more similar incidents in 1992 following research on respondent's ability to remember (Dodge 1987)

Capping versus all reported crimes

Although the frequency of violent crimes is recorded in surveys, published official statistics are not based on this reported data. Instead, official estimates are based on capped data. Capping limits the number of crimes included in official estimates of crime. Capping is applied to series events, which record multiple incidents of the same type of crime. Capping reduces the total estimated count of crimes substantially. Capping of series crimes has been routine in most victimization surveys. In England and Wales, all series incidents have been capped at five since the survey's inception in 1982. The choice of five appears to be arbitrary (Hough and Mayhew 1983). Thus, a reported count of 24 victimizations of the same type—about one every two weeks— would be truncated to five. The US NCVS traditionally removed all series victimization reports (six or more incidents) from national estimates—in effect capping any series at zero crimes. The national survey in Mexico (Encuestas Nacionales Sobre Iseguridad) caps at five incidents (Planty and Langton 2013) while that in Canada caps at three (Nazaretian and Marolla 2013). The justification of the cap by the Home Office, and since 2010 the ONS, has been that since the numbers of victims that experienced large numbers of crimes is relatively small, including them would increase the year-to-year fluctuations in the estimates of violent crime to an extent that is unreasonable since a priority use of the statistics is to provide an account of changes in the rate of crime over time: '[T]he restriction to the first five incidents in a series has been applied since the CSEW began in order to ensure that estimates are not affected by a very small number of respondents who report an extremely high number of incidents and which are highly variable between survey years' (ONS 2013a: 15). However, capping the number of crimes has some negative consequences. Farrell and Pease (2007; 2010) report that capping reduces the estimated number of personal crimes by at least a third. Walby et al. (2014) report that when all reported crimes in 2011/12 were counted rather than capped, violent crime increased by 60 per cent and violent crime against women by 70 per cent, noting that capping reduces some types of crimes more than others thereby introducing a skew into the distribution. Capping in the US NCVS is discussed by Planty and Strom (2007). On the one hand, they note an 'increase in year-to-year estimate instability' if the data were not capped and identified a potential problem of over-reporting when 'respondents rely on cognitive exercises to generate a discrete number of victimizations' (Planty and Strom 2007: 197). On the other hand, they note some major disadvantages produced by capping: the estimates of victimizations are severely underestimated and 'certain groups disproportionately affected by the counting rule may be severely under-recognized as groups prone to victimization'. They concluded that series victimizations should not be excluded, stating 'A viable solution is to count the reported number of series victimizations and then to publish both incident and prevalence rates. . . . It seems more logical to trust what a respondent reports and to err in reporting this information than to dismiss it all and exclude these victimizations. Exclusion creates a larger and more serious error than inclusion' (Planty and Strom 2007: 198). Following these discussions, Lauritsen et al. (2012) proposed a change in NCVS methodology. The Bureau of Justice Statistics now (since 2010) includes incidents recorded on series Victim Forms up to a maximum of ten in a six-month period (the median response rate over all respondents for all crime types). Ten was chosen as the consistency of responses began to decline for larger caps and the magnitude of discrepancies began to increase (Lauritsen et al. 2012: 14). Planty and Langton (2013) note that series incidents are not periodic anomalous outliers occurring occasionally but, rather, are consistently reported each year and under similar conditions. The routine capture of these victims by the NCVS procedures is evidence of a real phenomenon and not a measurement error.

'Too many to count'

A further issue concerns the CSEW response category '97' labelled 'more than 96/too many to count', which are also capped at five incidents. While 96 victimizations in a year might appear an unrealistically large response, it is actually equivalent to being victimized about twice a week over a 12-month period, which is not uncommonly found in the domestic violence literature. While some respondents may be unwilling or unable to remember the frequency of attack, other respondents do report their experience of very high levels of violence (more than 96 incidents). One solution could be to take the mean or median number of crimes in the series Victim Forms for each form of violent crime for each year. However, this is likely to severely underestimate the number of crimes that 97-coded Victim Forms should contribute to the estimate of violent crime. Between 1994 and 2013/14 this would have meant a CSEW count between 4 and 12. The second method is to use a count of '60' for all 97-coded Victim Forms. This method was used in the ONS-endorsed Home Office study (Walby and Allen 2004) on domestic violence using the CSEW. The count of 60 was derived from a review of the secondary literature, including on women in refuges. This count of 60 for '97' has been supported in later studies using the CSEW (Farrell and Pease 2010; 2007). This second method provides a more robust solution, so we use a count of 60 for Victim Forms coded '97'.

Discerning trends in volatile data

Volatility in annual estimates can adversely affect the reliability of estimates of change over time. This is a general issue for victimization surveys (UNODC and UNECE 2009). There is a trade-off between volatility and accuracy. Planty and Langton (2013: 3) are clear that these large series incidents are 'not considered to be errors, but true estimates of victimization with substantive importance'. Thus, increasing or eliminating the cap will increase volatility but also increase accuracy. Capping, in contrast, produces bias in the total estimated number of crimes and the distribution between different crime types. Accurate measurement is important. ONS (2013c: 8) includes accuracy of measurement as one of its five quality indicators, defining accuracy as 'the closeness between an unknown true result and its estimated value'. These ONS guidelines define processing error (B.4.1) as 'systematic error introduced by processing systems' and suggest that outputs should describe the main sources of such error and provide an estimate of the processing error. It is possible to reduce volatility while counting all reported incidents and thus including the experiences of high-frequency victims. Such methods to 'smooth' data have long been used. The simplest of these is the moving average. This is used by ONS and Eurostat for calculating (and reducing volatility in) unemployment rates—using a three-month average over three consecutive months (Bishop 2004). The disadvantage of losing estimates from the start and end of the series is balanced by the ability to more clearly estimate long-term trends with reduced volatility. We propose a three-year moving average methodology to reduce volatility to the level of current ONS capping methodology, while increasing accuracy by removing the cap. Trend detection is a challenge for survey data, where an observed increase may or may not be statistically significant (potentially being within the sampling variability of the data). There are two approaches to this issue: compare two adjacent years or adopt a methodology that examines a longer trend. The ONS (CSEW published annual statistics) takes the first approach. They offer statistics that compare estimates for adjacent years (year on year) or for differences in pairs of years using selected start and finish years. This methodology means that the choice of comparison years (start and finish years) can make considerable difference to the conclusion about the direction and rate of change. A second approach is to model the data. This examines long-term trends in the data series through the fitting of a non-linear statistical model, thereby reducing the effects of the arbitrary selection of particular years to be compared (see Appendix).

Conclusions for our methodology

For the source of data, the use of surveys not police records is now consensus. We use the CSEW as a world-leading survey and use data derived from the Victim Form module. For the unit of measurement, we use measures of crimes as well as victims and compare the outcomes to show the implications of each. Discerning trends in volatile data: to address the methodological challenge of small numbers of high-frequency victims, we increase accuracy while not increasing volatility by using all reported crimes as three-year moving averages rather than by capping. Further, statistical modelling removes the arbitrary selection of year pair comparisons for trend analysis.

RESEARCH QUESTIONS

The main research question concerning changes in the rate of violent crime is disaggregated into three questions. First, is violent crime captured by the CSEW increasing or decreasing between 1994 and 2014? Second, are there different changes in the rate of violent crime depending on whether the victims are women or men, or depending on the relationship between victim and perpetrator (whether this is a domestic relation, acquaintance or stranger)? Third, is the rate of change (both overall and disaggregated by gender of victim and by relationship) different when the unit of measurement of violent crime is based on victims or crimes? In order to answer these questions, it is necessary to address the methodological challenge of accurate measurement of small numbers of high-frequency victims navigating the tension between achieving accuracy in the measurement of the extent and distribution of violent crimes and an achieving acceptable volatility over time. We describe our solutions to the methodological challenges before moving to the substantive questions.

METHODS AND FINDINGS FOR A NEW METHODOLOGY

We detail the methods used to: estimate the number of violent crimes; control volatility, so it is of the same order as that produced by the current ONS method (capping); and assess changes in violent crime (details in Technical Paper, doi: 10.17635/lancaster/researchdata/53).

Data source

The data are the number of violent crimes and victims of violent crime captured in the CSEW from 1994 to 2013/14, drawn from the main questionnaire Victim Forms. This population survey is a representative sample of adults (16 years and over) who are permanent residents of a household in England and Wales.

Definitions

Violent crime is here defined as 'violence against the person' plus 'sexual offences' (see section 'What is violent crime?'). We follow ONS (2014b) in using the category of 'violence against the person' excluding threats and robbery, and Walby et al. (2014) in including sexual violence. The relationship between victim and offender is disaggregated into domestic, acquaintances and strangers, following the ONS CSEW classification. Domestic perpetrators are current and ex-intimate partners and also family and other household members. Acquaintances are: workmate or colleague; client or member of the public met through work; friend or acquaintance;

neighbour; local child, child in the neighbourhood, young people in the local area; tradesman, builder, contractor; ex-husband, wife or partner of someone in the household; or other person known at least by sight. Strangers are those who are unknown, even by sight. In order to make comparisons over time, we use rates (of victims and of crimes) per 1,000 of the appropriate population. This enables us to take into account the changes in the size of the UK population.

Estimation of Total Counts of Crimes in the Population

For each respondent, we take the aggregate over all Victim Forms of the counts for the specific form of violent crime reported, use a count of 60 for the 'too many to count' category (see section 'What is violent crime?') and follow the ONS convention of using a count of two for series Victim Forms that 'do not know' or 'refuse' to say the number of incidents (coded '98' in the data set). We multiply the weighted population for each individual by the number of incidents they report to the survey. This is then summed over all respondents. The estimates are then adjusted to meet the ONS mid-year population estimates (ONS 2013a: 67–9). We repeat this procedure to obtain estimates for capped crimes and for victims. In estimating capped crimes, we follow the ONS procedure of capping each Victim Form, rather than each respondent, at a maximum of five. Counting victims effectively caps the aggregated Victim Forms for each respondent at a maximum of one. We include incidents that happened to respondents outside of England and Wales, rather than restricting valid offences to only those that have occurred within the country boundaries. The ONS also has a complicated 'valid' and 'invalid' time period for each sweep of the CSEW because of its continuous, rolling interview process. As we are using data from sweeps that include two different sampling processes in terms of the 'valid' reporting periods, so we have included all offences recorded by each sweep of the CSEW. We are not producing estimates of individual years but rather comparing the trend over a long time period, thus we have opted to use a consistent methodology of counting all reported offences for each sweep. This gives estimates of crime based on data captured by the CSEW for three units of measurement (all reported crimes, capped crimes and victims) across 12 crime types (all violent crime; domestic violent crime; acquaintance violent crime; and stranger violent crime—with each of these four crime types also being disaggregated by victim gender (female and male)).

Impact of Capping On High-Frequency Victims

We investigate how many Victim Forms are subject to capping to understand if this practice is rare or common. We find around 5 per cent of Victim Forms report counts greater than 5 in each sample year (see Table 1). This means that high-frequency responses are relatively common. It is thus hard to justify the ONS argument that such responses are rare. We also look at the frequency of '97' ('more than 96/too many to count') responses. Table 1 shows that the number of '97' responses is relatively small.

Statistical methods for measuring volatility

Using our new estimates, we investigate the different levels of volatility produced by existing and our proposed new methodologies. The new estimates are produced using all reported crimes averaged on a rolling basis over three years. Estimates for threeyear moving averages are obtained by averaging the estimate for the target year with the estimate for the year before and the year after. (The estimates for each form of

Table 1 Percentage of 'high-frequency' Victim Forms and Victim Forms coded 97: all violent crime against both women and men

Year of survey	% of Victim Forms with over five violent crimes	% of Victim Forms coded 97	Total number of violent crime Victim Forms	Sample size
1994	5.9	0.4	831	16,550
1996	5.9	0.0	1,011	18,955
1998	4.0	0.1	692	14,947
2000	3.5	0.1	823	19,411
2001/02	4.7	0.7	953	32,824
2002/03	5.8	0.3	968	36,479
2003/04	4.6	0.5	992	37,931
2004/05	6.1	0.3	999	45,120
2005/06	6.2	1.0	1,044	47,796
2006/07	5.9	0.7	1,169	47,203
2007/08	5.0	0.7	1,429	46,983
2008/09	4.3	0.7	1,361	46,286
2009/10	5.1	0.5	1,175	44,638
2010/11	5.4	0.5	1,372	46,754
2011/12	5.8	0.6	1,253	46,031
2012/13	6.6	1.2	887	34,880
2013/14	5.3	0.8	586	35,371

violent crime by each sweep and for all three estimation methods (all reported crimes, capped and victims) are given in the Technical Paper (doi: 10.17635/lancaster/ researchdata/53): all estimates are disaggregated by gender of victim and relationship between victim and perpetrator). To compare the volatility produced using each method, we need a method of measuring volatility. This involves separating the signal or trend in the data series from the noise. The usual method of measuring volatility is to take the variance or standard deviation of the data series around the trend line. However, this method assumes that the variance is unaffected by the size of the mean. With count data, it is common for the variance of a data series to increase with the mean, so this assumption is unrealistic. Thus, instead we fit an overdispersed quasi-Poisson model with the time trend modelled by a smooth cubic spline curve with three degrees of freedom (details of the volatility modelling are in the Appendix).

Addressing the tension between the accurate measurement of extent and distribution and accurate measurement of change over time We produce volatility estimates generated using year by year data for victims, capped crimes and all reported crime and a three-year moving average for all reported crimes. The volatility generated by all reported crimes year by year and all reported crimes using three-year moving averages are then compared to the volatility generated using the official method (capped crimes generated using year by year data) and to the method widely used in the 'violence against women' field (number of victims generated using year by year data). Table 2 shows the volatility estimates for these four different estimation methods for our 12 forms of violent crime. When using all reported crimes to generate year by year estimates (column 3), volatility increases substantially (and unacceptably) compared to the official method (column 2). The increase is around four times, and as much as nine times for domestic violence. However, the volatility is reduced to the same level as that produced by the official estimation method when estimates of violent crime are generated using all reported crime and three-year averages (column 4). The volatility generated by this method compared to the official method is lower for all forms of violent crime except two. Even in these cases (domestic violent crime and domestic violent crime against women) that have a slightly higher volatility, it is still of the same order as that generated by the official method. Thus, estimates generated from all reported crimes averaged over three years are more accurate than those produced by capping while ensuring that volatility is of the same order as the current method in official use (year by year estimates of crimes capped at five). The approach of three-year averaging is the best way to address the tension between accurate measurement of violent crime and volatility over time.

Statistical models for examining trends in violent crime To examine trends in violence crime, we adopt a regression approach so that all data points over the period contribute to the estimation. This is in contrast to the preferred ONS method that is to examine changes between two specific years. There are a number of issues that determined our modelling strategy. The first is whether to examine changes in the number of crimes or victims or to examine rates of violence. While there may be interest in whether absolute numbers of crimes or victims are changing, the use of rates allows statements on the populations at risk. Since there has been a substantial increase in the population of England and Wales over the period of study (12 per cent, from 40.5 million in 1994 to 45.3 million in 2013/14 (ONS 2013a: 69; ONS 2015c)), we have chosen to use rates. The rate is per 1,000 of the appropriate female, male or total adult population. Modelling rates makes our analysis more conservative than examining numbers, as a constant rate over the period implies an increase in violent crime of 12 per cent in line with the population. The second issue is the choice of model. We have modelled the data using a quasiPoisson log-linear model (which allows for overdispersion) and using the sample size as an offset (see Appendix). The third issue is how to allow for changes in the survey sample size over time. This has varied from 16,550 in 1994 to around 46,000 between 2004/05 and 2011/12 then dropping to around 35,000 in 2012/13 and 2013/14 (Table 2 in Technical Paper (doi: 10.17635/lancaster/researchdata/53)). We deal with this by modelling estimated sample counts that use the individual population weights but are rescaled back to the size of each survey sweep sample, and including the log of the sample size as an offset in the log-linear model. This allows the observed counts to be of the same size as the sample but representative of the population. When estimating change over time, we follow the segmented regression method described by Muggeo (2008a), which fits two regression lines that meet at a breakpoint. Both the breakpoint and the two regression lines are estimated from the data. With the segmented regression model, the slopes of the two regression lines can be tested to see if they are significantly different from zero: this tells us whether the violence is increasing or decreasing at a significant rate. Where the slope is not significantly different from zero, the rate of violence is static. Full details of the model specification are in the Appendix.

Table 2 Volatility for different estimation methods

	Year by year			Three-year average
	Victims	Capped crimes (official ONS method)	All reported crimes	All reported crimes
All violent crime	9,601.2	21,648.5	81,353.9	10,731.9
Violent crime against women	5,792.8	18,504.4	122,408.6	15,860.0
Violent crime against men	7,956.9	16,986.9	63,362.8	5,363.6
All domestic violent crime	3,077.0	8,267.2	80,854.1	9,890.1
All acquaintance violent crime	6,800.8	15,162.2	37,133.1	4,725.4
All stranger violent crime	6,255.1	13,306.1	33,630.6	3,737.5
Domestic violent crime against women	1,836.6	11,746.9	106,297.7	13,088.4
Domestic violent crime against men	3,893.1	5,421.2	10,470.6	2,198.3
Acquaintance violent crime against women	6,994.2	12,510.8	68,856.0	7,813.8
Acquaintance violent crime against men	4,201.5	12,541.3	49,199.7	5,354.9
Stranger violent crime against women	3,212.8	8,107.3	28,853.1	4,659.4
Stranger violent crime against men	5,112.4	9,969.6	23,399.8	2,185.1

Are there changes in the trends of each form of violent crime?

Table 3 shows the results of the Davies test to ascertain whether or not there is a statistically significant change in the trajectory of the various forms of violent crime between 1994 and 2013/14 (see Table 3). For those forms of violent crime where the Davies test shows no significant change, a single slope parameter estimate is given. This shows the direction of slope of the trend and its significance. Slopes that are significantly different from zero indicate either a significant decrease or a significant increase in that form of violent crime, depending on the direction of the slope. For example, for 'all violent crime' using estimates based on capped crime counts, there is no evidence of a breakpoint, and the estimated slope of the line is −0.0523, which is significantly different from zero ($p < 0.001$). Exponentiating this gives the yearly rate of change; exp(−0.0523) = 0.949, suggesting that (using the ONS capping methodology) all violent crime declines by an estimated 5.1 per cent a year. For those forms of violent crime where a significant change is detected, a segmented regression model is applied to the data. The breakpoint estimates and the slopes of the two components of the segmented line—before and after the breakpoint—are given in Table 4.

Table 3 Significant changepoints in violent crime trajectories

	All reported crimes		Capped crimes		Victims	
	Significant change detected?	Significance of detected change	Significant change detected?	Significance of detected change	Significant change detected?	Significance of detected change
All violent crime	Yes	***	No	NS	No	NS
Violent crime against women	Yes	***	Yes	*	Yes	**
Violent crime against men	Yes	***	Yes	*	No	NS
Domestic violent crime	Yes	***	Yes	***	Yes	***
Acquaintance violent crime	Yes	***	Yes	*	No	NS
Stranger violent crime	No	NS	No	NS	Yes	**
Domestic violent crime against women	Yes	***	Yes	*	Yes	***
Domestic violent crime against men	Yes	***	Yes	*	No	NS
Acquaintance violent crime against women	Yes	***	No	NS	No	NS
Acquaintance violent crime against men	Yes	***	No	NS	No	NS
Stranger violent crime against women	No	NS	No	NS	No	NS
Stranger violent crime against men	No	NS	No	NS	Yes	**

When the trend for 'all violent crime' is based on all reported crimes and three-year averages, there is evidence of a breakpoint. This is estimated to be 2008.7, i.e. in the autumn of 2008. The two slopes are estimated to be −0.0600 ($p < 0.001$) and +0.0467 ($p < 0.05$). Exponentiating the slopes gives the yearly rate of change before and after the changepoint: thus exp(−0.0600) = 0.942, and exp(0.0467) = 1.048, giving a 5.8 per cent yearly decline before the changepoint and a 4.7 per cent yearly increase after the changepoint. Thus, our preferred methodology of using all crimes reported to the survey over a three-year average, when compared to the ONS methodology results in a different trajectory of violent crime. Using our preferred methodology, we find that 9 of the 12 forms of violent crime show a significant change of slope. Using the current ONS methodology, only six show this. Moreover, with our methodology, five of the nine regression slopes after the changepoint are positive and significantly different from zero: suggesting rates of violent crime are now increasing. These are: all violent crime, violent crime against women, domestic violent crime, domestic violent crime against women and acquaintance violent crime against women. Two of the remaining four change from a declining slope to an increasing slope, but not one that is significantly different from zero. This shows that the decline in these forms of violence has ceased and may now be beginning to rise.

Table 4 Trends in violent crime by methodology, relationship and gender: segmented regression results

Forms of violence	All reported violent crime			Capped violent crime			Victims of violent crime		
	Date of significant changepoint	Slope 1 parameter estimate & sig.	Slope 2 parameter estimate & sig.	Date of significant changepoint	Slope 1 parameter estimate & sig.	Slope 2 parameter estimate & sig.	Date of significant changepoint	Slope 1 parameter estimate & sig.	Slope 2 parameter estimate & sig.
All violent crime	2008.7	−0.0600***	0.0467 *	–	−0.0523***	–	–	−0.0433***	–
All violent crime against women	2009.3	−0.0647***	0.1297 **	2003.7	−0.0886***	−0.0343*	2003.8	−0.0726***	−0.0286**
All violent crime against men	2004.6	−0.0668***	−0.0271***	1996.0	0.1035^{NS}	−0.0554***	–	−0.0400***	–
Domestic violent crime	2008.9	−0.1040***	0.1279 *	2008.5	−0.1042***	0.0220^{NS}	2008.7	−0.0859***	0.0071^{NS}
Acquaintance violent crime	2007.9	−0.0655***	0.0294^{NS}	1996.0	0.1035^{NS}	−0.0554***	–	−0.0534***	–
Stranger violent crime	–	−0.0240***	–	–	−0.0295***	–	2010.8	−0.0168**	−0.1094^{NS}
Domestic violent crime against women	2009.4	−0.0952***	0.1650**	2005.2	−0.1159***	−0.0381^{NS}	2004.0	−0.1043***	−0.0408**
Domestic violent crime against men	2006.8	−0.1490***	0.0461^{NS}	2007.8	−0.1138***	0.0145^{NS}	–	−0.0681***	–
Acquaintance violent crime against women	2008.5	−0.0562***	0.0796*	–	−0.0531***	–	–	−0.0474***	–
Acquaintance violent crime against men	2002.3	−0.1072***	−0.0332***	–	−0.0621***	–	–	−0.0562***	–
Stranger violent crime against women	–	−0.0084^{NS}	–	–	−0.0201*	–	–	−0.0234***	–
Stranger violent crime against men	–	−0.0292***	–	–	−0.0315***	–	2010.7	−0.0148*	−0.1289**

The steepest slope observed after the changepoint is for domestic violent crime against women. The estimate of 0.1650, once exponentiated, gives a value of 1.91 suggesting that the rate of domestic violent crime against women nearly doubles every year after 2009. The location of the estimated changepoint is significant. Most estimated changepoints lie between 2008 and 2009.

DISCUSSION OF SUBSTANTIVE FINDINGS

There are four new substantive findings when analysis is based on the new methodology of including all reported violent crimes rather than on capped crimes or the number of victims. First violent crime against women has been increasing since 2009; second most violent crime against men is still falling; third domestic violent crime has a different trajectory from other forms of violent crime and has been rising since 2009; and fourth overall, violent crime has been rising since 2009, not falling.

Implications of revising the methodology to measure violent crime Using our preferred method of including all reported crimes over three-year moving averages, there is an increase (rather than decrease) in violent crime and especially in the amount of violent crime against women and by domestic perpetrators. Our preferred method allows the high-frequency victims to become visible. This has consequences for the analysis of the distribution of violent crime. When all violent crime reported to the CSEW is included, there is an increase in violent crime. This increase is found especially in repeated crimes against the same victims. It is found especially in violent crime committed by domestic perpetrators and violent crime against women. If the current ONS capping method is used, the rate of violent crime overall appears to still be falling, as is violent crime against women. Violent crime by domestic perpetrators appears to have ceased falling but does not show a significant increase after the changepoint (2008.5). If victims are the unit of measurement, the same pattern is found as for the capped analysis, with the appearance of a continuing fall in the rate of violent crime and violent crime against women, but a cessation in the falling rate of domestic violent crime. Basing estimates on all reported crimes allows the extent and significance of highfrequency victims to be seen. Survey methodologies that prioritize the measurement of prevalence (CSEW selfcomplete questionnaire; WHO 2013; FRA 2014) are challenged by our findings since they make invisible any increase in domestic violence that is concentrated on highfrequency victims. When victims are the unit of measurement, the number of repeat victimizations is treated methodologically and theoretically as irrelevant: this approach misses the important changes in violent crime driven by high-frequency victims. Different units of measurement also find different trends in acquaintance and stranger violent crime. Capped crimes and victims of acquaintance violence are still falling, whereas all reported crimes stop falling in 2007/08. Crimes (all and capped) of stranger violence are continuing to fall, whereas the prevalence rate falls to 2010/11; after which the fall in the number of victims stops.

Violent crime against women

The trend in violent crime against women is sensitive to the unit of measurement, as illustrated in Figure 1. The trend is different depending on the unit of measurement, showing that female victims of violent crime experiencing one or a small number of

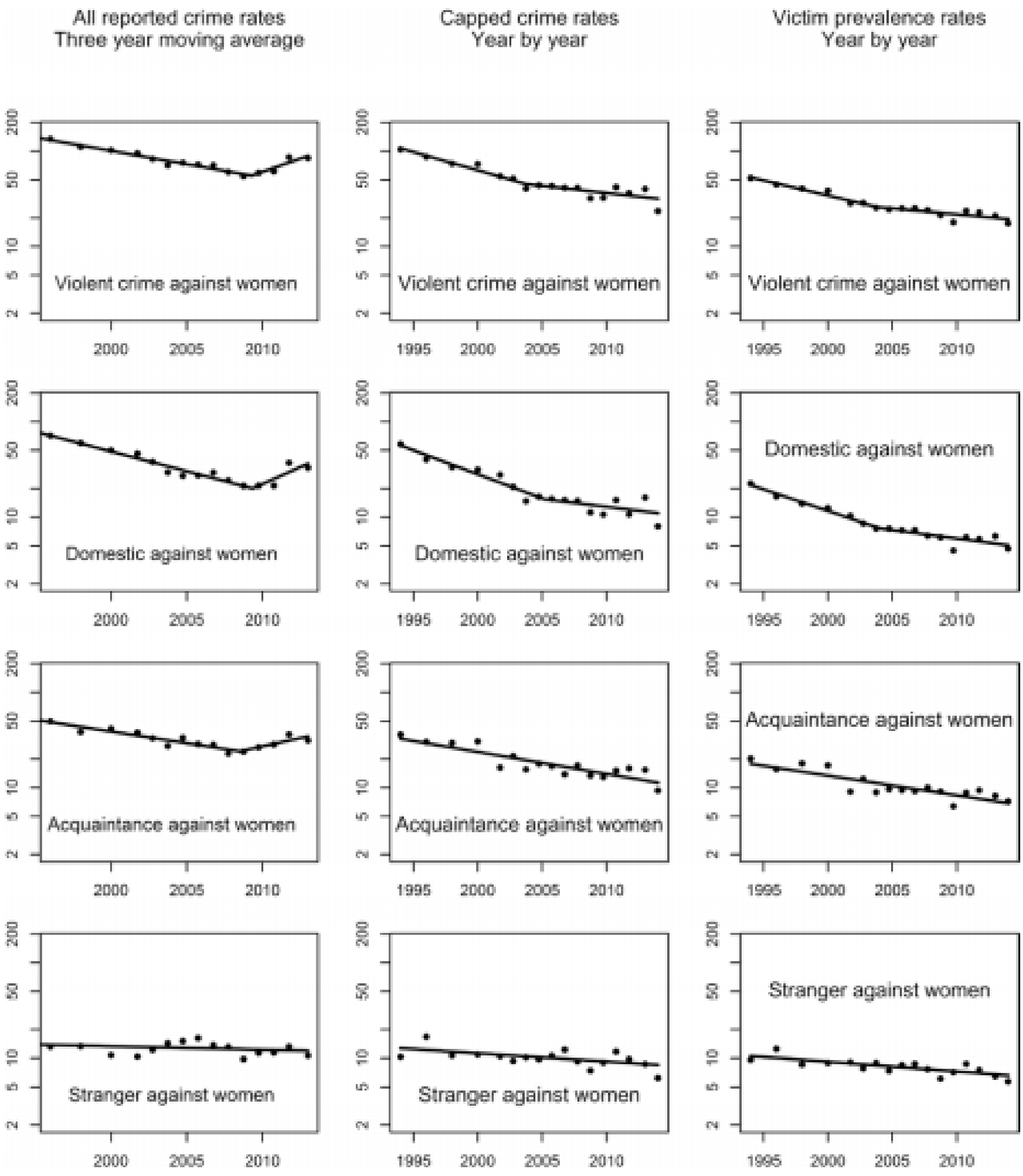
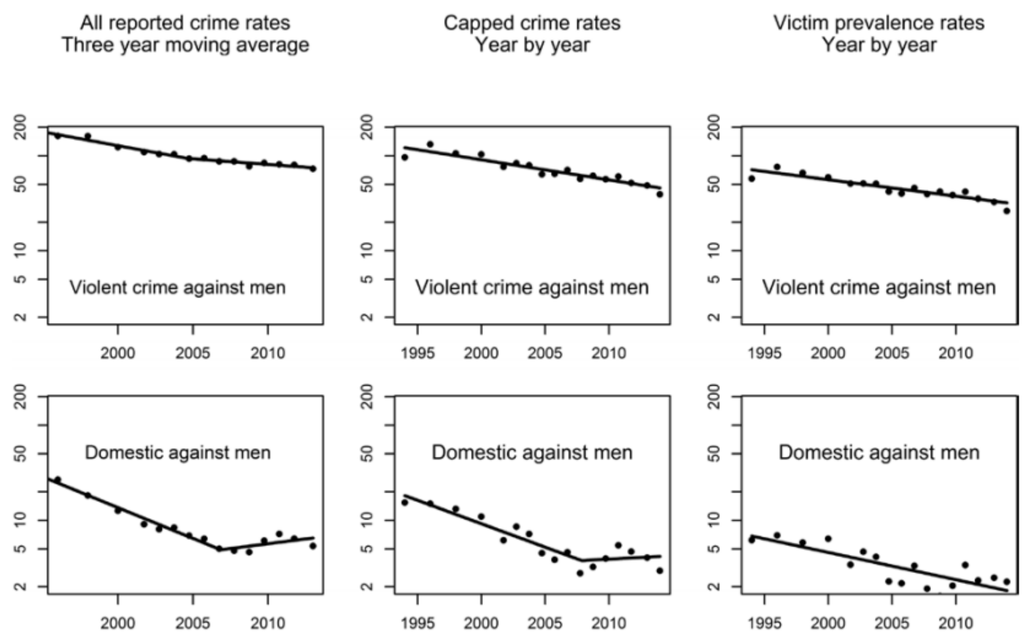


Fig. 1 Violence against women. Reported crime rates per 1,000 population on log scale graphed against year with fitted segmented regression line. Three methods are used to measure violent crime—all reported crime, capped crime and victim prevalence. Source: CSEW 1994 to 2013/14

victimizations are continuing to fall, while the number of female victims of violent crime experiencing high-frequency repeat victimizations has stopped falling: the number of victimizations these women are experiencing now appears to be increasing. When all reported crimes of violence against women is the unit of measurement, the fall stops in 2009 and rises significantly after this date; however, the capped crimes and victims units of measurement do not detect the increasing number of violent crimes committed against women after 2009. All domestic violent crimes against women fall between 1994 and 2009; then the fall stops and domestic violent crime starts to increase. The capped crimes unit of measurement only detects the stop in the fall. The victims unit of measurement does not detect any stop in the fall of domestic violent crime against women, finding instead a continuing fall in the number of victims. This suggests that while the number of female victims is still falling, the fall in those victims with repeat victimizations has stopped and in particular the number of crimes high-frequency repeat victims are experiencing may be increasing. The trend in acquaintance violent crime against women also varies considerably depending on the unit of measurement. When all reported crimes are the unit of measurement, acquaintance violence against women falls between 1994 and 2008: after 2008 the number of crimes increases. By contrast, when capped crimes or victims are used as the unit of measurement, neither the cessation in the fall of acquaintance violence nor the recent increase in crimes is detected. The trend in both capped crimes and victims indicates a fall in acquaintance violence between 1994 and 2013/14. This difference in trends found by the different units of measurement adds further weight to the hypothesis above that while the number of female victims experiencing low frequency victimization may still be falling, the number of women experiencing high-frequency repeat victimization has stopped falling and the number of crimes these women are experiencing may now be increasing. The trend in stranger violent crime against women also shows a difference by unit of measurement. Both capped crimes and victims show a fall in stranger violence against women between 1994 and 2013/14. By contrast, when all reported crimes are used, there is no change found in the rate of stranger violent crime against women over the period. This also suggests that it is high-frequency repeat female victims that as a group are experiencing an alternative trend in violent crime compared to female victims experiencing low frequency victimization. When all forms of violent crime against women are aggregated, evidence of the same trend is found. All reported crimes fall to 2009: after this date the fall stops and the rate of violent crime against women increases. By contrast, when the number of capped violent crimes and the number of female victims are the units of measurement, violent crime against women is still falling. The reporting of increasing numbers of incidents against some victims but much smaller increases in the number of victims suggests that this change in reported rate is not due to changes in the willingness of respondents willing to report violent crime to surveys but rather reflects changes in the 'real' rate of violence.

Violent crime against men

The rate of violent crime against men is falling, as illustrated by the graphs in Figure 2. The unit of measurement does not make a substantial difference to the trends in violent crime



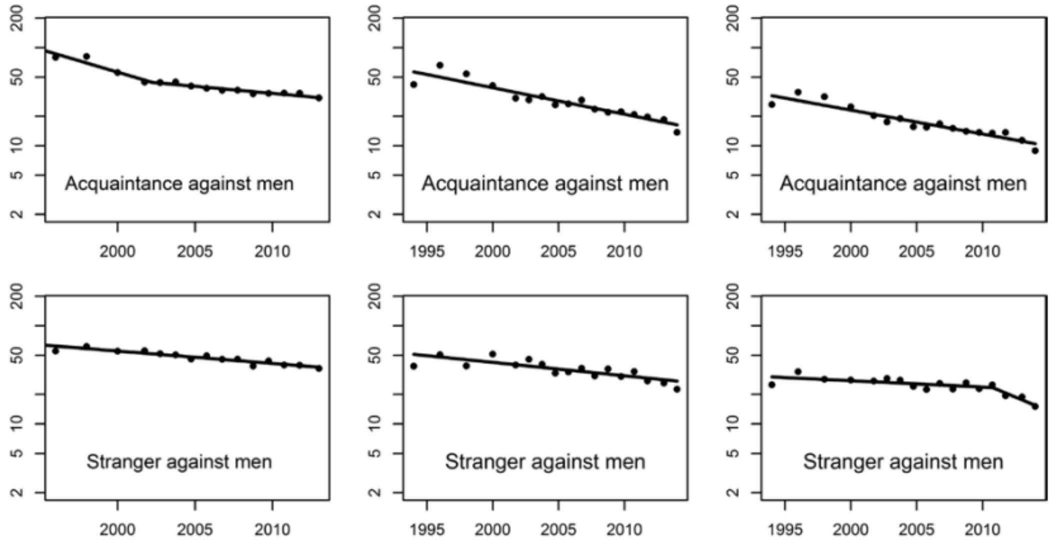
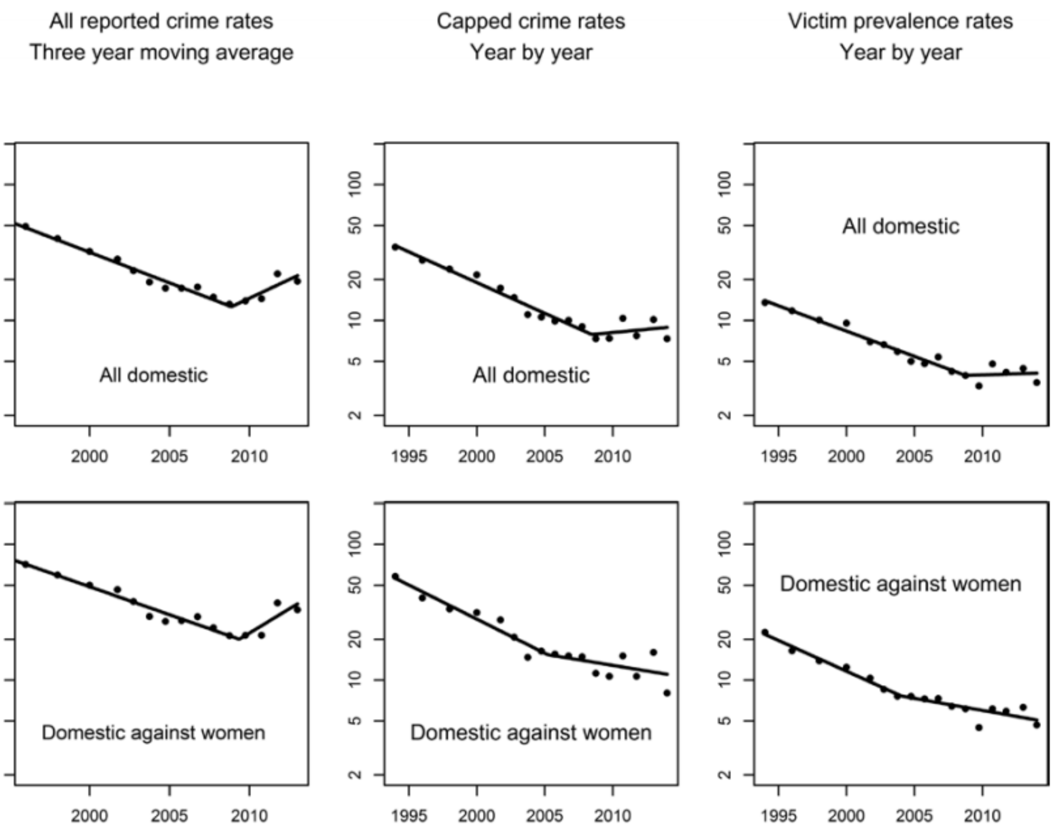


Fig. 2 Violence against men. Reported crime rates per 1,000 population on log scale graphed against year with fitted segmented regression line. Three methods are used to measure violent crime—all reported crime, capped crime and victim prevalence. Source: CSEW 1994 to 2013/14

against men. All violent crime against men, acquaintance violent crime and stranger violent crime against men are all falling no matter which unit of measurement is used. The only exception to the falling trend is domestic violent crime against men. The rate of domestic violent crime against men falls from 1994 to 2006/07 for both all reported and capped crimes: after this date the fall stops and no significant difference in the rate is detected.

Domestic violent crime

The trajectory of domestic violent crime is different to that of other forms of violent crime. For all three units of measurement, the fall in domestic violent crime, which had been occurring since 1994, stops in 2008/09, as illustrated in Figure 3. When the unit of measurement is all reported crimes, not only does the fall in the number of crimes stop in 2008/09, after this date the rate of domestic violent crime



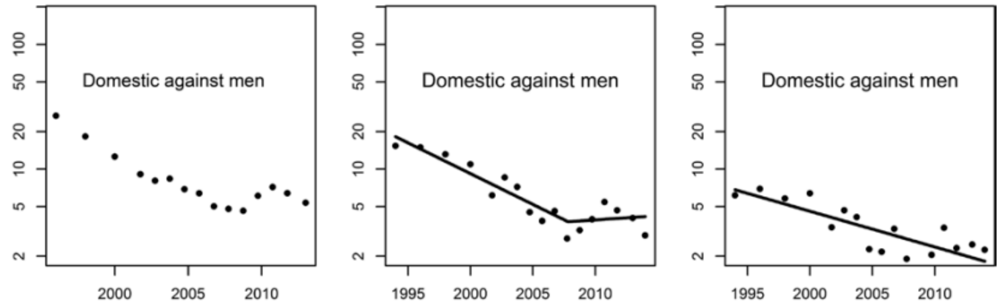


Fig. 3 Domestic violence. Reported crime rates per 1,000 population on log scale graphed against year with fitted segmented regression line. Three methods are used to measure violent crime—all reported crime, capped crime and victim prevalence. Source: CSEW 1994 to 2013/14.

significantly increases. This trend is also found for domestic violent crimes against women. Although the rate of domestic violence against men also stops falling in 2008/09, it does not significantly increase after this date. The trend in domestic violent crime shows a clear stop in the fall, which had been occurring since 1994, in 2008/09. This stop is detected no matter which unit of measurement is used. No other form of violent crimes shows a change in the trend as consistently as domestic violent crime across all units of measurement.

All violent crime

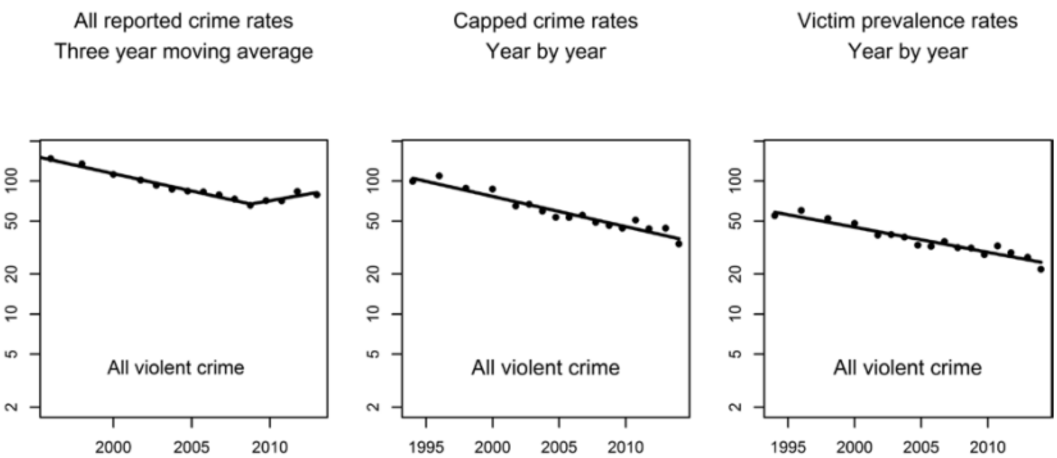
When the unit of measurement is all reported crimes, the fall in violent crime ceases in 2008/09; the rate of violent crime increases significantly after this point (see Figure 4). However, when the unit of measurement is capped crimes or the number of victims, all violent crimes continues to decline across the whole period.

Disaggregation by gender and relationship

To summarize, gender matters: but this is only visible when all violent crimes reported to the survey are included in the analysis. In order to make visible the trends in violent crime against women in contrast to those in violent crime against men, it is necessary to derive the estimates for analysis from all reported crimes reported to the CSEW. Violent crime against men is not increasing. By contrast, violent crime against women stops falling in 2008/09: many forms of violent crime against women have been increasing since 2008/09. The categories of 'gender of victim' and 'relationship of victim and perpetrator' show separate effects and they overlap. The largest increase in crimes is at the point of overlap: women victims of domestic relations. The making visible of high-frequency victims produces a different profile of violent crime. It raises the importance of violence against women, perpetrated by domestic relations compared to unknown (male) perpetrators against other men. Further, violent crime is increasingly against women, increasingly perpetrated by domestic relations and decreasingly against men. By mainstreaming gender and relations into the analysis of violent crime, we make visible these comparisons. Isolated analysis of violence against women, separated from violence against men, makes invisible the changes in the gender profile of crime.

Timing of the changes in the rate of violent crime

The changepoints in the rate of violent crime against women and by domestic perpetrators are both in the period 2008/09. Before that year the rate was falling; afterwards it is rising. The turning point in the rate of these violent crimes is consistent with an explanation focused on the reduced economic independence of women and the impact of the cuts to services on which women disproportionately depend. However, caution is necessary in asserting this explanation since this paper has not provided evidence on the



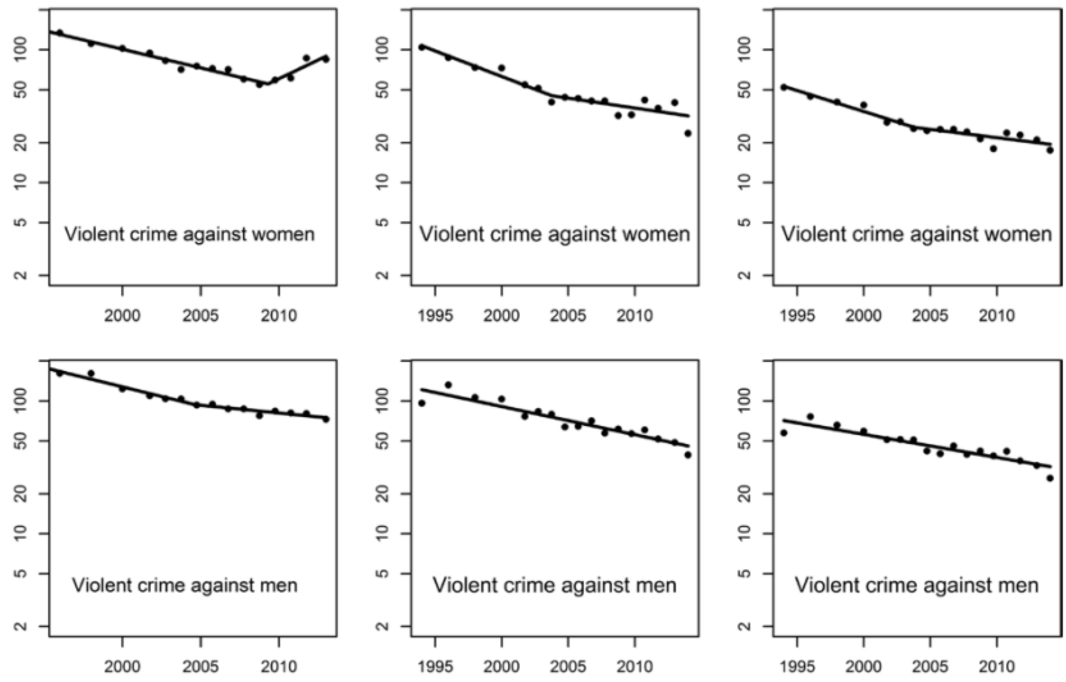


Fig. 4 All reported violence. Violent crime rates per 1,000 population on log scale graphed against year with fitted segmented regression line. Three methods are used to measure violent crime—all reported crime, capped crime and victim prevalence. Source: CSEW 1994 to 2013/14.

changes in the microeconomic relations within households experiencing violence nor for individual women experiencing violent crime. This requires further investigation. Further, the findings indicate that the theorization of violence against women needs to extend beyond domestic violence and the household in order to also account for the rising trend in acquaintance violent crime and all violent crime against women.

CONCLUSION

Unit of measurement

High-frequency victims are significant in the changing rate of violent crime and are an important component of the changes in violence over time; this is lost if victims and/ or capped data are used as the unit of measurement. Domestic violence (which is disproportionately against women and a gender-saturated category) is often a crime that is repeated by the same perpetrator against the same victim. Challenging and replacing the methodology of capping: the 'cap' is gendered; disproportionately reducing the amount of violent crime against women that is included in the official statistics. Removing the cap increases the estimate of the amount of violent crime against women and the amount of violent crime that is domestic. Removing the cap makes visible the increase in domestic violence and violence against women that is otherwise hidden by the cap. In particular, the findings demonstrate the significance of the increase in violent crime against those who are repeatedly victimized. We offer a new methodological resolution to the dilemma of measuring small numbers of high-frequency victims that does not generate excessive volatility. This is to use three-year moving averages and statistical modelling. Three-year moving averages effectively trebles the sample size. Statistical modelling of trends allows for the inclusion of many more data points than comparing the start and finish years. This is relevant to the estimation of official statistics on crime in general as well as on violence against women. Removing the arbitrary cap that excludes some violent crimes committed against the most highly victimized increases the estimate of the amount of violent crime and increases the proportion of violent crime committed against women and by domestic perpetrators. The findings challenge the use of the cap in the presentation and publication of official statistics on violent crime, finding it incompatible with ONS standards of quality for official statistics. This challenge to remove the cap and to revise the methodology extends to surveys in the United States, Canada, Mexico and any other country that uses this practice.

Gender specificity of violent crime

The findings challenge the gender neutrality of crime statistics by demonstrating the relevance of gender for violent crime, it demonstrates the need for ONS, other National Statistical Offices around the world and the UNODC's International Crime Classification for Statistical Purposes (ICCS) to gender disaggregate official statistics, including crime statistics, on a routine basis. Serious violent crime policy: by demonstrating the increase in violent crime against women, at the same time as a fall in violent crime against men, our findings challenge the presumption that violent crime is predominately a problem of violence against men. It thus adds impetus to the changes in public policy to address violence against women, in the domestic and public spheres. The findings challenge the focus of serious violent crime policy on violence between men. Violent crime is increasing against women and by domestic perpetrators. Policy to target reductions in serious violent crime should include action concerning violence against women and domestic perpetrators, including those that are already multiply victimized.

Gender mainstreaming

By demonstrating the significance of gender for changes in violent crime, and their timing, it challenges criminological and social analysis to pay increased attention to gender relations, which are needed in order to explain these changes in violent crime. This means including gender relations within mainstream criminological and social theories. It does not mean confining the analysis of gender-based violence to a specialist field. It is necessary to be able to compare the gender-specific rates of violent crime, which is not possible if studies are made of women only.

All violent crime is increasing

This is only visible when high-frequency victims are included in the measurement of violent crime.

Re-theorizing violence

The findings have implications for the internal construction of each of the three theoretical frameworks identified in the section 'Theoretical issues', as well as for the comparison of their explanatory efficacy. The thesis of long-term decline in violence associated with the pacification of society linked to increased self-control is challenged by the increase in violent crime against women. It is hard to explain this increase, especially its gender specificity, as due to a temporary increase in permissiveness. The timing of the increase in violence against high-frequency victims, in violence against women and in violence by domestic perpetrators is consistent with the thesis that the increase is due to the economic crisis that reduced income levels and increased inequalities and thereby reduced the propensity of victims to escape violence, including exiting violent relationships or enabling conflicted households to split up. The analysis of the links between economic inequalities and violent crime needs to address the gendering of both economic inequalities and of violent crime. The financial, economic and ensuing fiscal crisis has been gendered in that the reductions in the resources have disproportionately affected women. This paper has not addressed the specificities of these resources, such as the relative importance of reduced income from wages and benefits, reduced access to specialist domestic violence services and reduced access to funds to pay for civil legal justice. This is a question to be addressed elsewhere. Addressing it would enable an evaluation to be made of the utility of applying a gendered version of routine activity theory to the analysis of violent crime. The findings challenge the thesis that there is still a drop in the rate of violent crime. The fall in the rate of violent crime has ceased and violent crime against women and by domestic perpetrators is increasing. Criminological and social theory should desist from the assumption that the most important aspect of violent crime is male on male violence. Gender matters. Gender saturated contexts of domestic relations matter. The analysis of violence against women and domestic violence should not be confined to a separate field but is core to the theory of violence. The analysis here has concentrated on data for England and Wales. There is a need for these methodological innovations to be applied to global violent crime data in order to understand whether trends in different countries are following the same or alternative patterns. This would contribute significantly to the further development of the theorization of violence in the global context.

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ACKNOWLEDGEMENTS

We thank the ONS for the use of the CSEW and the UK Data Service for assistance in accessing this data. The original data creators, depositors or copyright holders, the funders of the Data Collections and the UK Data Service bear no responsibility for this analysis and interpretation. The data are available from the UK Data Service at doi:10.5255/ UKDA-SN-7619. The study analysed the CSEW main questionnaire and Victim Form module data sets for consecutive sweeps between 1994 and 2013/14, downloaded in SPSS, listed as study numbers: SN7619; SN7422; SN7252; SN6937; SN6627; SN6367; SN6066; SN5755; SN5543; SN5347; SN5324; SN5059; SN4787; SN4463; SN4081; SN3832; SN3591. Technical details on the data set and the crime and population counts used in this paper can be found at http://dx.doi.org/10.17635/lancaster/researchdata/53.

APPENDIX

This appendix describes the statistical methodology used in this paper on (1) measuring volatility and (2) modelling trends over time. There is an additional Technical Paper on the specifications of the CSEW data that we use in our analysis available at http://dx.doi.org/10.17635/lancaster/researchdata/53

Modelling volatility

We have four sets of estimates for the 12 forms of violent crime all the sweeps of the CSEW from 1994 to 2013/14. The estimates are available in Tables 1a to 1d in our Technical Paper. The four sets of estimates are: (1) All reported crimes year by year data (2) All reported crimes three-year moving average data (3) Capped crimes year by year data (4) Victims year by year data When assessing methods of volatility reduction, we need a method of measuring volatility. This involves separating the signal or trend in the data series from the noise. The usual method of measuring volatility is to take the variance or standard deviation of the data series around the trend line. However, this method assumes that the variance is unaffected by the size of the mean. With count data, it is common for the variance of a data series to increase with the mean, so this assumption is unrealistic.

We therefore adopt the following procedure for each form of violent crime and for each unit of measurement: fitting an overdispersed quasi-Poisson model, with the time trend modelled by a smooth cubic spline curve with three degrees of freedom. Three degrees of freedom is sufficient to allow the trend curve to have some degree of non-linearity, while still allowing sufficient degrees of freedom to assess volatility. The 'noise' or volatility of the data series is then measured by examining the deviations of the data around this smooth curve. As the variability of count data increases with the mean, we do not use the residual sum of squares but instead use the overdispersion parameter estimate. This is estimated, as is usual, by the chi-squared statistic X2 divided by the residual degrees of freedom (Hinde and Demetrio 1998). The resulting volatility estimates are presented in Table 2 for the various methods of measurement.

Modelling trends over time in violent crime

To assess trends, we model the whole data series, such that each point in the data series contributes to the trend analysis. The data we are modelling are rates per 1,000 of the relevant population. Common models for rates are an ordinary least squares model, and a Poisson log-linear model, or overdispersed variants of this model. Osgood (2000) highlights the advantages of a log-linear modelling approach that allow for the variance increasing with the mean; we follow this route. Count data are also commonly overdispersed; we have allowed for this by assuming a quasi-Poisson rather than a Poisson model. This allows for the estimation of a dispersion parameter κ that measures the degree of overdispersion. Rates are modelled in the usual way by including log of the sample size as an offset in the model (Hilbe 2014). When estimating change over time, we have choices for the shape of the trend curve. We could fit a quadratic or cubic function or use various forms of smooth regression models. However, such models do not readily allow a determination of changes in slopes, or whether a data series appears to be changing direction at a specific point in time: the detection of changepoints is important (Kenny and Knowles 1997). We have therefore adopted the approach of segmented or changepoint regression modelling (Muggeo 2008a) and assume that the data series can be represented as two straight lines with a change at an unknown time breakpoint. Segmented regression models have been used here as they are more specific than general changepoint models and require continuity of the two regression lines at the breakpoint. Formally, the log-linear segmented model can be written as:

$$\mu_i = E(C_i) \quad \mathrm{Var}(\mu_i) = \kappa\mu_i \text{ and}$$
$$\log(\mu_i) = \log(N_i) + \beta_0 + \beta_1 \mathrm{year}_i + \beta_2(t_i)$$

$$t_i = \begin{cases} \mathrm{year}_i - \psi & \text{if year}_i > \psi \\ 0 & \text{otherwise} \end{cases}$$

where Ci are the rescaled counts, and Ni is the observed sample size for time point i. Both the breakpoint ψ and the regression parameters β of the two lines are estimated from the data. We follow the method outlined by Muggeo (2008a). First the presence of a breakpoint is tested using the Davies test that tests the hypothesis that there is no breakpoint and only one regression line. If the Davies test suggests rejection of this hypothesis, a segmented log-linear regression model is fitted and the breakpoint estimated. Of specific interest are the estimated time point at which the breakpoint occurs and the slope of the two regression lines, estimated by β1 and β1 + β2 . Thus, an additional advantage of the segmented model is that the slopes of the two regression lines can be tested to see if they are significantly different from zero. All models and tests are fitted using the segmented package in the statistical software R (Muggeo 2008b).

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CHAPTER 16 POVERTY AND CRIME: BREAKING THE VICIOUS CYCLE

Dario Berrebi

Poverty and crime have a very «intimate» relationship that has been described by experts from all fields, from sociologists to economists. The UN and the World Bank both rank crime high on the list of obstacles to a country's development.

Governments trying to deal with poverty often also have to face the issue of crime as they try to develop their country's economy and society. Crime prevents businesses from thriving by generating instability and uncertainty (at micro and macroeconomic levels). This is true in markets of all sizes, national, regional, municipal and even neighborhood-al (okay the word doesn't exist).

That's why having a business in a ghetto is rarely a good idea.

The Vicious Cycle of Poverty and Crime

International organizations also blame crime – including corruption – for putting at risk Africa's chances of development nowadays. The same goes for Latin America. Crime has this capacity to generate vicious cycles causing unemployment, economic downturns and instability. Poverty and crime combined together leave people with two choices: either take part in criminal activities or try to find legal but quite limited sources of income - when there are any available at all.

Citation: Dario Berrebi, Poverty and Crime: Breaking the Vicious Cycle, http://www.poverties.org/poverty-and-crime.html

Unemployment, Poverty and Crime

Starting from the 1970s, studies in the US pointed more and more at the link between unemployment, poverty and crime. After that other connections with income level, time spent at school, quality of neighborhood and education were revealed as well. Fresh research from the UK even indicates that economic cycles may affect variations in property and violent crimes.

But most importantly, what reveals the unmistakable connection between poverty and crime is that they're both geographically concentrated - in a strikingly consistent way. In other words, where you find poverty is also where you find crime. Of course this doesn't include "softer" crimes such as corruption which causes massive damage to people's lives but in a more indirect type of violence.

EDUCATION, POVERTY AND CRIME

Poverty is a corporate government policy - photo courtesy of Xiao Zhuli

Not all Crimes are Created Equal

During the hard times that have hit Europe from 1975 to 1995, scholars noticed that unemployment among the uneducated youth spurred a massive tendency for theft and violence. In particular in France, the crime rate soared like never before. Ever watched the movie “La Haine” back from 1995? It was translated “Hatred” and “Hate” in the UK & US and has really become the classic of a generation.

Although the depicted segregation against immigrants in France roots back a few decades before the 1990s, the “first wave” (of immigrants) has rarely shown such outburst of violence. In theory the main difference with the first generation of these immigrants’ children is that they have spent much more time at school, as research has often concluded that education tends to reduce violent crime.

On average, the more time you spend at school the less violent you will become. Schools don’t just teach you about history or maths, they teach you how to live in society. But the real problem is: are kids in poor urban areas even going to school at all? Are they learning any social skills when being systematically discriminated against? Research dating back to 1966 - with the famous Coleman Report - shows integration into society is key to better grades and successful education.

Why follow the right path?

Why would anyone follow the “right path” (i.e. schools) if you see that your parents did so and are still jobless or at best exploited and humiliated? Or if your identity and your place in society are constantly questioned, often by the government itself? It certainly won’t help you feel at home.

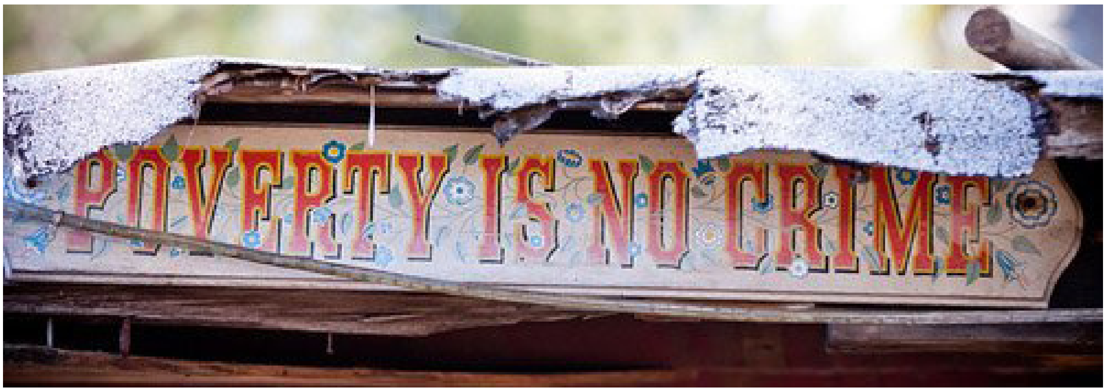
This is a problem many governments are facing all over the world and they tend to react to demonstrations quite aggressively as they try to please certain groups of voters. By doing so they also forget that the very people they repress are also voters, and that trying to divide a nation will only bring more instability and more violence.

Poverty causes crime

In the countries where the social discrimination factor isn’t very strong, results have shown that less education meant more criminal offenses ranging from property crime to “casual” theft and drug-related offenses (again, mostly theft). But not violence. It appears that in fact, poverty itself is more tied with violence, criminal damage and also drug use - as a catalyst for violence.

There are huge consequences of this kind of research for public policy and the positive impact of keeping children in school and reducing poverty. But for that we would need governments to actually read the research their universities produce! It shouldn’t seem like too much of a stretch to argue that having kids actually graduate from school will in itself contribute to reduce poverty, no?

INEQUALITIES: INCOME AND UNEMPLOYMENT



Poverty is not a crime - photo courtesy of Thomas Hawk

Inequalities & Mixed Populations

Another study across 20 cities in the US analyses how local inequalities and heterogeneous populations can influence crime rates. As ever more countries face problems related to immigration, policymakers should be aware that inequality, even within one ethnic group, is a major cause of crime.

It’s also crucial to take into account how many ethnic groups live within a single neighborhood to understand local dynamics. Some are more likely to clash against others, depending on where they live. When inequalities are great, crime goes over the roof both within and between different ethnic populations. The more heterogeneous, the more jealousy, the more misunderstandings and the more crime there can be in a given place.

The key? Re-building the social fabric

Because of heterogeneity, there’s a lot less communication (if any) between the residents which means that public policy should focus on structures of social integration and facilitating communication in order to help build a new social fabric, or at least a sense of neighborhood.

In this case more than ever, the local (neighborhoods) and the global (immigrants) both matter just as much and need to be integrated. Income inequalities generate pockets of poverty and crime concentrated in the same ghettos, not only between but also within ethnic groups.

The spectacle of wealth

It's only when people witness the starkest wealth differences that they can start complaining about injustice. In fact, often times crime is even worse within communities. Perhaps because it's easier, but maybe also because inequalities are felt all the more intensely when it happens between people living in the same group.

For example, in China some 90,000 demonstrations occur every year and what the media never mention is that the bulk of it it happens at the "border" between urban and rural areas, where poor farmers can see first hand the massive inequalities between rich urban residents and themselves.

Property crimes vs. violent crimes

In a broader, social sense, inequalities generate more aggressive behaviour as a reaction to social bias and discrimination, which results in an increase in violent crimes. And while it's been well-established that where poverty and police activity are strongly connected to property crime, they hardly have any impact on violence.

This is one (very) important lesson for governments: property crimes are correlated to hard times (i.e. poverty) but violent crimes are tied to the lack of social cohesion or harmony and can lead to riots and social unrest. In the end, it's no big surprise that unemployment is also connected with crime as it's an important factor of inequalities. It's only recently that studies have revealed that unemployment causes not only higher property crimes but violent ones too.

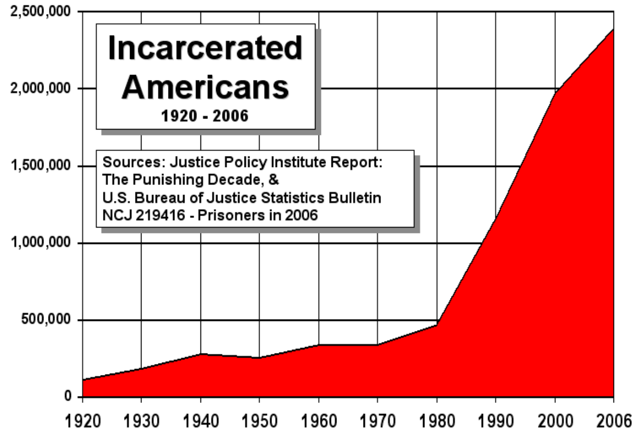
Besides, joblessness has a deeper impact on the community because it destroys entire communities and whatever social cohesion that kept people living together in peace. This is a process that is all the more difficult to reverse. Eventually, it leaves a community completely helpless towards the growing cycle of poverty and crime.

Broken social contract

In Europe unemployment and income inequality have become the markers of social cohesion, or lack thereof. At very high levels, they indicate a fracture of the "social contract" . With an ever growing number of people who feel that the government has broken the social contract for many reasons (discrimination, lack of meritocracy). Hence they feel they can legitimately refuse to obey the rules of a society that will eventually abandon them to poverty and rather turn to crime out of frustration.

Thus the safety of private property and social order are seriously undermined and it's even worse with the uneducated youth that has never perceived any kind of social contract at all since it has never benefited from public services (schools, social assistance) that ensure a certain equality of chances.

THE 'RACIAL DIVIDE': THE ROLE OF SEGREGATION



Incarcerated Americans: the impact of the tough on crime policy

"They acknowledged something that tough-on-crime rhetoric has too long ignored: almost everyone in prison will eventually return to society." (The Economist)

The failure of mass-incarceration

The flailing American policy of mass-incarceration coupled with long sentences has for two decades been proved quite a failed strategy for the war on crime over the long run. At the same time it also helped the US achieve the highest incarceration rate in the world throughout the 1990s. Kudos.

Recently tons of reports are revealing that even traditionally tough-on-crime republican states and their senators are turning their backs on this policy because of the unbearable cost on the public finances. So much money - quite a few billions per year and per state - that could go instead to infrastructures, education, healthcare and so on.

"Black crime" and poverty

However the whole problem here remains that of discrimination. Logically if an overwhelming majority of the poor in the US are black and poverty causes crime… then a lot of the criminals are black. Obviously, it's the same in any country (the criminals also being the poor, that is).

And the association with an ethnic group is all the worse when the word "criminal" implies a moral value ("he's a bad person") while it should in fact be more of a social issue. In the end the mass-incarceration strategy has largely targeted the black population of the US and that in itself is a huge issue. It creates a peculiar sense of segregation by the system and a social bias against an entire ethnic group. What's even worse is that the habit of long-term prison sentences in the US has completely wiped out any chance of ever getting a job again for most of these people. So what do you do when you can't get a job at all, hum?

Unemployment… leads to poverty and crime, here again. And the vicious cycle gets more vicious, sending older generations back to jail for another 20 years. Apparently some states in the US even start releasing prisoners on parole without real motive but to cut spending. And you know what? Over the long run it costs less to offer them an education for 10 years than to keep them in jail for life. The maths is in fact quite simple.

Tough on crime = more crime

A recent book by Todd Clear (Imprisoning Communities, Oxford University Press 2007) offers new evidence that over the years the tough-on-crime stance has actually contributed to fuel crime and second offenses. So in the long run the effect of imprisonment on crime is not that great. After all, what do you expect people to learn in prison? It's certainly not by stuffing them into overcrowded cell blocks that criminals will learn about social values or the virtues of universal love.

So, why does Todd Clear accuse mass-incarceration of being "criminogenic"? Simply because its bias destroys entire communities and makes jail become a normal, inevitable step in people's lives. Young blacks witness their fathers, brothers and uncles inevitably spend years in jail and think it's just the way life is for them.

On top of that, when you lock parents up for years (including for minor offenses), it deprives their children of basic life education. Eventually they miss on any form of education whatsoever as they tend to drop out of school quite early on. If no parent is around, who's gonna tell them to go to class every morning?

Rebuilding communities and confidence in institutions

At this point unemployment is already widespread, except this time poverty and crime are marked by violence because these kids lack sense of the most basic social norms and behaviors. One solution for Clear is to rebuild communities with community policing strategies so that justice works with the people rather than against them, and thus hoping that confidence in the system can gradually be brought back in.

IS LEAD POISONING AFFECTING CRIME RATES?

The relationship between lead poisoning and violence has long been established by medical studies and was then followed by social scientific ones to study the possibility of large-scale lead poisoning in the air, soil, water and food. Most people involved in these studies are well aware this is a real problem, especially a few decades ago when lead-based paint and leaded gasoline were so common (forbidden since the 1970s in the US).

And there was indeed a direct impact on property and violent crime - revealed across thousands of cities - and the impact has been so much worse in poorer areas.

Impoverished communities more exposed to lead poisoning

The reason is that impoverished areas have had the least resources, be it in terms of public education on the risks of lead-based material or in financial means and resources to treat and prevent the poisoning epidemic.

Less money to replace the hazardous infrastructure such as old water pipes and wall paint, including protection from toxic dust during any renovation and basic health recommendations. Most of all, poor areas are often located nearby industrial ones, which are the best ones to find sky high lead levels in the air, soil and water. Yummy.

BREAKING THE CYCLE OF POVERTY AND CRIME

Unemployment and education

Public policies that aim to restructure the labor market in order to tackle structural unemploymenthave a clear-cut (positive) effect on income levels and economic growth. Decreasing unemployment remains central to breaking the cycle of poverty and crime and restoring some social harmony.

Other strategies such as education in prison, or even college-in-prison providing with real diplomas, have been extremely efficient at helping integrate ex-convicts in society and reducing recidivism. The biggest barrier to this type of initiative remains the dilemma of offering free education to criminals while many law-abiding citizens have a hard time paying for one. At least, providing education - or treatment for drug addicts - proves insanely cheaper than pure and simple long-term incarceration.

Housing for all

Other policies should focus on low-income housing as an opportunity to raise households' income and sense of social fairness. That is as long as the government doesn't create entire ghettos out of such social housing in a bid to separate the poor from the rest of the population. Maintaining quality social services and a well-functioning social ladder is key to building a just society in which every citizen if offered a chance to develop his own potential.

Building an efficient welfare system

Finally, higher levels of welfare assistance are strongly associated with crime reduction. Now that may seem controversial to some, but... it's not. Simply put, countries that integrate social welfare like the US in their "war on poverty" and claim that it's been useless disregard the fact that the war was never properly fought. Consequence, the results are biased and policies highly inefficient because of lack of monitoring and improvement of the different strategies experimented. A failure doesn't always mean the idea was bad, but sometimes that you should just better the system step-by-step. That's how we, humans, learn.

Fighting poverty should be more a long term social justice plan, but welfare assistance has been disproportionately lower in the US than in other Western countries where welfare works much better. In many cases, poorly designed welfare policies has done damage to the very idea of welfare and led many countries to abandon welfare strategies to reduce poverty and crime. And yet, studies have shown that the connection between welfare and poverty reduction is indisputable in many cases... But it often seems as though no one in our governments likes using all this research. So what's the point of even having universities like Harvard, Yale, Oxford, Cambridge and whatnot?

Given the outright correlation between poverty and crime, any policy serious about tackling crime has to take poverty reduction policies into account.

High poverty, low crime?

However, something radically new is happening right now in the US. With sky-high poverty levels and 1 in 4 children on food stamps, we're witnessing a remarkable statistical exception because crime has never been so low. Many studies tend to show that there are several reasons for this:

- Community policing is working very well and new (smarter) ways of working against crime are very fruitful - as the police seem to have abandoned the era of filling quotas of arrests;
- Communities and gangs seem to have stabilized and found common grounds to live in peace - each in its neighborhood.

While the relationship between poverty and crime holds true in the rest of the world, specialists still have to understand what is going on in the United States. Recent articles are suggesting that as far as gangs are concerned, in most cities they have settled in their territories and "fought" for stability in order to increase revenue from their illegal activities. Drugs contributing to less crime? Well, it's all about business in the end.

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CHAPTER 17

THE ABSENCE OF CRUELTY IS NOT THE PRESENCE OF HUMANNESS: PHYSICIANS AND THE DEATH PENALTY IN THE UNITED STATES

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The death penalty by lethal injection is a legal punishment in the United States. Sodium Thiopental, once used in the death penalty cocktail, is no longer available for use in the United States as a consequence of this association. Anesthesiologists possess knowledge of Sodium Thiopental and possible chemical alternatives. Further, lethal injection has the look and feel of a medical act thereby encouraging physician participation and comment. Concern has been raised that the death penalty by lethal injection, is cruel. Physicians are ethically directed to prevent cruelty within the doctor-patient relationship and ethically prohibited from participation in any component of the death penalty. The US Supreme Court ruled that the death penalty is not cruel per se and is not in conflict with the 8th amendment of the US constitution. If the death penalty is not cruel, it requires no further refinement. If, on the other hand, the death penalty is in fact cruel, physicians have no mandate outside of the doctor patient relationship to reduce cruelty. Any intervention in the name of cruelty reduction, in the setting of lethal injection, does not lead to a more humane form of punishment. If physicians contend that the death penalty can be botched, they wrongly direct that it can be improved. The death penalty cocktail, as a method to reduce suffering during execution, is an unverifiable claim. At best, anesthetics produce an outward appearance of calmness only and do not address suffering as a consequence of the anticipation of death on the part of the condemned.

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Sodium thiopental, a drug once standard in the practice of anesthesiology, is no longer available in the USA. This is due to concerns by the manufacturer over use in the death penalty via lethal injection.[a]Anesthesiologists possess the pharmacological and technical expertise required to utilize alternatives to sodium thiopental injection in the setting of medical practice. From a technical and pharmacological perspective, the death penalty, by lethal injection, appears to possess common elements to the practice of Anesthesiology. As a consequence, death penalty proponents have sought advice from anesthesiologists and derive benefit both from the applicable knowledge possessed in the medical practitioner and the ability to usurp a civilized image by association. Death penalty opponents have used the 8th amendment of the US constitution as justification against the death penalty [1, 2]. The argument asserts that death by injection would constitute cruel and unusual punishment. Indeed, evidence exists that the death penalty by lethal injection, as practiced in the United States, falls below the standard of veterinary euthanasia [3] or the normal conduct of an anesthetic performed within a medical setting [4]. States that practice the death penalty have attempted to answer this concern by asserting that the death penalty is in fact constitutional by imposing a standard of humanness [5]. This paper will address the following concerns: First, what is meant by cruelty in the context of the death penalty? Second, what are the moral duties and obligations of the physician, both as doctor and citizen, with respect to conduct in society? Last, what is the role of the physician with respect to mitigation of cruelty and promotion of humanness in the setting of the death penalty?

It is important to draw the distinction between cruel acts and cruel individuals. When we say that a person is "cruel" we are referring to their motives. They want to inflict pain on others, take pleasure in the pain of others, or are indifferent to the pain of others. When we say that an action is cruel we are referring to its consequences: it causes unnecessary or excessive pain. Cruel people are prone to engage in cruel practices but sometimes kind and gentle people engage in cruel practices from a professed motive of mercy: they want to diminish the pain/suffering involved in the cruel practices. Cruel punishment was defined by the original framers of the constitution according to the prevailing notions of the time. The legal system recognizes that cruelty will always reflect a standard commensurate with the maturation of a civil society and that punishment should be proportionate to the severity of the crime. The U.S. Supreme Court has held that the death penalty itself is not inherently cruel, but has described it as "an extreme sanction, suitable to the most extreme of crimes" [6] It is important to recognize that constitutional protection is concerned with the method of punishment, not what is considered as the necessary suffering inherent in any method utilized to end a life humanely [7]. The court has considered the death penalty from a consequentialist perspective, that is, fundamentally, the death penalty is successful when the result is death of the condemned. From time to time, as society evolves, the court will evaluate the method of execution against the current cruelty standard only, not the rightness or wrongness of the death penalty.

In the setting of the doctor-patient relationship, medical ethics directs the physician to act without maleficence, that is, to do no harm. Is it reasonable that a physician, acting in ones own professional capacity, has no moral duty/obligation to anyone other than the patient? Many would argue that physicians have multiple other obligations, e.g., to public health and safety, to obey the law, the duty to warn, the duty to report, and various other public-spirited duties. On occasion, military physicians have duties that potentially place them in situations where medical ethics and military interests collide. Physicians' desire to reduce cruelty in the setting of the death penalty may be compared to the actions of military physicians' who use medical knowledge to enhance prisoner interrogation, resolve hunger strikes and prescribe psychotropic medications to retain soldiers in combat areas or accelerate a return to active duty [8]. Rather than affirming the universal ethical duties of physicians, recent Department of Defense memoranda create vagueness by distinguishing treating from non-treating physicians, [9] in order to justify participation of non-treating physicians in using their medical knowledge to inflict cruelty. The American Medical Association, Council on Ethical and Judicial Affairs, adopted the World Medical Association Declaration of Tokyo (1975) [10] which refutes the claim that physician participation in torture or other coercive, non-therapeutic activities benefits the detainee by affording some form of protection [11]. Physicians are citizens, but in a free society, the adherence to a rule is not inviolate. The conduct of a citizen allows thoughtful dissent from certain activities. A physician may refuse to perform certain military duties as a form of conscientious objection. With regard to the death penalty, physician refusal carries a higher moral authority than participatory complicity. Moral self-deception is created when a small purpose close at hand interferes with a greater purpose, perhaps more distant [12].

David Waisel makes the case for physician involvement in the death penalty by lethal injection from the perspective of "humanness [13]." He refers to numerous reports of executions that proceeded with difficulties including problems with intravenous access, [10, 11] subjective assessments by observers that suffering occurred in the condemned, [14] and drug and dosage errors [15]. The claim that the death penalty by lethal injection can be botched suggests that it can therefore be improved. The appeal for improvement in the name of humaneness succeeds in drawing physicians in, [16] by appealing to a sympathetic concern for the welfare of others. From the above considerations of ethics and cruelty, the argument in support of humanness fails for several reasons. Physicians who participate in the death penalty are not concerned with prolonging life. This would certainly be the basic activity of medical practice. Physician participation then is in the name of mercy, or a reduction in the cruelty of lethal injection, except when it addresses that the purpose of the injection is to produce death. How cruel are the details of lethal injection apart from the lethality itself? By how much does a doctor's intervention reduce cruelty during execution? Non-physicians can establish intravenous access, and are able to draw up and inject medication. Non-physicians can provide comfort to the condemned as they anticipate and finally approach the execution table. It is conceivable that physician participation might increase cruelty from the perspective of the condemned. Physician endorsement of execution is so counter to normal medical practice that in the prisoners final moments, all vestiges of hope of a better society, should that be imagined, would be lost. Ultimately, the assertion that physician participation reduces cruelty is unverifiable. Only outwardly does it seem so by the witnesses. The administration of the death penalty is absolutely silent on the experience of the witness and needs not be addressed further.

Physicians are ethically directed to act with beneficence, and humanness may be subsumed within beneficence. Beneficence and humanness, as acts of conduct by physicians, are only directives within the doctor-patient relationship. Though acting humanely as a general activity may benefit society, it is not enforceable as a general standard of human conduct. If it is asserted that physicians are required to perform humane actions outside of the doctor-patient relationship, operationalizing such activity would be impossible. Within the complete rendering of human affairs, much inhumanity exists. No method exists to rank order humane tasks yet some method of humane triage would be required. If physicians position themselves as possessing statutory requirement for humane intervention in all affairs, they would otherwise be rightly accused of acting in one area at the seemingly arbitrary, or value laden, neglect of another. Physicians, like all citizens, may choose to act with humanity. Physicians may claim that in certain circumstances, they are not acting as a physician but as a private citizen.

Arguing that within the context of the death penalty the physician is a private citizen acting with "humanness" is flawed. Physician involvement is sanctioned by the state because physicians posses the medical knowledge of the components of lethal injection. Physicians, however, are not able to separate their medical knowledge and conduct in circumstances that possess the look and feel of a medical act. The death penalty does not claim to be a medical act and is therefore not subject to the standards within the performance of medical acts. Yet, it has chosen to usurp the tools of the medical trade thereby misleading physicians to believe they are working within the framework of medicine, and the public to believe that civility and safe oversight are in place.

Physicians are unambiguously prohibited from active participation in the death penalty according to the American Medical Associations opinion on capital punishment [17]. In the United States, only 20% of physicians are members of the AMA [18]. Additionally, only 7 of the 35 states that use the death penalty have statutory or regulatory incorporation of AMA ethical guidelines [19]. States have successfully barred medical boards from disciplining physicians who have been involved with the death penalty [20]. The AMA is limited in ability to punish physicians who are at odds with AMA policy beyond revocation of AMA membership. AMA membership is not a requirement by physicians to obtain medical licensure or practice medicine. State governments affirm legal authority in the regulation of medical practice, even in circumstance where the state medical board objects. In this regard, medical ethical conduct and state legal authority are at odds. The Nuremberg defense has clearly defined that medical practice, outside of ethical conduct is not made right by state fiat [21].

The death penalty by lethal injection is a two-fold process. First, a state government acquires a chemical, or a combination of chemicals that when injected, causes death in people. Second, these chemicals are given as a punishment to individuals who have been lawfully convicted of certain offences with the purpose of causing them to die. In this situation, the convicted individual is not a patient and therefore physicians have no role in this activity. Physicians are neither capable nor required to remove cruelty in circumstances outside of the doctor-patient relationship. Physicians as citizens are not charged with the promotion of humanness outside of the practice of medicine. Physicians therefore have no obligation or mandate to be involved. It remains the states prerogative to execute individuals but it should be prohibited from using words or methods that are terms of art, which are used by physicians to describe medical practice.

In summary, physicians have no ethical requirement to participate in the death penalty. Fundamentally, any invocation of a reduction in suffering consequent to physician activity should exist within a doctor-patient relationship. A physician and a condemned prisoner have no doctor-patient relationship in the context of the administration of the death penalty by lethal injection. If, according to the United States Supreme Court, the death penalty is not cruel per se, it needs no improvement. If the death penalty is cruel, then attempts to reduce cruelty by pharmacological adjustments are not necessarily humane, or worse, create an illusion of humanness as they are physician directed.

ENDNOTES

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CHAPTER 18

UNDERTAKING RESEARCH IN OTHER COUNTRIES: NATIONAL ETHICO-LEGAL BAROMETERS AND INTERNATIONAL ETHICAL CONSENSUS STATEMENTS

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ABSTRACT

Is it ethical for scientists to conduct or to benefit from research in another country if that research would be unlawful, or not generally accepted, in their own country?

There are many reasons for scientists to undertake research with colleagues in other countries. They may benefit from sharing knowledge and experience with colleagues from different backgrounds. They may obtain funding that is directed to transnational projects. They may gain access to more diverse facilities and participants in research. They may acquire kudos, academic advancement, or commercial benefits from an enhanced international reputation. And they may also be able to undertake activities in another country that would not be permitted in their own country, due to legal or ethical constraints.

In most cases, it will be lawful in their own country to undertake such activities overseas. It is rare for countries to have laws directly preventing their nationals doing research overseas that would not be permitted at home, or even bringing back the products of such research, unless they pose a safety risk, such as importing genetically manipulated organisms created overseas. However, some people have asked whether it is ethical for scientists to do research overseas in order to benefit from a favourable regulatory scheme and whether there should be laws to prevent such research.

This paper argues that, in the great majority of cases, there are no ethical reasons to prevent scientists from doing research abroad or using the research results at home, even if the research does not comply with local laws. To illustrate my argument, the paper focuses particularly on human embryonic stem cell research and a project in which international and multi-disciplinary experts agreed on a consensus statement setting out principles for transnational stem cell research [1]. The group of experts, known as the Hinxton Group, consisted of 60 scientists, doctors, philosophers, lawyers, scientific journal editors, federal regulators, and others from 14 countries, who attended a meeting sponsored by the

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Wellcome Trust at Hinxton near Cambridge, United Kingdom in February 2006 (the project is described in [2]). The group developed and unanimously endorsed a set of international principles (summarised in Box 1), even though the law and the ethical procedures in their respective countries often differed.

Box 1. Some Ethical Principles Agreed Upon by the Hinxton Group

The consensus statement published by the Hinxton Group said that stem cell research "holds out immense promise for good" but acknowledged "the reality of cultural diversity and moral disagreement" about some aspects of it. It said that "Law makers should be circumspect when regulating science"; laws should be flexible to "accommodate rapid scientific advance"; and laws should not be extraterritorial. The statement set out the following ethical responsibilities of scientists, journal editors, and scientific academies and organizations (which I have paraphrased).

- *Scientists* should conduct research only if it is scientifically and ethically defensible and undertaken according to ethically accepted norms, especially protecting the well-being, liberty, and rights of cell and tissue donors and research participants. Scientists should obtain valid informed consent from research participants and address conflicts of interest. If requested by editors, they should provide protocols for ethics review, consent forms, and information statements. They should submit any stem cell lines they derive to national or international depositaries and make cell lines and data publicly available.
- *Journal editors* should promote high standards for scientific peer review. They should require authors to state whether their research complies with local laws and policies, including ethical oversight. They should encourage authors to include in manuscripts explicit descriptions of their roles in the published research and to submit data verifying the source of cells, the authenticity of the cell line(s), and how the scientists have complied with good cell culture practice.
- *Academies of science and professional organisations* in consultation with the public should continue to develop guidelines for the ethical conduct of stem cell research and clinical trials, including the "challenges of international collaboration". A public database should be established of "statements of ethical conduct and guidance, research protocols, consent forms, [and] information provided to potential human subjects and tissue donors…"

My central argument is that when research done overseas falls above a certain level on a country›s "ethico-legal barometer" (see Figure 1), it should be assumed that there is not such a high level of ethical objection within the country as to make its ethical standards significantly different from those reflected in the international consensus statement. However, when the proposed research falls in the red zone of the barometer (very widely condemned; laws with extraterritorial application), compliance with the consensus statement would not reassure people in the home country. Such "red zone" research done overseas may be regarded as unethical and should be prohibited. If scientists in the home country seem inclined to do "red zone" research in other countries, the home country can enact extraterritorial laws to prevent them doing so.

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Each country's laws generally apply only within its boundaries; laws with extraterritorial effect are enacted only when an activity is widely condemned (e.g., paedophilia)

ISSUES IN TRANSNATIONAL RESEARCH: A SCENARIO

Assume that an Australian scientist wants to obtain and study stem cells from a human embryo created by somatic cell nuclear transfer (SCNT), so that the cells are immunologically compatible with those of the person whose somatic cells are used to create the embryo. In Australia, it is unlawful to create an embryo by SCNT and derive stem cells from it, but in the UK, those practices are lawful.

Is there any legal or ethical reason why the Australian scientist should not be permitted to conduct the research in the UK, or to use the stem cells or research data obtained in the UK when returning to Australia? Could the researcher, his or her employer, or an Australian or UK agency that funds the research, face legal liability for a possible breach of Australian law? Can ethical concerns in Australia about the proposed research be placated by knowing that the research has undergone scientific and ethical scrutiny in the UK?

THE LAW

The law is perhaps clearer than the ethical aspects of such cases. In the scenario above, the Australian scientist (and others associated with the project) will be acting lawfully if the research undertaken in the UK is lawful in that country, even if it is not lawful in Australia. It is a fundamental exercise of the notion of sovereignty which underpins international law for states (such as Australia and the UK) to determine and enforce applicable law within their own physical territory. Foreign nationals visiting or working in another country are primarily subject to the laws of that host country. Governments consistently warn their nationals intending to travel abroad of the need to respect the laws of the countries they visit or suffer the consequences under that local law.

There are some exceptions to this general principle. The Australian government could restrict the use within Australia of research data or material obtained in another country, in the same way as it limits the importation of biological material under its quarantine and customs legislation. This means that the Australian scientist could not benefit from using the stem cells in further research in Australia but would not be committing any offence against Australian law by doing the research in the UK. Similarly, an employer or funding body would not be an accessory to criminal activity, as no crime has been committed. There would only be a crime if a law was passed in Australia preventing scientists from undertaking the research in another country.

International law does recognize that governments can exercise national jurisdiction "extraterritorially"—that is, beyond the physical territory of their country. In Australia, this must be specifically stated in the relevant legislation; silence means that it applies only within Australia. National jurisdiction can be extended on the basis of a person's nationality rather than the physical territory of the country where they engaged in their activity. Most countries (including the UK and Australia) have legislation extending the application of their criminal law to acts of their military personnel engaged in operational deployment abroad. Other examples of laws imposing criminal liability for nationals' acts overseas include violations of the Chemical Weapons Convention and "sex tourism" (paedophilia).

Thus, countries can extend their territorial jurisdiction, either by penalizing acts of their nationals committed abroad, or by preventing their nationals from using the products or results of work undertaken overseas when they come back. In practice, however, such laws are rare and they will only be made when other countries have very different domestic laws and the activity is one that they really condemn (such as the development of chemical weapons or paedophilia).

Although the laws on embryonic stem cell research vary between countries, no country to date has tried to enact legislation to directly extend its territorial jurisdiction in this area. The Council of Europe's Convention on Human Rights and Biomedicine prohibits the creation of embryos for research purposes [3]. However, a convention operates as law only if it is ratified by a particular country and is made a national law. It will have extraterritorial effect only if specified in the legislation. No country has done that. At most, countries have extended their extraterritorial "reach" by preventing the importation of certain bodily material, or by attaching conditions to funding of research overseas. For example, all recipients of United States government funds for research are required to follow applicable US regulations on research involving human participants, even if the research is done in other countries. The US restrictions apply only to government-funded or government-regulated research, not to research funded by private agencies. Also, problems may arise where there are multiple funders or the US regulations conflict with local laws. In such cases, the effectiveness of funding restrictions is varied in extraterritorial regulation. If the research is supported solely by federal funding, the US regulations must be obeyed; if scientists receive non-federal funding, they can do research that would otherwise be prohibited. Presumably the reason that countries have not directly enacted extraterritorial laws on stem cell research is that there is not sufficient condemnation in the researcher's home community of the stem cell research that is permitted in other countries (see Figure 1). Indeed, the same is true in other areas of science and medical practice. Australia, for example, has not legislated to prevent its nationals going to the US to undergo commercial surrogacy or to use commercially obtained eggs for infertility treatment, despite these practices being prohibited in Australia. There is no legislation preventing the use of research results from trials in developing countries, even if they fall short of Australian requirements. A foreign research project involving victims of capital punishment would not be allowed in Australia (where capital punishment is not permitted), but Australia is unlikely to enact legislation preventing that research in other countries (where it may be lawful) or the use of results from such research in Australia. It is only where there is a public safety risk (as with the importation of genetically modified organisms) that laws have been enacted to prevent importation of a product of research, and they do not extend to doing the research in another country.

Indeed, it is only with widely condemned practices, such as paedophilia and the making of chemical weapons, that countries have legislated to prevent their nationals doing those things overseas. There is no extraterritorial legislation on human embryo research, paying volunteers in clinical trials, buying eggs for fertility treatment, or engaging a paid surrogate mother. Views might differ on the acceptability of all these practices and even if they are not permitted in Australia, the community has not called for legislation to prevent Australian nationals doing them abroad. It is only in extreme cases that legislation might be demanded to prevent such practices as, for example, research on victims of torture. However, even in such a case, a country will propose extraterritorial legislation only if its nationals appear likely to engage in such practices.

ETHICAL PRINCIPLES

Whatever the law may be, however, the issues are more problematic if one takes an ethical, rather than a legal, view. Even if it is lawful for an Australian scientist to do research in the UK that is not allowed in Australia, is it ethical for Australian scientists to do that in order to avoid the ethical constraints in their own country? To what extent can one adopt a relativist approach: *autres pays, autres mores* ("other countries, other customs")?

In considering this question, it is useful to imagine a continuum of conduct—a national ethico-legal barometer (Figure 1). Conduct in the red zone is prohibited by both national and extraterritorial laws; in the orange, prohibited only by national laws; in the yellow, permitted subject to national laws and ethical oversight; and in the green, permitted subject to ethical oversight. The two relevant areas are the red and the orange; in the others, there is no legal prohibition.

The Red Zone

For red zone activities, a relativist approach seems unacceptable. The conduct in the other country would not only be unlawful in Australia but would be widely condemned on ethical grounds, even if it were lawful in the country in which it occurs. However, more interesting issues arise if one adds some activities from the bottom of the orange zone.

Imagine that an Australian scientist wants to undertake reproductive cloning in a country where that is not forbidden by law and wants to develop the technique back in Australia. Such research would be unlawful in Australia and almost universally regarded as ethically unacceptable, particularly because of the unknown risks to any child born from such a procedure. Similarly, research that imposes severe suffering on animals, especially for a cosmetic rather than scientific purpose, would be widely condemned as well as unlawful in Australia, as would research that involves killing animals from rare and endangered species.

Even if these types of research were allowed in another country and arguments could be advanced to support them, Australians might reject a relativist approach and not allow the results to be used in Australia (though if there were a real benefit from the research, the initial repugnance might be overcome, which involves different moral issues). If activities were widely regarded as morally or ethically wrong, then no requirement of scientific rigour or ethical oversight in the other country would make them acceptable in Australia. Thus, although activities such as reproductive cloning are not currently the subject of extraterritorial laws, the law could be changed. If Australian scientists seemed inclined to undertake those activities abroad, the country's ethico-legal barometer might rise, with extraterritorial legal restrictions being imposed on Australian nationals working abroad.

The Orange Zone

For conduct that falls within the orange zone, one might adopt a relativist approach. Although unlawful in Australia, such activities are not so much condemned as to require extraterritorial effect and may in fact be condoned by many Australians, even if a majority disapproves of them. Creating a human embryo by SCNT, for example, is unlawful in Australia, but many people support the English position where this is allowed and supporters can give detailed ethical reasons for their views.

Supporters of SCNT argue that SCNT embryos are not true embryos because they are not formed from male and female gametes; they are not intended for use in a pregnancy; and they are not viable without extended scientific support. Alternatively, even if SCNT embryos are not regarded as being essentially different from "sperm–egg embryos", it is ethically justifiable to use both kinds of embryos in research for a limited period subject to strict regulatory controls and ethical oversight because it may yield important scientific knowledge and perhaps lead to cures for serious genetic conditions. Indeed, it is ethically inconsistent to allow "surplus" embryos from fertility programs to be used in research (which is lawful in Australia as well as in the UK), but not specially created and non-viable SCNT embryos.

In the orange zone, where there are no laws preventing scientists undertaking research in other countries and ethical views are divided, objectors may be reassured by the requirements of scientific and ethical scrutiny of the research in the other country. This was the starting point for the Hinxton Group who were able to agree on a consensus statement, despite its members coming from many different countries, with different laws and ethical principles [1]. The principles in the statement are based on generally agreed-upon ethical concepts, many of which are not expressly set out in the statement but incorporated by reference to "ethically acceptable norms".

These principles include observance of the practices of scientific integrity; not exposing participants, including cell and tissue donors, to unreasonable risks; fully informing research participants before they consent; and openness to ethical review. The principles are worded in general terms, like the international statements [4,5] and ethical principles on which they are based, and, like the international statements, they are silent on the creation of embryos for research purposes. (Both the Declaration of Helsinki [4] and the Council for International Organizations of Medical Sciences' *International Ethical Guidelines for Biomedical Research Involving Human Subjects* [5] do not discuss embryo research. The latter guidelines note that "An attempt to craft a guideline on the topic proved unfeasible. At issue was the moral status of embryos and fetuses and the degree to which risks to the life or well-being of these entities are ethically permissible".)

The Hinxton principles do not even suggest that human embryos have a special moral significance. They do not require, for example, that the use of embryos in research and the number used should be justified. The only relevant statement that could perhaps apply to embryos is that "any risk of harm should be commensurate with expected overall benefit", and that might refer to the need to protect women from exploitation as egg donors, or other research participants from potential harms.

CONCLUSION

How reassuring are broad ethical principles in international consensus statements, such as the one produced by the Hinxton Group, for people who have deeply held ethical objections to the type of research that is conducted in other countries? As noted, the issue of greatest contention, the creation of embryos for research, is not addressed in the Hinxton statement. Also, objectors are asked to take on faith that research will be scientifically and ethically monitored under another country's regime, but this monitoring cannot be checked or enforced in another country as it can in the home country.

In Australia, for example, human embryo research is monitored by a federal licensing committee and government inspectors with broad powers to enforce the legislation. If the scientific integrity of a project is questioned, or there is any doubt about whether participants entered the project freely after proper information and consent, then those matters can be investigated by calling for the records of the project, including the plain language statement and the consent form. Similarly, it would be possible for the government authorities responsible for testing and approving new drugs and procedures to examine the records to check the accuracy of scientific data. That is not the case when research is done in another country. Even if there is provision in that country for external examination of records associated with a research trial, the procedure cannot be instigated or enforced by Australian authorities. Also, the review that may be needed for quality assurance of imported stem cell lines and other biological substances depends largely on the cooperation of the collaborators in other countries.

On the other hand, the principles and procedures approved by the Hinxton Group do suggest that countries can agree to adopt a similar approach to particular types of research, at least in relation to scientific and ethical oversight being the best form of regulation rather than national laws. The real issue is how helpful such principles will be when there are wider and more deeply held differences of opinion about particular types of research. With human embryo research, views may vary about what is permissible or people may agree to differ on the source of embryonic stem cells for research. Issues may then be resolved by general, fairly non-contentious principles for scientific and ethical oversight, such as those in the Hinxton statement. For research that is even more contentious, where orange zone activities may be made red ones, one cannot imagine that a consensus approach would be possible.

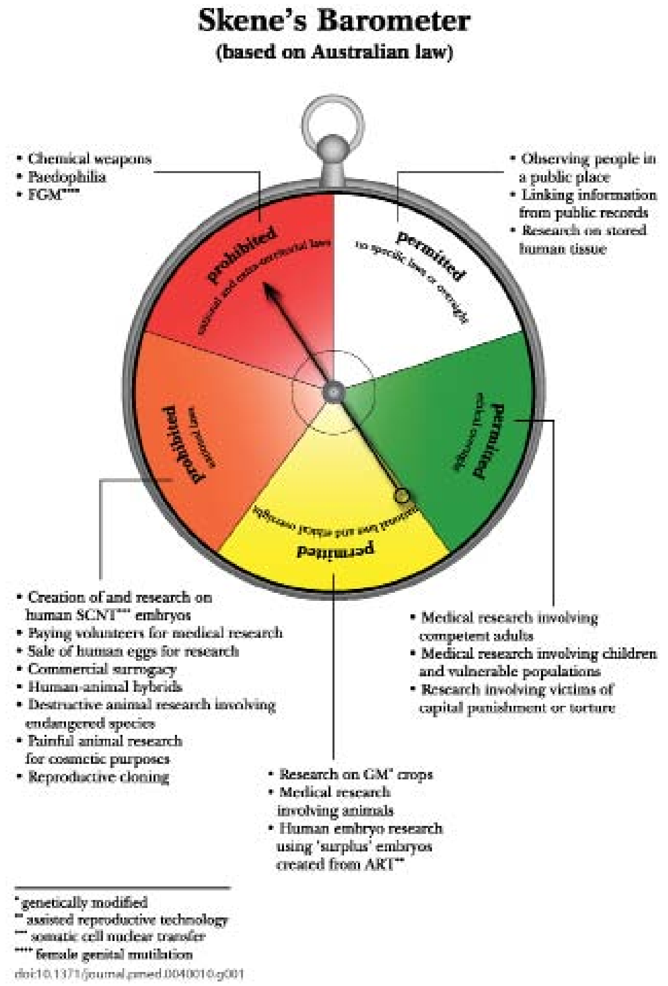

Figure 1. The Ethico-Legal Barometer: Australia (illustration: Anthony Flores and Loane Skene).

ACKNOWLEDGMENTS

My colleague Professor Tim McCormack, an expert in international law, kindly contributed to the section of the paper called "The Law".

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CHAPTER 19

WHITE HOUSE ADMITS THAT LOCKING PEOPLE IN CAGES FOR VICTIMLESS CRIMES IS DEVASTATING TO THE ECONOMY

Matt Agorist

Matt Agorist

Washington D.C. —On Saturday, economists in U.S. President Barack Obama's administration released a report detailing the adverse effects on the economy derived from locking non-violent drug offenders and criminals behind bars.

Citation: Skene Matt Agorist, White House Admits That Locking People In Cages For Victimless Crimes Is Devastating To The Economy, - http://www.activistpost.com/2016/04/white-house-admits-that-locking-people-in-cages-for-victimless-crimes-is-devastating-to-the-economy.html

For decades, a guiding philosophy of authoritarians was that locking more people up would result in less crime. This has created a prison state in the U.S., which represents 4.4% of the world's population yet houses 22% of the world's prisoners.

Since 1980 alone, the US prison population has skyrocketed by nearly 5 times.

H0wever, the negative effects of such a totalitarian approach to drug crimes and other victimless offenses is having a staggering economic impact on the United States.

According to a **report by Reuters,** economists are "of one mind" that packed prisons, excessively long sentences, and insufficient reentry programs "are counter-productive to our economy as a whole in addition to hurting the people involved," Jason Furman, chairman of the White House Council of Economic Advisers, told reporters in a call on Friday.

On Monday, administration officials, economists, business leaders, and scholars will discuss the Council's findings at an event hosted by the White House, the American Enterprise Institute think tank, and New York University's Brennan Center for Justice.

The United States can reap greater economic benefit through investments in police, prisoner education, and job opportunities for ex-prisoners than it can from putting additional funding toward prisons, the Council's report said.

According to a **recent study,** the mass incarceration policy in America over the last 40 years has created more problems than it has solved. The longer the term served, the higher the rate of reconvicted felons.

The research from University of Michigan economics professor, Michael Mueller-Smith, has proven that prison terms don't rehabilitate a criminal and turn them into a law-abiding citizen.

The US penal policy just doesn't appear to be working. The criminal world is expanding, despite more and more criminals being incarcerated and isolated from society.

The American practice of imprisoning people for even the most trivial offenses, not only ruins lives but tends to act as a *college* for crime.

Up to 75 percent of former prisoners are **rearrested** within 5 years of their release date.

This revolving door of creating and processing criminals fosters the phenomenon known as *Recidivism*.**Recidivism** is a fundamental concept of criminal justice illustrating the tendency of those who are processed into the system and the likelihood of future criminal behavior.

The impetus behind the mass incarceration in America is the War on Drugs. The illegality of drug possession and use is what keeps the low-level users and dealers in and out of the court systems, and most of these people are poor black men. As Dr. Ron Paul has pointed out time and again, black people are more likely to receive a harsher punishment for the same drug crime as a white person.

The War on Drugs takes good people and turns them into criminals every single minute of every single day. The system is setup in such a way that it fans the flames of violent crime by essentially building a factory that turns out violent criminals.

Calling it *rehabilitation* is a sick joke as the mere act of locking someone in jail for a victimless crime is almost a guarantee they will never be able to enter the workforce again.

When drugs are legalized, crime and gang violence drops — drastically. Not only does it have a huge effect on the localized gangs in America, but the legalization of drugs is **crippling to the violent foreign drug cartels too.**

Until Americans educate themselves on the **cause** of this violence, uninformed and corrupt lawmakers will continue to focus on controlling the **symptoms.**

We will see more senseless killings and more innocent lives stripped of opportunity by getting entangled in the system.

Matt Agorist is the co-founder of ***TheFreeThoughtProject.com****, where this article* ***first appeared****. He is an honorably discharged veteran of the USMC and former intelligence operator directly tasked by the NSA. This prior experience gives him unique insight into the world of government corruption and the American police state. Agorist has been an independent journalist for over a decade and has been featured on mainstream networks around the world. Follow @ MattAgorist*

CHAPTER 20

CONCEALED HANDGUN LICENSING AND CRIME IN FOUR STATES

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ABSTRACT

Firearm policy in the United States has long been a serious policy issue. Much of the previous research on crime and firearms focused on the effects of states' passage of concealed handgun licensing (CHL) legislation. Today, given the proliferation of CHL legislation and growing strength of the "pro-gun" movement, the primary policy focus has changed. State legislators now face issues concerning whether and how to increase access to CHLs. Because of this transformation, this research moves away from the research tradition focused on the effect of a legislative change allowing CHLs. Instead, we consider two issues more policy relevant in the current era: What are the dynamics behind CHL licensing? Do increases in concealed handgun licensing affect crime rates? Using county-level data, we found that the density of gun dealers and other contextual variables, rather than changing crime rates, had a significant effect on increases of the rates at which CHLs were issued. We also found no significant effect of CHL increases on changes in crime rates. This research suggests that the rate at which CHLs are issued and crime rates are independent of one another—crime does not drive CHLs; CHLs do not drive crime.

INTRODUCTION

America has the most heavily armed civilian population in the western world. Estimates from the most recent Small Arms Survey [1] indicate that American civilians owned between 270 million and 310 million firearms in 2011. Using census data for a comparable period [2], that minimum figure of 270 million translates to 117 firearms in civilian hands for every 100 Americans 18 years of age or older. European countries fall far behind the USA in gun ownership rates. Those nations with firearm ownership rates closest to the United States have less than half the firearm density reported for the United States; Swiss citizens held only 46 firearms for every 100 adults; Finland had 45 firearms per 100 adults [1].

As interesting, inspiring, or frightening as these data may be, general data on firearm ownership have, for a single reason, been the focus of little criminological research in the United States. American criminals, in the vast majority of crimes involving firearms, use handguns. In 2011, for example, handguns were used in 72 percent of firearm homicides, while

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rifles and shotguns were used in slightly less than 8 percent of firearm homicides [4]. Thus, researchers interested in the relationship between firearms and crimes have expended the bulk of their energy investigating the impact of handguns on crime.

More specifically, for decades, researchers have investigated the impact of the passage of concealed handgun licensing (CHL) legislation in various American states. The debate concerning the effects of CHL legislation began in 1997 with the publication of John Lott's work indicating that the passage of concealed handgun legislation significantly reduced crime [5]. The literature on this issue is now extensive (see Moody and Marvell [6] for a summary of this research). The results of this research, as of very early in the 21st century, were summarized by the National Academy of Science panel as "inconclusive" [7]. Given the results of more recent research, one would easily be justified in reaching that same conclusion today [8–14].

However ambiguous the results of the research on this topic may be, the effect of the passage of CHL legislation is, in reality, no longer a pressing policy issue. Forty-six of the 50 states in the United States now issue licenses to citizens that allow them to carry concealed handguns [15, 16]. Allowing concealed carry is no longer the issue. Instead, whether and how to loosen restrictions on the issuing and carrying of concealed handguns are the major policy issues that now dominate much of the concealed handgun debate in state legislatures. Recent years have seen a burst of state legislation easing citizens' restrictions of citizens' ability to carry concealed handguns [17, 18].

Most recently, the state of Kansas passed legislation allowing any adult resident to carry a concealed handgun without acquiring a license or receiving any training on gun safety or relevant state law related to the use of deadly force [19]. This highly publicized legislation that Kansas passed as it prepared to host the 2015 National Rifle Association annual meeting and gun show was not, however, ground-breaking legislation. Kansas simply joined Alaska, Arkansas, Arizona, Montana, New Hampshire, and Vermont as states that do not require licensing of residents to carry concealed handguns [3].

Unfortunately, little research is currently available to ascertain just what the effects of such "liberalization" may be. At this point John Lott offers the currently available research related to changes in CHL permit density and crime. Lott reports the results of his preliminary analyses of state-level concealed handgun permit data and crime from 2007 and concludes that a one percentage point increase in the percent of the adults in a state holding CHL permits may generate roughly a 1.4 percent drop in the murder rate [3].

This research follows Lott's lead in using CHL permit data as its main independent variable. However, this research differs from Lott's research in that we used county-level CHL permit and serious crime data covering at least a decade after passage of CHL legislation in four states. In its report, the National Academy of Sciences indicated that new approaches and different data are needed to be used to develop a clearer picture of the relationship between concealed carry and crime [7]. The strategy utilized in this research constitutes one response to that call. We used these county-level crime and CHL data to address two issues. First, what factors affect the rate at which concealed handgun licenses are issued in a county? Second, what effect does an increasing CHL rate in a county have on changes in the crime rate?

Why Do Individuals Seek a CHL? The basic argument used by those who support greater access to concealed handguns is that individuals seek a CHL as a response to the fear of victimization [3]. However, research on more general gun ownership indicates that demographic factors, as well as desire for self-protection, play a role in gun ownership [20]. Fragmentary data suggest that such factors may also play a role in who seeks a CHL [21].

One can argue that both crime and demographics may affect the demand for CHLs. The other side of the issue (analogous to supply) involves estimating the number of opportunities civilians have to acquire a CHL. Unfortunately, no previous research has investigated this issue. In this research, we use the number of federally licensed firearm dealers in a county to represent the supply of CHL providers. CHL applicants must have a handgun, so the supply of firearm dealers is an important factor in access to a handgun. The density of Federal Firearm Licensees (FFLs or licensed gun dealers) should be positively associated with increased opportunities to acquire a CHL.

In Texas, for example, CHL applicants must provide a photo and fingerprints for a background check, pass a written exam, and pass a handgun proficiency test, which involves the supervised and graded a marksmanship test on a firing range [22]. These requirements make it easier for commercial gun dealers (FLLs) to offer CHL courses, using their firing ranges, equipment, and employees for CHL training, as an additional source of revenue and a potential source of customers for firearms. Figure 1 serves as a graphical representation of our preliminary model for CHL licensing.

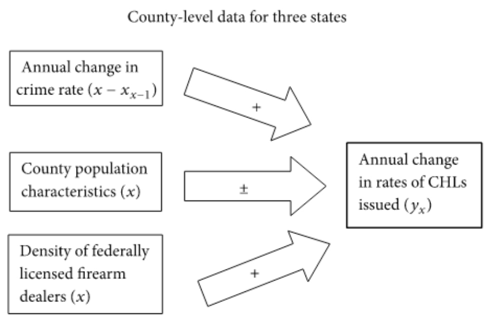

Figure 1: Hypothesized relationships in model estimating changes in county CHL rates.

Effect of Concealed Handgun Licensing on Crime. The theoretical foundation of the hypothesized relationship between CHLs and crime has always been a simple deterrence model, or as Lott puts it, "more guns, less crime." The mechanisms underlying the alleged relationship between passage of CHL legislation and crime have always been somewhat obscure. In addition, how one correctly models the effects of this legislation on crime with the appropriate covariates has been a topic of considerable debate [5–14]. In this research we take advantage of the longitudinal nature of the available data to allow each county to serve over time as its own "covariates" and estimate the model depicted in Figure 2. Our hypothesized preliminary model implies that crime rates will vary among states, across years, and as a result of variation in lagged values of the rates at which CHLs are issued in a county.

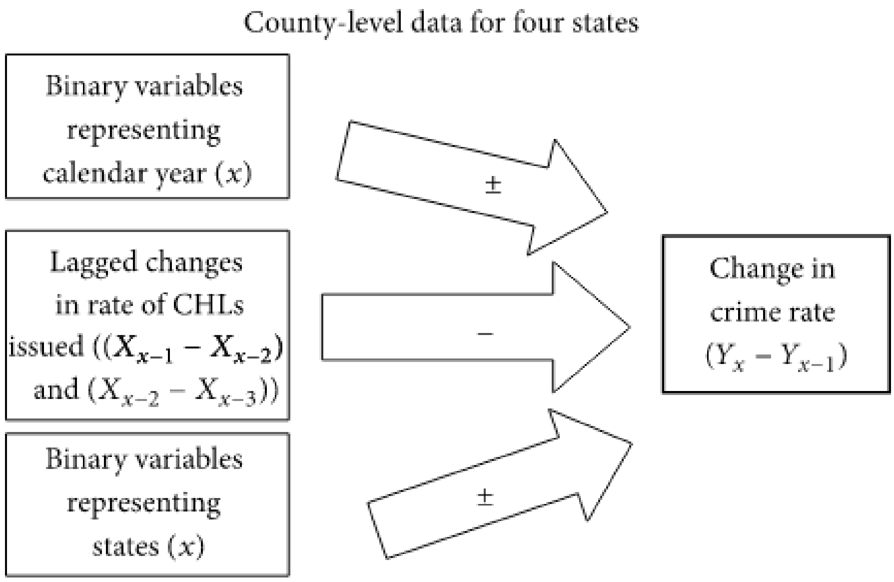

Figure 2: Hypothesized relationships in model estimating the relationship between CHLs and crime.

METHODS

Data

Study States

Our analyses used data on the number of CHLs issued from 1998 to 2010 in every county in Florida, Michigan, Pennsylvania, and Texas. After reviewing the publicly available data from each of the states with CHL legislation, only these four states publicly reported CHL and arrest data at the county level for at least a decade following the passage of the CHL legislation in the state. Table 1 presents basic information on these states and their legislation.

Table 1: Concealed handgun information for study states.

Study state	CHL laws [3]	Estimated number of CHL holders [3]	CHLs per population of 100,00	Percent of population with CHL	State laws allowing open carry of handguns
Florida	Shall Issue 1987	1,278,246	6,779	7%	No
Michigan	Shall Issue 2000	430,095	4,325	4%	Yes
Pennsylvania	Shall Issue 1989	872,227	6,876	7%	Yes
Texas	Shall Issue 1995	798,048	2,816	3%	No
United States	—	11,113,013	3,599	4%	

As Table 1 indicates, the four states for which we found publicly available county-level data passed "Shall Issue" CHL legislation over a period of thirteen years. Shall Issue legislation removes almost all local discretion from the process of issuing CHLs. Anyone who meets the state statutory requirements "shall" be issued a CHL. Understandably, those states that have had the statutes in effect have the largest proportion of their population (seven percent) licensed for concealed carry of a handgun. Though the states differed in the date they passed legislation, the study period for all states was restricted to 1998 to 2010. This focus was taken because that time span allowed the research team to use the most recent full decade of data on CHLs and crime for each state.

Two of the four states also allowed open carry of handguns. However, both states place restrictions on such activities. In Michigan, a citizen is required to obtain a permit to purchase a handgun for open carry and that purchase is registered with state officials [23]. In Pennsylvania, open carry is allowed outside Philadelphia, though a permit is required for open carry in a vehicle. In fact, the Pennsylvania Firearms Owners Association indicates that open carry is openly discouraged by Pennsylvania law enforcement [24].

Why Do Individuals Seek a CHL?

To investigate what factors affect the rates at which CHLs are issued, the research team was able to use data from three of our four states (Florida, Pennsylvania, and Texas). The analytic database included data taken from five county-level datasets: (1) concealed handgun licenses (CHL), (2) arrest data from the Federal Bureau of Investigation (UCR), (3) Federal Firearms Licensees (FFLs), (4) US census data, and (5) the Area Resource Files (ARF). The CHL and UCR data sources are discussed in Section 2.1.3.

The Bureau of Alcohol, Tobacco, Firearms and Explosive (ATF) posted information on all Federal Firearms Licensees (federally licensed gun dealers) in our study counties. We downloaded the publicly available 2010 and 2011 data for three of the states from the ATF website [25]. At the time of our data development, the research team contacted the ATF to obtain additional data on FFLs. the ATF did not respond to our requests. Currently, however, additional data have become available on the ATF website.

The research team obtained data for 388 counties in our three-state database. However, we excluded three counties in Texas; one county had a CHL rate that was an extraordinary outlier; two counties had missing data. The final database contained 385 counties. Texas counties constituted 65.2 percent of the counties, while Pennsylvania and Florida each accounted for roughly half of the remaining counties. County-level covariates included in the analysis were county demographic characteristics gathered from the U.S. Census Bureau [26] and the Area Resource File (ARF) from the National County-Level Health Resource Information Database [27].

Effect of Concealed Handgun Licensing on Crime

This analysis only used data from two sources. CHL data were obtained from publicly available state data, and crime (arrest) data from the publicly available Uniform Crime Reports were used. The CHL data were obtained from the Florida Department of Agriculture and Consumer Services [28, 29], the Michigan State Police [30,31], the State Police Department in Pennsylvania [32, 33], and the Texas Department of Public Safety in Texas [34, 35], respectively. CHL data for the entire study period (1998–2010) were available for Florida, Pennsylvania, and Texas. In Michigan, CHL data were only available from 2001–2010 because the "Shall Issue" CHL statute was passed in 2000. The number of arrests and offenses for each type of crime from 1998 to 2010 in each county was abstracted from the Uniform Crime Reports (UCR) [29, 31, 33, 35].

MEASURES

Why Do Individuals Seek a CHL?

The dependent variable for this analysis was the annual rate at which concealed handgun licenses were issued in a county, and the major independent variable was the change in the arrest rate for each type of index crime: seven individual crime arrests, violent crime arrests, property crime arrests, and total UCR arrests in the previous year.

To calculate the concealed handgun license (CHL) rate and the Federal Firearm Licensee (FFL) rate, we divided the total number of CHLs issued in 2011 in each county and the total licensed federal firearm dealers in the county by the total number of people aged 20 and over in the county times 10,000 people. We used the population aged 20 and over in our analysis because the available census data did not provide total population aged 21 and over. In most states, a person must be at least 21 years of age to apply for concealed handgun license. In Texas, however, a person at least 18 years of age can apply for concealed handgun license if he/she is currently serving in or honorably discharged from the military [36].

We calculated the change in arrest rates per 100,000 from 2009 to 2010 and used these figures in the construction of our lagged arrest/crime variable. We separately analyzed data for each of the seven crimes, for violent crimes, for property crimes, and for total crimes. Violent crimes include murder, rape, robbery, and aggravated assault, while property crimes include burglary, larceny, and motor vehicle theft. We calculated the density of FFLs per 10,000 persons in the county.

We performed natural log transformations on the CHL rate and FFLs rate because these variables exhibited positive skews. Using the data on general firearm ownership, we included a number of county-level covariates (e.g., age structure, average income) in our models.

Effect of Concealed Handgun Licensing on Crime

Our analyses of the effect of CHL rates on crime included annual county arrest rates for murder, rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft. We further categorized these crimes into two broader categories: violent crime (murder, rape, robbery, and aggravated assault) and property crime (burglary, larceny, and motor vehicle theft).

The research team used U.S. Census Bureau county-level population data to develop county-level crime rates. For 2000 and 2010, we used the actual census estimates [37] of the county population as denominators in our analysis. For other years (2001–2009), we used county population estimates derived from intercensal estimates [37] as the denominators. The intercensal demographic estimates of population are generated from complex models joining administrative records with data from the previous census [38, 39].

We converted the number of CHLs issued in a year into rates per 10,000 county residents and changes in crime from one year to another into rates per 100,000 county residents. We used total county level population estimates, rather than population over 21 years of age, to calculate the rates of CHL issuance in these analyses, in contrast to our other analyses. We did so because intercensal population estimates were not available for the above-21 population.

Analysis Strategy

Why Do Individuals Seek a CHL?

We used bivariate analyses to examine the relationships among log CHL rate, log FFL rate, and arrest rates for different crimes. Unadjusted and adjusted regression models were estimated. Since one cannot expect an instantaneous change in CHL rates due to changes in crime rates, we lagged the change in crime rate, our main independent variable, by one year. County covariates were included in the models. Covariates that had no significant effect were pruned from the final model.

Effect of Concealed Handgun Licensing on Crime

As the effect of receiving a CHL license on crime is expected to materialize over time, we conducted longitudinal analyses. We estimated the effects of changes in CHL density on crimes using three sets of time lag models:(i)A one-year lagged CHL rate model.(ii)A two-year lagged CHL rate model.(iii)A third model with both one- and two-year time lags for CHLs.

To account for the highly skewed nature of CHL rates, we used the natural log of CHL rates in our analysis. Analyses were completed using STATA statistical software (version 12.1) [40]. The time lag model was chosen in part because the longitudinal nature of the data allows each county's prior values to serve as "comparisons controls or covariates" for the relationship under investigation. In essence, this approach obviates the need for an elaborate list of county covariates.

Another advantage of the time lag model is that it allows for easy identification of any significant latent association between measures over time. We accounted for the within-county correlation for crime rates and CHL license rates over time by computing cluster-robust standard errors at the county level [41].

In each of these models we included indicator variables for each state. As Table 1 indicates, the states differ in CHLs and firearm policy. These indicator variables constituted controls for these factors. Indicator variables were also included for each year, to control for any long-term changes in the counties.

In supplementary analysis, data from each state were analyzed separately. This was done to assure that pooling the data from the four states did not obscure differences among the states. In other analyses, annual county crime data points indicating a zero rate of a crime were deleted from analyses. This strategy served dual purposes. It removed smaller counties with potentially questionable UCR data from the analysis. It also protected the model estimates from any bias toward a positive relationship between CHLs and crime due to the fact that any change in the crime rate in a year following a year with no crime could only mean an increase in crime.

The results of these supplementary data analyses did not differ significantly from the results of the more general analyses. In few instances in these analyses, a positive relationship was observed between CHL licensing and crime. These results did not involve the violent crimes that one expects CHL to affect, and the results were not consistent.

For example, in these more finely grained analyses, the only significant negative result came in Florida. For larceny, the one-year lag for CHLs had a significant negative coefficient () and the two-year lag in that same model had a significant positive coefficient (). Given the number of parameters being estimated and the low likelihood that CHL changes would affect larceny rather than violent crimes, the authors attributed such results to Type I error. Because of the consistency of the results with the more general analysis, only the results of the more general analysis are reported.

In addition, one might be concerned about the effects of spatial correlation on the results. The effect of such correlation is to increase the likelihood of Type 1 error. The results presented below seem to be in no danger of such a bias.

RESULTS

Why Do Individuals Seek a CHL?

Table 2 presents descriptive statistics for variables used in these analyses. The average change in the county arrest rate for each crime type ranged from −2.10 (larceny) to 1.96 (motor theft). The average percent of divorced females in our sample of counties was 10.8% and the average percent of country population residing in an urban area was 49.2%. The mean percent of persons over 16 years of age who were unemployed was 8.1%, and the average percent of people in the county over age 25 with less than high school degree was 21.2%.

Table 2: Variables used in analyses of rates at which CHLs are issued in counties.

Variables	Average (n=385)	SD
CHLs issued in 2011		
Log concealed handgun license (CHL) rate (per 10,000, aged 20+) in 2011	4.72	0.65
Change in arrest rate (per 100,000) from 2009 to 2010		

Murder	−0.09	0.88
Rape	−0.04	1.85
Robbery	−0.22	1.73
Assault	0.93	27.45
Burglary	−1.45	6.29
Larceny	−2.10	10.00
Motor vehicle theft	1.96	41.94
Violent crimes	0.59	27.66
Property crimes	−1.58	44.71
Total crimes	−0.99	54.18
Log federal firearms license (FFL) rate (per 10,000) in 2011	1.75	0.62
Percent female divorced	10.83	2.75
Percent urban population	49.17	31.82
Percent unemployed rate, aged 16+	8.13	2.25
Percent person over 25 with less than HS education	21.23	8.36
Counties		
State	N	%
Texas	251	65.2
Pennsylvania	67	17.4
Florida	67	17.4

Table 3 presents the results from estimated least squares regression models with change in the county CHL rate. These results were obtained in models that contained all significant county covariates. Table 3 shows the crime rate parameter and log FFL rate parameter for each crime and total crimes. Among the crimes, motor vehicle theft and total crimes showed slightly negative relationships with the CHL rate. Further research is needed to determine the robustness of these seemingly anomalous results. Other crimes show no statistically significant relationship with the CHL rate. However, the estimated positive and statistically significant relationships between the log CHL rate and the log FFL rate in these models were relatively consistent and robust with respect to the specific crime measure.

Table 3: Parameters for lagged county crime rates and logged federal firearms license rate (FFL) in models estimating county CHL rate.

Modeling CHL rates	Crime coefficient (SE)	Log FFL coefficient (SE)
Murder	0.034 (0.026)	0.196 (0.043)
Rape	−0.005 (0.013)	0.194 (0.043)
Robbery	0.006 (0.014)	0.196 (0.043)
Assault	−0.002 (0.0008)	0.192 (0.043)
Burglary	0.002 (0.004)	0.190 (0.044)
Larceny	−0.003 (0.002)	0.194 (0.043)
Motor vehicle theft	−0.001 (0.0006)	0.194 (0.043)
Total crimes	−0.001 (0.0004)	0.194 (0.043)

Effect of Concealed Handgun Licensing on Crime

Table 4 indicates that the average annual increase in CHLs per population of 100,000 varied from a low of 386 in Texas to a high of 1469 in Pennsylvania. While the other states had "Shall Issue" CHL legislation for many years prior to the period covered in this research, Pennsylvania only enacted its "Shall Issue" legislation in 2000. Thus, as one would expect, we see higher rates of concealed handgun licensing in Pennsylvania in its early years of the availability of such licenses. The research team does not consider the inclusion of states with a mixture of time periods since the enactment of CHL legislation is a problem; in fact, this may enhance the robustness or external validity of our results.

Table 4: Average annual change in crime rates and CHL rates per county population of 100,000 ().

Average annual change per population of 100,000	Years			
	1998–2010			
	FL	MI	PA	TX
Concealed handgun licenses	598.4	604.8	1,469.1	386.1
Personal crime rate	−9.15	0.14	1.36	1.36
Property crime rate	−6.12	−1.69	−0.79	−8.65
Murder rate	0.09	−0.43	0.03	−0.11
Rape rate	−1.34	−0.42	−0.22	−0.35
Robbery rate	0.03	0.08	0.54	−0.264
Assault rate	−7.75	0.37	1.05	1.62
Burglary rate	−1.08	−0.90	−1.49	−3.12
Larceny rate	−1.13	0.34	2.39	−3.04
Motor theft rate	−3.73	−1.38	−2.08	0.26

The changes in crime rates exhibit a number of patterns. Rape and burglary showed decreases across all four of our study states. Robbery, aggravated assault, and larceny increased in Michigan and Pennsylvania, with Texas and Florida showing mixed results for the rates of changes in these crimes. Murder decreased in Michigan and Texas, but it increased in Florida and Pennsylvania.

In Table 5, we report the results of the multivariate analysis obtained using data from all four states, using both one-year lagged and two-year lagged CHL changes, and including a series of binary variables representing years and states. As these results indicate, in all nine of the models estimated, we see no statistically significant relationship between changes in lagged CHL rates and crime rates in these four states during the recent decade, in models that also included indicators for each state and each year.

Table 5: Multivariate analysis of changes in county crime rates per population of 100,000, using both one-year lagged and two-year lagged CHL ().

Though the focus here was on CHL licensing, one might have expected that the state indicators for those states with the greatest density of concealed handguns, as Lott's preliminary analysis at the state-level seems to suggest, would display significant negative relationships with changes in the crime rate. Our results provided no evidence to support this conclusion [3]. Obviously, other research aimed more directly at this issue than our study should provide interesting results related to this issue.

DISCUSSION

The basic question underlying the hypotheses investigated in this research is simple—Is CHL licensing related in any way to crime rates? The results of this research indicate that no such relationships exist. For our study states, during the time period covered by our data, changes in crime rates did not affect subsequent CHL licensing rates. In addition, CHL licensing rates did not have a significant, negative or positive, effect on subsequent crime rates.

These results have some implications for the current policy debates concerning concealed handguns. The logic of relaxing requirements for concealed carry for the purposes of public safety implies that such legislation should reduce crime rates. However, our results indicate that more concealed handgun licensees in our four states had no significant negative effect on crime rates. This lack of a significant negative relationship is especially noteworthy for violent crimes such as murder, rape, robbery, and aggravated assault.

Intertwined with much of the discussion of easing restrictions on the accessibility of CHLs is the idea that citizens seek access to concealed weapons as a result of the risk of victimization. Our analyses of real changes in individuals' risk of being victimized did not appear to be a driving factor affecting increases in concealed handgun licensing.

Instead, our results indicated that contextual factors drive the acquisition of concealed carry permits. The age distribution of the county population, the degree of urbanization, the level of educational attainment, and the specific state of residence had significant effects on CHL acquisition. In addition, more people acquired concealed carry permits in counties where more businesses or individuals sold firearms. The number of CHLs issued was driven more by the number of individuals or businesses offering handguns for sale (the supply of handguns) than by changes in the real threat of victimization as measured by county crime rates.

This study has two limitations. First, analysis focused on the change in the rate of CHLs, not rate of gun ownership per se, or rate of unlawful concealed carry. Second, we analyzed data from only four states within a limited time span. With these limitations in mind, the research team believes that these results do provide information that may be useful when considering the easing of restrictions on CHL access. Our results imply that such changes, to the degree that they increase legal concealed carry rates, will not have an effect on crime rates. The results also suggest that increases in carry rates resulting from easing access to concealed carry licenses will be driven more by the supply of firearms dealers in an area than by changes in crime rates. As interesting as these results may be, further research using the types of data utilized in this research will determine the robustness of our results.

CONFLICT OF INTERESTS

The authors declare that there is no conflict of interests regarding the publication of this paper.

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Comparative Criminal Justice Systems

Comparative Criminal Justice investigates and evaluates a national system of justice in terms of other countries and cultures. Several authors pointed to the lack of serious recent work on comparative methodology. Many researchers therefore avoid comparative research. Therefore, the initial part deals with new and fresh approach that avoids the risk to be drowned in theoretical discussions, this Chapter is offering practical solution. The so-called ‘SPOCs & survey’-method consists of nominating a SPOC (short for a single point of contact) for the countries to be included in the comparative analysis and asking them to fill out a multiple choice based survey, complemented with free text fields and the option to request documents to be attached. The question arises which evidence should be used to support policy decisions. Criminal policy making is not solely based on evidence related to national experiences. The problems that the researcher encounters are language barriers, limited accessibility of up to date information and the risk of misinterpreting information due to an inadequate understanding of the specificities of the foreign criminal justice system. Comparative Criminal Justice takes a descriptive, historical, or political approach. The functions of a criminal justice system are broadly categorized into policing, adjudication and corrections. Comparativists are trying to find the best solutions by observing international practice through space and time. They research solutions taken in other systems, searching for the best options for domestic law to evolve. In other words, they are trying to find out the causes and reasons of why some solutions are working in one environment and not in other. Interaction of national systems always lead to progress, which can be seen from the examples of Judgment of the European Court of Human Rights in the second, third and fourth Chapter, which is increasingly gaining in importance. But the countries does not need a supranational authority so that they would accept acknowledged, positive solutions from other countries. Perception of others will always be colored to some extent by our own cultural starting points – even when the researcher says that he is trying to learn the good examples. The field of comparative science is incredibly wide. One of the reasons is the fact that Comparative Criminal Law is trying to enable us to avoid mistakes of humanity from the past. Therefore the legal traditions are so important for comparative legal science. Legal theories are important and numerous. Comparative legal sciences can bring much good if they are interpreted objectively and by using right methodology. The fifth Chapter brings out the basis of the legal systems that both designed the law of western hemisphere. After (Chapter 6) follows a scientific review from one of the countries whose law is based on the tradition of Civil law. It has been shown that decentralized peer-punishment can produce the second-order public good but often at a net cost for the group. These findings prompted scholars to invoke more organized forms of enforcement to explain cooperation, leaving the strategic nature of the punishment situation underexplored. They took a step back and showed that dissecting the second-order public good problem can reveal some interesting and hitherto understudied mechanisms of second-order public good provision. The Czech Tool for Assessment of Offenders is described in Chapter 7. Another important aspect is certainly the punishment, finding the right way to preserve the real values and return to them, but to meet society's sense of justice, victims and their families, their suffered damage and injuries. From prison statistics we can learn a lot although many may find it superfluous, to be seen as giving attention to those who have caused damage to the society and individuals. But we need to know the reasons that push individuals to come to that point, but also the path to reintegrate those who are incarcerated to the society. One of the focal points of this science are prison systems and organizations. Chapters 8,9,10 are watching New South Wales, Tasmania and Australia prison systems. These countries apply for quiet and isolated, and therefore are always interesting for observation. Because they have fewer contacts with law and crime in neighboring countries and over border crime, so we can quickly recognize the causes and consequences. Then in the Chapter 11 we jump to the USA to take a note of a current global problem, prison overcrowding. Given that this is a burning issue in the United States the best data is comming from there. This is a theme, especially the private prison systems, which require the head of the separated book. So we give you just the basics. Because comparative teachings deal with the problems in the whole world, South America deserves its representative also. We give you a Systematic review of time trends, prevalence rates and risk factors in Brazil in Chapter 12, and the Impact of Crime on Public Trust in Central American Justice System in Chapter 13. While in the Chapter 14 we will observe a practical question with the regard of Islamic law, another big and complex topic to which we owe reverence in one book such as this. Is violent crime increasing or decreasing? This is the first question criminal researcher is asking himself, so we do so also in Chapter 15. This is a finding of an investigation using the Crime Survey for England and Wales, 1994–2014, and an improved methodology to include the experiences of high-frequency victims. Ties between poverty and crime are described as a pre bases for studying the connection among economy and criminal in Chapter 16, which is another area of comparative law. Supporters are increasingly merging theories on crime and economic sciences and theories. Does poor living conditions actually produce “bad” people? Comparative legal tradition endures for long in the efforts to abolish the death penalty. To establish a humane and dignified punitive measures that will really lead to results, Chapter 17 is mentioning this subject as a moral issue. Chapter 18 is dealing with researching in other countries generally. Legal provisions that would be able to function permanently and whose results are seen in life and not just on paper and in media. So it is essential to study both good and bad practices. Therefore it is necessary to set a good base, anticipate risks and evaluate the situation. Then we can take a solution from another legal system, where the same causes and other factors exist, or work on our existing punitive measures, and solve our countries problems by smart legal policy. Or, even better, anticipate the negative trend and nip it in the bud. Chapter 19. goes further on the prison subject and asks: is locking people in cages for victimless Crimes devastating to the Economy? Final part (Chapter 20) is about the impact of gun control on crime. Again, USA is the example because it has liberal laws in this matter and grave impact of the availability of weapons on the crime rates.

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