

REVIEW ESSAYS

CRIMINAL JUSTICE POLICY IN LATE MODERNITY: THE SIGNIFICANCE OF LOCAL EXPERIENCES IN GLOBAL TRENDS

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Hard Lessons: Reflections on Governance and Crime Control in Late Modernity edited by Richard Hil and Gordon Tait (Aldershott, England: Ashgate Publishing, 2004) pages 1–206, Price £50.00 (hardcover). ISBN 075462216 9

*[In this review of Richard Hil and Gordon Tait (eds), *Hard Lessons: Reflections on Governance and Crime Control in Late Modernity* (2004), I examine the theoretical framework in which the ten review essays are located: the new punitiveness and populism of the control and governance of crime in late modernity. The volume appropriately draws attention to the complexity, volatility and populism of current crime control policies and provides some excellent case studies of criminal justice policies which have resulted in negative outcomes. However, in some of the essays, local cultural, legal and political differences are sometimes downplayed or ignored in the drive to provide a comprehensible account of international trends in policy and theory and there is a tendency to view the case studies as illustrations of a grand 'master pattern' announcing or confirming the arrival of late modernity. My basic thesis is that such approaches underestimate the complexity of the relationships between culture, policy, law and politics and that local differences are significant. I conclude with some broad reflections on the importance of contesting those differences in the gloom of contemporary penal policy.]*

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I INTRODUCTION

Hard Lessons: Reflections on Governance and Crime Control in Late Modernity presents 10 review essays, nine of which describe case studies in criminal

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justice policy which have ‘gone wrong’. The outcomes have been ‘unintended consequences, unforeseen outcomes, unanticipated results, counter-productive effects or negative side-effects’.¹ The remaining review essay and the unifying conceptual theme of the book develop the thesis that ‘government in late modernity [is] a continually failing operation’.² The book concludes that ‘the process of regulating criminal activity is, and will remain, far more complex, contingent and arbitrary than dominant public discourses on crime control would have us believe’.³

The case studies are diverse and there is no consistent or overarching principle underlying the choice of topics. Three are concerned with youth justice policies;⁴ the others relate to fear of crime,⁵ drug policy,⁶ DNA use in the criminal courts,⁷ zero tolerance policing,⁸ prostitution law,⁹ and child removal policies.¹⁰ The one common denominator is that something unexpected has happened. Most of the policy outcomes are negative and unintended, but not always. The chapter on the use of DNA by Barbara Ann Hocking and Hamish McCallum reviews some of the developments whereby people wrongfully convicted of criminal offences have been exonerated after subsequent DNA testing. Another chapter by Judith Bessant examines the child removal policies in both Australia and Britain and questions the extent to which the outcomes were unintended. She makes a persuasive case that the policies were racially motivated and that the terrible outcomes relating to sexual, emotional and physical abuse were intended insofar as the ‘mission to civilise superseded all other policy outcomes’.¹¹

In this review, I attempt to examine the theoretical framework in which the essays are located: the new punitiveness and populism of the control and governance of crime in late modernity. Part II examines the theoretical ideas, challenges and claims made in the volume about the governance of crime in the current historical and political context. The remaining sections examine the

¹ Richard Hil and Gordon Tait (eds), ‘Introduction’ in Richard Hil and Gordon Tait (eds), *Hard Lessons: Reflections on Governance and Crime Control in Late Modernity* (2004) 1, 1 (‘*Hard Lessons*’).

² *Ibid.* 13.

³ *Ibid.*

⁴ John Pitts, ‘Korrectional Karaoke: New Labour and the Zombification of Youth Justice’ in Richard Hil and Gordon Tait (eds), *Hard Lessons* (2004) 73; Anthony McMahon, ‘Parental Restitution: Soft Target for Rough Justice’ in Richard Hil and Gordon Tait (eds), *Hard Lessons* (2004) 115; Richard Hil, ‘In Pursuit of the Responsibilised Self: Boot Camps, Crime and Punishment’ in Richard Hil and Gordon Tait (eds), *Hard Lessons* (2004) 131.

⁵ Murray Lee, ‘Governing “Fear of Crime”’ in Richard Hil and Gordon Tait (eds), *Hard Lessons* (2004) 33.

⁶ Greg Newbold, ‘The Control of Drugs in New Zealand’ in Richard Hil and Gordon Tait (eds), *Hard Lessons* (2004) 53.

⁷ Barbara Ann Hocking and Hamish McCallum, ‘Expect the Unexpected: DNA, Guilt and Innocence’ in Richard Hil and Gordon Tait (eds), *Hard Lessons* (2004) 97.

⁸ Chris Cunneen, ‘The Political Resonance of Crime Control Strategies: Zero Tolerance Policing’ in Richard Hil and Gordon Tait (eds), *Hard Lessons* (2004) 151.

⁹ Belinda Carpenter, ‘Good Prostitutes and Bad Prostitutes: Some Unintended Consequences of Governmental Regulation’ in Richard Hil and Gordon Tait (eds), *Hard Lessons* (2004) 170.

¹⁰ Judith Bessant, ‘Unintended Consequences or Deliberate Racial Hygiene Strategies: The Question of Child Removal Policies’ in Richard Hil and Gordon Tait (eds), *Hard Lessons* (2004) 187.

¹¹ *Ibid.* 198.

various essays and offer a critical assessment of the insights presented. In general, I have selected for a more detailed examination those essays which focus on international trends in criminal justice and in which there is a tendency to view the case studies as illustrations of a grand ‘master pattern’ announcing or confirming the arrival of late modernity. Whilst I agree with many of the observations concerning the complexity, volatility and populism of current crime control policies, I am left with a concern that local cultural, legal and political differences are sometimes downplayed or ignored in the drive to provide a comprehensible account of international trends in policy and theory. I have devoted more critical attention to the essays which adopt this approach because of my concern that it underestimates the complexity of the relationships between culture, policy, law and politics. My basic thesis is that differences (even small ones) do matter, and that there remain spaces in the gloom of contemporary penal policy to contest those differences. I conclude with some broad reflections on this theme.

II THE THEORETICAL CONTEXT

The first essay by Gordon Tait, ‘Modernity and the “Failure” of Crime Control’,¹² provides a skilful overview of the theoretical context in which the book is located. Tait briefly reviews the failures of the modernist project in social policy and governance and then examines some of the important critical works in the context of crime control: Foucault, Giddens and Beck. His review is succinct and insightful. It will make an excellent teaching resource for undergraduate courses in criminology. The essay also sets the framework for the remainder of the book. Tait argues that government is a ‘congenitally failing operation’¹³ and that ‘it is through the constant recursive assessment of the outcomes of various elements of social management — positive and negative, intended and accidental, direct and indirect — that government operates’.¹⁴

The introduction to the volume also sets out a number of theoretical propositions of significance to the big picture in which the essays are located:

The policy loop of hope, good intentions, despair, disillusionment and then hope and good intentions again is integral to the history of penal ‘reform’ movements over the past two centuries or so ... Indeed, the path of criminal justice has never been smooth or based on a trajectory of enlightened and upwardly spiralling progress ... We have chosen in this book to focus on some of these lurches ... to illustrate ... the familiar story of things going wrong in the domain of criminal justice. But more than this, we consider why ... It is in this regard that we draw from Foucault’s notion of governmentality as a means of explaining the strategies, discourses, technologies and myriad justifications and legitimations that underpin the exercise of power in neo-liberal democratic states.¹⁵

¹² Gordon Tait, ‘Modernity and the “Failure” of Crime Control’ in Richard Hil and Gordon Tait (eds), *Hard Lessons* (2004) 18.

¹³ *Ibid* 30 (citations omitted).

¹⁴ *Ibid* 31.

¹⁵ Hil and Tait, above n 1, 3–4.

Like others who have trod this path before, the editors point to a number of features of crime control in late modernity: the new punitiveness, the reluctance to listen to informed opinion, the populism of crime control policies, and the politicisation of crime.¹⁶

The book has two political caveats or postscripts. One is presented at the end of the introduction and is headed 'A Final Word'.¹⁷ The other is a brief chapter at the end of the book by John Pitts, titled 'Postscript: Which Way Is Up?'.¹⁸ Both constitute a plea to 'those who would attempt to achieve progressive reform in the criminal justice system' to remain engaged.¹⁹ Pitts is most eloquent in his call for 'critical engagement',²⁰ notwithstanding that 'in late or post-modernity, or whenever it is we are supposed to be living, the very idea of progress has become problematised to the point where, quite literally, we are no longer sure which way is up.'²¹ To borrow from Lucia Zedner in a slightly different context, we are given some hope by Pitts that we are not being abandoned 'to the dismal history of the penal present'.²²

III THE CASE STUDIES

As noted above, the topics raised in the case studies do not attempt to represent a comprehensive or thematic analysis of contemporary criminal justice issues. The different sites of governmental intervention and regulation appear to be largely an accident of the authors' interests at a particular time. In the following sections I have grouped the essays under four headings: 'Law Enforcement: The Application of International Policies in a Local Context'; 'Young People: Marching to the Beat of the Same Drum?'; 'Victimisation'; and 'Prostitution Law Reform: Some Important Differences'. The examination of the essays in these four groups allows a discussion of some general themes which emerge, but the framework does not pretend to have an intellectual integrity beyond convenience.

A Law Enforcement: The Application of International Policies in a Local Context

Chris Cunneen's essay, 'The Political Resonance of Crime Control Strategies: Zero Tolerance Policing',²³ deals with what is probably the most widely known of the law and order strategies of late modernity across the Western world. Zero tolerance has entered into the vocabulary of many unrelated areas of social

¹⁶ See, eg. Russell Hogg and David Brown, *Rethinking Law and Order* (1998); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001).

¹⁷ Hil and Tait, above n 1, 14.

¹⁸ John Pitts, 'Postscript: Which Way Is Up?' in Richard Hil and Gordon Tait (eds), *Hard Lessons* (2004) 202.

¹⁹ *Ibid* 202.

²⁰ *Ibid* 204.

²¹ *Ibid* 202.

²² Lucia Zedner, 'Dangers of Dystopias in Penal Theory' (2002) 22 *Oxford Journal of Legal Studies* 341, 366.

²³ Cunneen, above n 8.

policy, as well as the language of the community at large. For those of us who teach in criminal law or criminology, it is a recurring experience to be confronted with the astonishment of successive cohorts of undergraduates when the somewhat thin intellectual underpinnings of the famous Wilson and Kelling thesis²⁴ are examined in detail for the first time.²⁵ For the community at large, the fragility of the concept is not exposed and it is viewed as an appropriate and respected approach to a wide variety of social problems outside the narrow context of policing. Zero tolerance is encountered in areas as diverse as drug and alcohol policy, domestic violence, sexual assault, and verbal harassment and intimidation in the workplace, notwithstanding the obvious failures by the relevant agencies to impose zero tolerance responses.

In these contexts, zero tolerance has taken a broader meaning and is no longer confined to a particular style of policy enforcement. It refers more broadly to the moral condemnation by a particular community of certain forms of conduct, not a mere description of the response of a defined agency to the conduct. In its wider meaning, it is also a rather bankrupt enterprise. For example, whilst considerable efforts have been made to prevent child sexual assault and to respond to the needs of the victims, the failures of criminal law and the criminal justice system to protect victims and punish offenders appropriately are patently obvious. The reference to zero tolerance adds nothing to our understanding of child sexual assault, it adds little or nothing to community condemnation of the conduct and it fails to describe accurately the criminal justice and institutional responses. In this context, zero tolerance may be viewed as a rather empty and self-serving slogan for institutions which wish to persuade the wider community that they are actually doing something about a particular problem.

Cunneen's essay carefully outlines the genesis of the concept, the political context in which it took hold and the policing contexts in which it has been developed. The essay draws from research into the home of zero tolerance policing, New York, and also some of the research into the extensions of the policy in the United Kingdom and Australia. Cunneen explains the popularity of the concept as a successful bridge to 'both conservative appeals to a social harmony of obligations and authority maintained through hard, uncompromising policing, as well as contemporary claims to managerialist and risk assessment approaches to policing'.²⁶ He explores the role of computerised offence managerial databases in the implementation of zero tolerance policies and examines the experience in New South Wales of the Operations and Crime Reviews ('OCR').

²⁴ James Wilson and George Kelling, 'Broken Windows' (1982) 249(3) *Atlantic Monthly* 29. Cunneen describes the thesis as follows:

If one broken window is not repaired in a building, then others will be broken and the building vandalized, followed by other buildings, then the street, the neighbourhood, and so on. An un-repaired window is a sign that no-one cares and therefore more damage will occur. Similarly, according to Wilson and Kelling, if disorderly behaviour is not dealt with in a particular area, then more serious crime will be the result.

Cunneen, above n 8, 151.

²⁵ Cunneen, above n 8, 151.

²⁶ *Ibid* 154.

The confrontational management styles and over-policing of certain communities found in New York were also observed in New South Wales.

Cunneen reviews the research findings which attempt to assess the impact of zero tolerance policing on levels of crime in New York and points to the confounding of the zero tolerance hypothesis with demographic, social and economic factors, as well as drug usage patterns and firearms controls. He then focuses on the other outcomes of zero tolerance policing under the headings of 'The Suppression of Dissent',²⁷ 'Police Brutality Particularly against Racial and Ethnic Minorities',²⁸ and 'Complaints against Police.'²⁹ His conclusion is persuasive and succinct: zero tolerance 'makes a science of repressive policing strategies' and its 'international appeal ... can be understood partly within the parameters of law and order populism, and the rising fear of "outsiders" which is ruthlessly exploited by a range of political parties'.³⁰ Cunneen's essay will be an effective teaching tool insofar as it critically but simply examines the history and use of the policy outcomes of one of the modern 'miracles' of policing, as well as the way in which he firmly places its appeal within conservative and populist truths about law and order.

In his essay 'The Control of Drugs in New Zealand',³¹ Greg Newbold presents an analysis of the failures of law enforcement policy in drug control in New Zealand. Whilst the essay loosely fits into the theme of the failure of policy, perhaps the most interesting feature is the unique history told of drug usage patterns in New Zealand. Unlike Australia, Britain and the United States, heroin does not appear to have become the drug of choice for many New Zealanders and 'imported heroin in New Zealand is rare'.³² Newbold refers to a 1995 prosecution for the importation of two kilograms of heroin as one of the last major heroin 'busts'.³³ He also refers to heroin seizures by police: 'since 1985, the total heroin appropriations listed in police annual reports has only exceeded one kilogram on three occasions'.³⁴ The reasons offered for the striking difference in the importation and consumption of heroin between New Zealand and most other Western countries are also interesting. Newbold points to the widespread presence of medically prescribed morphine (morphine sulphate tablets) which can be readily converted into an injectable form as a heroin substitute.³⁵ He also refers to New Zealand's size and geographical location as a relevant factor:

New Zealand is separated from its nearest neighbour, Australia, by about 1900 km of ocean. One of the most remote landmasses in the world, with an econ-

²⁷ Ibid 163.

²⁸ Ibid.

²⁹ Ibid 164.

³⁰ Ibid 166–7.

³¹ Newbold, above n 6.

³² Ibid 60.

³³ Ibid.

³⁴ Ibid 58.

³⁵ Ibid 60.

omy based largely on agriculture and fishing, it polices its borders and waters rigorously.³⁶

Also relevant is his claim that New Zealand does not have systemic corruption within its police force and customs service,³⁷ although he does not consider the relevance of a causal relationship between illegal drug markets and police corruption. The essay provides a powerful example of the ‘unanticipated results’, if not irrelevance, of drug law enforcement policy, and challenges the popular ‘law and order’ common sense assertion, described by Russell Hogg and David Brown, that Western countries are inevitably following similar trends in crime patterns, albeit at slightly different rates.³⁸

B *Young People: Marching to the Beat of the Same Drum?*

A related observation concerning the superficial similarities between nations in politics, crime and crime control may be made of John Pitts’ sophisticated and entertaining examination of the youth justice policies of the Blair government in the United Kingdom in ‘Korrectional Karaoke: New Labour and the Zombification of Youth Justice’.³⁹ He argues that the new youth policy has its genesis in what is known in Australia as the marginal seats strategy: policy development is undertaken with a view to swinging the votes of the few (usually conservative) voters in marginal seats where a swing may lead to a change of government. Such strategies have been a major feature of all state and national elections in Australia since the mid 1980s. As Pitts comments, ‘politics as a struggle between opposing interests or a public competition of ideas collapses’.⁴⁰ In consequence, we witness what Slavoj Zizek has called the ‘zombification of ... social democracy’.⁴¹

There are other resonances between Pitts’ description of the political landscape in the United Kingdom and Australia which most Australian readers will recognise: the attempted silencing of the voices of the elites (academics, criminologists, criminal justice professionals judges and magistrates, and so on); the politicisation of the public service; the media management of news by spin doctors and poll driven policies. Pitts offers a sobering critique of the populist and conservative youth justice policies introduced in the latter part of the 1990s in the United Kingdom. His critique extends to many components of the new policies, including the inadequacies of the research underpinnings of the causal model of delinquency at the heart of the policies, and the extensive use of cognitive-behavioural interventions as the major response to the problem of youth crime. The outcome of these policies has been a steadily rising penal population of young people and a decline in the ages of those incarcerated. His powerful conclusion refers to the ‘simplistic, but politically acceptable, solutions

³⁶ Ibid 62–3.

³⁷ Ibid 63.

³⁸ Hogg and Brown, above n 16.

³⁹ Pitts, ‘Korrectional Karaoke’, above n 4.

⁴⁰ Ibid 76.

⁴¹ Slavoj Zizek, ‘Why We All Love to Hate Haider’ (2000) 2 *New Left Review* 37, 45.

to remarkably complex social, economic and cultural problems', and the 'tyranny ... being visited upon many of the poorest and most vulnerable children and young people in our society'.⁴²

Of interest to many Australian readers are the similarities between the political landscape in the United Kingdom and Australia, coupled with the striking differences in the incarceration policies applied to young offenders. In the period between 1981 and 2002, the rate of detention of juveniles in Australia has more than halved: from 64.9 per 100 000 of the relevant (juvenile) population to 24.9 per 100 000.⁴³ Throughout this period there have been a number of law and order crises resulting in the introduction of new legislative provisions and policies for young people across the country, but few have been sustained, nor are they so harsh as to reverse the overall downward trend in detention rates. To return to the Hogg and Brown theme of 'law and order' common sense, it is important not to fall into the trap of assuming that due to apparent similarities in the social or political context of crime and criminal justice policy in many Western countries, there is no space to contest the differences. We are not all marching to the beat of the same drum and responding with the same policies and programs.

The essay by Anthony McMahon, 'Parental Restitution: Soft Target for Rough Justice',⁴⁴ examines research undertaken in North Queensland into the operation of the former s 197(1) of the *Juvenile Justice Act 1992* (Qld).⁴⁵ The former s 197(1) stated:

If it appears to a court that finds a child guilty of an offence relating to property or against the person of another, on evidence admitted or submissions made in the case against the child —

- (a) that wilful failure on the part of a parent of the child to exercise proper care of, or supervision over, the child was likely to have substantially contributed to the commission of the offence; and
- (b) that compensation should be paid to any person for —
 - (i) loss caused to the person's property whether the loss was an element of the offence charged or happened in the course of the commission of the offence; or
 - (ii) injury suffered by the person, whether as the victim of the offence or otherwise, because of the commission of the offence;

the court, by its own initiative or on application of the prosecution, may decide to call on the parent to show cause, as directed by the court, why the parent should not pay compensation.

The research is one of the few empirical examinations of the operation of parental responsibility or parental restitution laws. Only seven cases were identified in Queensland where parents were required to show cause why they

⁴² Pitts, 'Korrectional Karaoke', above n 4, 76.

⁴³ Michael Bareja and Kate Charlton, 'Statistics on Juvenile Detention in Australia: 1981–2000' (Technical and Background Paper Series No 5, Australian Institute of Criminology, 2003) 8.

⁴⁴ McMahon, above n 4.

⁴⁵ Amended by *Juvenile Justice Legislation Amendment Act 1996* (Qld).

should not pay compensation.⁴⁶ Four of the seven parents were interviewed and their experiences described.⁴⁷ The interviews with the first three parents revealed that ‘conscientious parents have been singled out and charged with offences that in no way mirror what has gone on in the family home in regard to caring for or disciplining of their children’.⁴⁸ Ultimately, the court declined to proceed in all three cases.

The remaining case involved an Aboriginal family who received ‘a letter of demand’ to pay \$2500 following the son’s court appearance for break and enter offences.⁴⁹ The imposition of compensation under the former s 197(1) was not discussed in the court proceedings. It is not clear who issued the letter of demand and, because the procedural requirements of s 197(1) had clearly not been complied with, the family were advised to, and did, ignore the demand.⁵⁰ McMahon interprets the issuing of the letter of demand as vigilante conduct by court and welfare officials to take the law into their own hands to compel parental control.⁵¹

McMahon’s analysis and conclusion are perceptive. He questions whether parental restitution can be effective in preventing further juvenile offending and notes that it may exacerbate family tensions and financial hardship.⁵² Parental restitution ‘does little or nothing to help and support ... parents’ and ‘tends to individualise the supposed causes of crime’.⁵³ One of the major ‘unintended consequences’ he identifies (in keeping with the theme of the book) is that ‘the judiciary has come to the realisation that proving parental neglect so as to enforce restitution proceedings is very difficult and may be too difficult to pursue at all’.⁵⁴

However, an examination of the subsequent developments which led to the current provisions in force in Queensland suggests that such optimism may be premature. Section 197 was comprehensively amended by the *Juvenile Justice Legislation Amendment Act 1996* (Qld) and was transferred to s 258 of the *Juvenile Justice Act 1992* (Qld) in 2002. Section 258 states:

- (1) This section applies if it appears to a court, on the evidence or submissions in a case against a child found guilty of a personal or property offence, that —
 - (a) compensation for the offence should be paid to anyone; and
 - (b) a parent of the child may have contributed to the fact the offence happened by not adequately supervising the child; and
 - (c) it is reasonable that the parent should be ordered to pay compensation for the offence.

⁴⁶ McMahon, above n 4, 121.

⁴⁷ Ibid.

⁴⁸ Ibid 128.

⁴⁹ Ibid 125–6.

⁵⁰ Ibid 126.

⁵¹ Ibid 129.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid 128.

- (2) The court may decide to call on a parent of the child to show cause, as directed by the court, why the parent should not pay the compensation ...
- (9) In this section —
 ‘compensation’ for the offence means compensation for —
- (a) loss caused to a person’s property whether the loss was an element of the offence charged or happened in the course of the commission of the offence; or
 - (b) injury suffered by a person, whether as the victim of the offence or otherwise, because of the commission of the offence.

As a matter of law, s 258 imposes a less onerous test of causation than the provision under examination in the research (the former s 197). The former s 197 required the court to find that ‘*wilful failure on the part of a parent ... was likely to have substantially contributed to the commission of the offence*’.⁵⁵ The current s 258 only requires that ‘*a parent ... may have contributed to the fact the offence happened ... and ... it is reasonable that they should be ordered to pay*’.⁵⁶

When introduced by the then conservative government in 1996, it was roundly criticised by the Labor opposition:

This Bill shifts the onus of proof from proof beyond a reasonable doubt, the criminal standard, to the balance of probabilities, the civil standard. That is quite inappropriate. It involves the imposition of a criminal penalty without the satisfaction of the criminal standard of proof. In other words, the parent in such circumstances may be ordered to make a payment in respect of a crime of which that parent may not have been able to be convicted himself or herself if one adopted the relevant standard of proof. That is an objection based on legal principle, but there is a more compelling reason why one would be concerned about this proposal: it does nothing to provide support and assistance for those families who genuinely want support and assistance to cope with the great problems that they confront upon having a juvenile in their family in conflict with the law.⁵⁷

Upon Labor’s election to government, its condemnation appears to have evaporated. The provision was re-enacted as s 258 by the *Juvenile Justice Amendment Act 2002* (Qld). Further research into the current position regarding parental restitution proceedings in Queensland would be illuminating. McMahon’s essay does not deal with these later developments, and whether there has been an increase in orders against parents is unknown. Although the current test would make it easier for orders to be handed down, it is possible that magistrates may approach the current provision with a great deal of caution. Such ‘judicial resistance’ to particular statutory amendments which conflict with the principles of classic jurisprudence has been described by Arie Freiberg in the context of governing the dangerous.⁵⁸ Freiberg refers to the techniques of resistance employed by the judiciary to avoid the application of laws which are perceived

⁵⁵ *Juvenile Justice Act 1992* (Qld) s 197(1)(a) (emphasis added) (superseded).

⁵⁶ *Juvenile Justice Act 1992* (Qld) s 258(b)–(c) (emphasis added).

⁵⁷ Queensland, *Parliamentary Debates*, 24 July 1996, 1846 (Matthew Foley).

⁵⁸ Arie Freiberg, ‘Guerrillas in Our Midst? Judicial Responses to Governing the Dangerous’ in Mark Brown and John Pratt (eds), *Dangerous Offenders: Punishment and Social Order* (2000) 51, 58.

to be unduly harsh and the resulting ‘ongoing dialogue between legislatures and courts’.⁵⁹ The principle at stake in the Queensland provision is one of classic jurisprudence and has a long common law history. The reluctance of the criminal courts to hold one person vicariously liable for the acts of another was first articulated in the 18th century.⁶⁰ One can only speculate on whether the principle will continue to command the respect of the courts in the current political context.

The essay by Richard Hil, ‘In Pursuit of the Responsibilised Self: Boot Camps, Crime and Punishment’,⁶¹ also examines a populist and punitive development in the field of juvenile justice. Hil traces the ‘rapid growth of boot camps in North America, Canada, Australia and New Zealand’ in the last 15 years.⁶² He locates the shift in the ‘changing cultures of crime control’⁶³ in late modernity which have resulted in a ‘hybrid and highly politicised system of crime control based on “targeted” policing and punitive judicial action’.⁶⁴ Coincident with this shift is an increasing focus on individual responsibility as central to much criminal justice policy, particularly in relation to juvenile offenders.

Hil provides an interesting review of the growth of boot camps in several Western countries, his one Australian example emanating from a boot camp experiment in Queensland in 2000. He also reviews a comprehensive body of evaluation research, largely from the United States, and concludes that ‘the key objectives of crime prevention/reduction have not been realised’.⁶⁵ The unforeseen consequences of the boot camp movement are summarised by Hil as the tendencies of such programs to result in brutalisation, value reinforcement of the most dubious of masculine values and desensitisation (to the use of violence and intimidation). Hil’s evaluation is particularly concerning because it goes beyond a mere conclusion that boot camps fail to realise their lofty goals, and argues persuasively that they may do real damage to the vulnerable youth who are the captive population subject to such excesses of the law and order campaigns of late modernity.

The most disappointing feature of Hil’s essay is the implication that the growth in the popularity of boot camps in the United States is either happening or just about to happen in Australia. It is not evident from Hil’s essay or more generally that Australia is about to embrace this particular response to the problem of youth crime. Juvenile detention rates in Australia are currently lower than at any time in the last two decades.⁶⁶ Jock Young’s comment regarding the stark contrast between adult imprisonment rates in the United States and Europe is

⁵⁹ Ibid 65.

⁶⁰ See, eg, *R v Huggins* (1730) 2 Ld Raym 1574; 92 ER 518; *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715.

⁶¹ Hil, above n 4.

⁶² Ibid 131.

⁶³ Ibid 130.

⁶⁴ Ibid 135.

⁶⁵ Ibid 145.

⁶⁶ See above n 43 and accompanying text.

equally appropriate here: there are important differences between the ‘American Dream’ and the ‘Australian Dream’.⁶⁷

C *Victimisation*

In her essay ‘Unintended Consequences or Deliberate Racial Hygiene Strategies: The Question of Child Removal Policies’,⁶⁸ Judith Bessant provides a sobering analysis of the intent underlying child removal policies in Australia and the United Kingdom, and presents a powerful argument that these children were the victims of cultural genocide policies. She observes that the ‘historical narrative of unequivocal benevolence and altruism’ is now ‘being rewritten to take account of well-documented evidence of systematic sexual, emotional and physical abuse of young people in state-run or state-sponsored institutions.’⁶⁹ The essay develops and presents a critique of modernist approaches to policy formulation:

According to both traditional liberal and radical-structuralist understandings of policy formulation, policy is rationally informed by the discovery of objective social problems ... From such perspectives policy formulation is a ‘funnel of causality’ where Truth and knowledge are contested, slowly move on to the ‘policy making processes’, finishing up with specific policies ... [I]dentification of problems and decisions about the solutions to any given social problem are said to be based on technical expert criteria, rational, proper co-ordination, planning and considered choice. ... The idea of policy as rational action ignores the creative or generative role of experts in discovering the problem ... it overlooks the confusion and malevolence that can characterise policy making.⁷⁰

Bessant challenges the widespread acceptance that the child removal policies were motivated by ‘good intentions’ notwithstanding the ‘actual horrific outcomes’.⁷¹ She examines the specific discourses that informed the policies and points to ‘a rich eugenicist discourse which underpinned the mandatory removalist policies’.⁷² She argues that the removal of indigenous children was not an instance of ‘well intended policies gone dreadfully wrong’, but ‘a clear and deliberate strategy directed towards achieving cultural genocide, assimilation and land tenure’.⁷³ As the last of the case studies in the book, it also offers the greatest challenge to the modernist ‘imperative of progress’⁷⁴ discussed in the introduction to the volume.

Murray Lee’s essay, ‘Governing “Fear of Crime”’,⁷⁵ opens with the statement that ‘[g]overning “fear of crime” is big business’.⁷⁶ He develops this theme by

⁶⁷ See Jock Young, *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity* (1999) 2, 17–18, 22–3.

⁶⁸ Bessant, above n 10.

⁶⁹ *Ibid* 187.

⁷⁰ *Ibid* 190–1.

⁷¹ *Ibid* 192.

⁷² *Ibid* 194.

⁷³ *Ibid* 196.

⁷⁴ Hil and Tait, above n 1, 3.

⁷⁵ Lee, above n 5.

first reviewing a range of governmental measures in New South Wales and the United Kingdom which are directed at the fear of crime: information dissemination on victimisation risks and crime prevention strategies (which target both crime and the fear of crime). From this base he makes a case that ‘fear of crime’ has become a governmental tactic or technique for risk reduction. This is achieved by shifting responsibility to the individual to reduce and manage risk exposure, and to buy insurance, security services and hardware. He examines the relationship between private policing and fear of crime and argues that the shift to smaller government has opened up the fear of crime to the market economy. The final area in which fear of crime has developed into an object for business and governance is in the proliferation of experts: ‘fear of crime commands the attention of an expanding cohort of criminologists and other researchers who in turn command research funding from governments and private industry’.⁷⁷ Whilst fear reduction remains an elusive goal insofar as the proliferation of policies and programs has failed to bring about the desired outcome, Lee argues that as a tactic of governance or regulation, ‘fear of crime’ is both growing and effective: ‘if success means the exercise of government at a distance and the development of self governing *fearing subjects* then perhaps the governance of crime fear is indeed a triumph’.⁷⁸ Lee’s analysis is thoughtful and thought provoking. I agree with the implication that it is premature to predict the demise of ‘fear of crime’ notwithstanding the measures purportedly directed at reducing its extent. It will continue as an object of business, governance and research and will continue to be viewed, somewhat naively, as a research conundrum in the context of low victimisation risks coupled with high fear.

‘Expect the Unexpected: DNA, Guilt and Innocence’,⁷⁹ by Barbara Ann Hocking and Hamish McCallum, provides an interesting and broad ranging review of the use of DNA technology in the courts. Hocking and McCallum argue that DNA technology may assist the victims of miscarriages of justice: ‘DNA may not actually impact greatly on crime statistics as it may serve to prove innocence as well as guilt’.⁸⁰ The essay manages to convey to a non-scientific audience some of the important scientific characteristics of DNA matching. The two different types of DNA databases of use in criminal proceedings are clearly described:

First there may be a database that stores DNA profiles of individuals, together with the individuals’ identities. Such a database can then be searched to identify suspects whose DNA matches an evidentiary sample. Second, the calculation of match probabilities requires the existence of a database that gives the frequency of occurrence in the general population of each of the alleles used in the DNA profile.⁸¹

⁷⁶ Ibid 33.

⁷⁷ Ibid 49.

⁷⁸ Ibid (emphasis in original).

⁷⁹ Hocking and McCallum, above n 7.

⁸⁰ Ibid 97.

⁸¹ Ibid 104.

Of particular interest is the discussion of DNA as a ‘tool to exonerate’.⁸² The authors point out that such uses in Australia are uncommon and, in the absence of appropriate statutory regulation and resources, it ‘depends on the independent actions of their lawyers’.⁸³ Hocking and McCallum briefly touch on the complicated role of public sympathy for the victims of crime and conclude that the unexpected outcome is ‘whether DNA may provide a new right of access to justice for those wrongfully convicted’.⁸⁴

D *Prostitution Law Reform: Some Important Differences*

Belinda Carpenter’s essay, ‘Good Prostitutes and Bad Prostitutes: Some Unintended Consequences of Governmental Regulation’,⁸⁵ examines the outcome of recent statutory changes to the law on prostitution in several Australian states and territories. She examines the justifications underlying the criminalisation of prostitution and then examines the effects of criminalisation under the headings of public order and the focus on street prostitution, the failure in many jurisdictions to criminalise and/or prosecute the clients of street prostitution, and police corruption and bias in the exercise of law enforcement. The essay then examines the legal options for ‘legalisation or decriminalisation of prostitution. These options may be encompassed within the regulatory approach to prostitution in which prostitution is permitted within the limits of a licensing or zoning system’.⁸⁶ Carpenter argues that two of the main justifications underlying legal reform are potential improvements in sexual health and the working conditions of prostitutes, and that neither of these objectives has been achieved. She concludes that

the legal model, which is being implemented slowly throughout the western world, also creates a two-tiered access to health care, as well as good legal prostitutes ... and bad illegal prostitutes. It also assumes that the good legal brothels are those that have the best work conditions, though evidence suggests that this is not necessarily the case. ... What western governments need to consider is the ways in which prostitution can be managed without the creation of a two-tiered system of good and bad prostitutes.⁸⁷

Whilst the essay properly raises many of the problematic and recurring themes which arise in the analyses of the sex industry in many parts of the Western world, the lack of specificity in the analysis of the laws and the failure to consider specific empirical findings as applying to a defined set of laws leads to an overly pessimistic conclusion and one which fails to accommodate the complexities of the impact of different laws. Carpenter’s analysis of law reforms does not attempt to distinguish between different legal approaches either in Australia or elsewhere in the Western world and is heavily influenced by the licensing system adopted in Queensland and Victoria. The differences between

⁸² Ibid 109.

⁸³ Ibid 111.

⁸⁴ Ibid 112.

⁸⁵ Carpenter, above n 9.

⁸⁶ Ibid 178 (citations omitted).

⁸⁷ Ibid 184.

the licensing model adopted in these states and the approach adopted in New South Wales is given scant recognition. The approach in New South Wales is best conceived as a partial decriminalisation in which the criminal law plays a reduced role. Unlike the laws in Queensland and Victoria, the New South Wales law does not impose licensing requirements, or create a zone or red light district.

In most common law jurisdictions the two most significant criminal prohibitions relate to soliciting in a public place and brothel keeping. These offences tend to form the cornerstone of the attempt to criminalise prostitution and are the most frequently prosecuted offences. Any legal analysis of prostitution laws requires careful attention to the existence and prosecution of these two offences. Neither offence exists in New South Wales. Under s 19(1) of the *Summary Offences Act 1988* (NSW), street soliciting is permitted except under certain defined locations:

A person in a road or road related area shall not, near or within view from a dwelling, school, church or hospital, solicit another person for the purpose of prostitution.

Carpenter's analysis does not allude to the fact that street soliciting has been legal in New South Wales for approximately 24 years except in the few prescribed locations.⁸⁸ The New South Wales provisions have resulted in the establishment of an extensive legal street market place in central and suburban Sydney, and in many regional towns and cities. This distinction between the New South Wales soliciting laws and those occurring elsewhere in Australia is not a fine legal distinction. It has a significant impact on the lives of prostitutes who work in this part of the industry. In the other Australian jurisdictions and many parts of the common law world, soliciting in a public place is prohibited per se. In other words, all street soliciting is prohibited and workers risk prosecution at all times. In New South Wales, soliciting in a public place is not prohibited, except near or within view of the prescribed locations, and there is a thriving legal street 'market place' in sexual services. Furthermore, the street market is not contained to a zone or red light district. It is dispersed throughout the cities and towns.

The recent history of the central offence of brothel keeping in New South Wales is also unique. The statutory offence of brothel keeping, s 32 of the *Summary Offences Act 1970* (NSW), was repealed in 1979.⁸⁹ However this attempt at decriminalisation by Parliament was soon undermined by police activity. In the early 1980s, police revived rarely used legislation enacted to deal with the 'wartime growth of gambling, sly grog and prostitution', the *Disorderly Houses Act 1943* (NSW).⁹⁰ Following a declaration by the Supreme Court under the Act, a person could be charged with the offences of owning, occupying or being found in a disorderly house. Police also revived the common law offence

⁸⁸ See David Brown et al, *Criminal Laws* (2001) 1051–68 for a more comprehensive description of the prostitution laws in New South Wales.

⁸⁹ Repealed by *Summary Offences (Repeal) Act 1979* (NSW).

⁹⁰ Select Committee of the Legislative Assembly upon Prostitution, Parliament of New South Wales, *Report* (1986) 244.

of keeping a brothel and laid a number of common law charges in the late 1980s.⁹¹

Reforms in 1995 were directed at these developments. Under the *Disorderly Houses (Amendment) Act 1995* (NSW) the common law offence of brothel keeping was abolished and a new provision was added to the *Disorderly Houses Act 1943* (NSW) prohibiting a declaration that a house was disorderly 'solely because ... the premises are a brothel'.⁹² There is now no general criminal offence of brothel keeping in New South Wales and no licensing or registration requirements which apply to brothels. Brothels are largely regulated by general planning laws: under the *Environmental Planning and Assessment Act 1979* (NSW), a development application to establish a brothel may be rejected by a local council.⁹³ The matters to be considered in determining a development application are laid down in s 79C of the *Environmental Planning and Assessment Act 1979* (NSW) and include the provisions of 'any environmental planning instrument'. The former Department of Urban Affairs and Environment has informed all local councils that Local Environment Plans will not be approved by the Minister for Urban Affairs and Planning if they contain a blanket prohibition on brothels,⁹⁴ although they are permitted to restrict them to industrial zones.⁹⁵

In contrast, the Victorian approach was to legalise the industry by a series of measures designed to license and register brothels, with the criminal law continuing to play a significant role in prosecuting brothels and workers operating outside the licensing framework. The Victorian law is contained in the *Prostitution Control Act 1994* (Vic). The Act preserves most of the prostitution-related criminal offences: soliciting in a public place,⁹⁶ living on the earnings of a prostitute,⁹⁷ being found in an unlicensed brothel⁹⁸ and carrying on a business which is an unlicensed brothel.⁹⁹ The Business Licensing Authority determines licence applications and grants manager approvals. Licences are refused to persons whom the Authority considers are not 'suitable persons' or have been convicted of a disqualifying offence within the last five years.¹⁰⁰ In determining whether an applicant for a licence is a suitable person, the Authority must consider whether the applicant is 'of good repute, having regard to character, honesty and integrity', and is 'able to obtain financial resources that are adequate to ensure the financial viability of the business.'¹⁰¹ Managerial approvals are not granted to persons not of good repute, having regard to character, honesty and

⁹¹ Brown et al, above n 88, 1054.

⁹² *Disorderly Houses Act 1943* (NSW) s 16.

⁹³ *Environmental Planning and Assessment Act 1979* (NSW) ss 78A–81.

⁹⁴ Department of Urban Affairs and Planning, New South Wales, *Council Circular — Planning Control of Brothels* (1995) 29.

⁹⁵ *Ibid* 16.

⁹⁶ *Prostitution Control Act 1994* (Vic) s 13.

⁹⁷ *Prostitution Control Act 1994* (Vic) s 10.

⁹⁸ *Prostitution Control Act 1994* (Vic) s 15.

⁹⁹ *Prostitution Control Act 1994* (Vic) s 21A.

¹⁰⁰ *Prostitution Control Act 1994* (Vic) s 37.

¹⁰¹ *Prostitution Control Act 1994* (Vic) s 38.

integrity or if the person has been convicted of a disqualifying offence in the last five years.

The approach adopted in Queensland in the *Prostitution Act 1999* (Qld) was strongly influenced by the Victorian approach. The Act creates a Prostitution Licensing Authority to grant licences for legal brothels and approve certificates for managers.¹⁰² Licences and approvals are not to be granted to people convicted of disqualifying offences.¹⁰³ Public soliciting continues to be an offence¹⁰⁴ and it is an offence to operate a brothel whilst the licence is not in force.¹⁰⁵ Under s 77A(1) it is an offence for a prostitute to provide prostitution involving sexual intercourse or oral sex unless a prophylactic is used. A corresponding client offence is provided in s 77A(2). The scheme commenced operation in July 2000.

The Victorian laws have been extensively criticised.¹⁰⁶ In the early years of the scheme, few licences were granted, and then only to the well-resourced ‘mega-brothels’. The majority of sex workers continued to operate outside the licensing provisions and continued to be subject to the prohibitions of the criminal law. In the early 1990s it was estimated that only 25 per cent of the sex industry in Melbourne operated within the licensing provisions.¹⁰⁷ Illegal street prostitution continues in areas of St Kilda, Melbourne and Footscray, and prosecutions are frequent. In 2003, it was estimated by the Victorian police that there were more than 100 illegal brothels operating in Melbourne.¹⁰⁸

There is little empirical research into the operation of the Queensland laws, but newspaper reports suggest that some of the same problems may be occurring as in Victoria. In November 2000, claims were made by a ‘key sex industry welfare group’ that the licensing scheme in Queensland contained too many restrictions, and the Prostitution Licensing Authority stated that few brothel applications had been approved by local councils.¹⁰⁹ It is likely that most of the industry continues to operate outside the licensing framework and remains subject to the provisions of the criminal law.

¹⁰² *Prostitution Act 1999* (Qld) pt 7.

¹⁰³ *Prostitution Act 1999* (Qld) s 8(e).

¹⁰⁴ *Prostitution Act 1999* (Qld) s 73.

¹⁰⁵ *Prostitution Act 1999* (Qld) s 78.

¹⁰⁶ See, eg, Marcia Neave, ‘The Failure of Prostitution Law Reform’ (1988) 21 *Australian and New Zealand Journal of Criminology* 202; Linda Hancock, ‘Legal Regulation of Prostitution: What or Who Is Being Controlled?’ in Sally-Anne Gerull and Boronia Halstead (eds), *Sex Industry and Public Policy: Proceedings of a Conference Held 6–8 May 1991* (1992) 165; Carolyn Pickles, ‘Legal Perspectives in Clarifying the Issues of the Sex Industry’ in Sally-Anne Gerull and Boronia Halstead (eds), *Sex Industry and Public Policy: Proceedings of a Conference Held 6–8 May 1991* (1992) 23; Sheranne Dobinson, ‘Victorian Situation with Legalisation’ in Sally-Anne Gerull and Boronia Halstead (eds), *Sex Industry and Public Policy: Proceedings of a Conference Held 6–8 May 1991* (1992) 117; Priscilla Pyett and Deborah Warr, ‘Women at Risk in Sex Work: Strategies for Survival’ (1999) 35 *Journal of Sociology* 183.

¹⁰⁷ Peter Richardson, ‘The Victorian Brothel Owner’s Perspective’ (1992) in Sally-Anne Gerull and Boronia Halstead (eds), *Sex Industry and Public Policy: Proceedings of a Conference Held 6–8 May 1991* (1992) 135.

¹⁰⁸ Padriac Murphy, ‘Talks Set to Tackle Boom in Brothels’, *The Age* (Melbourne), 4 September 2003, 3.

¹⁰⁹ Matthew Franklin, ‘State Prostitution Laws May Change’, *The Courier-Mail* (Brisbane), 9 November 2000, 2.

In contrast, there is some empirical research in New South Wales which suggests that there may be improvements in the health and welfare of workers which are, at least in part, attributable to the removal of the key criminal prohibitions. The court figures show a large decline in the policing of all forms of prostitution in New South Wales. Table 1 presents the number of charges prosecuted in the Local Court for the most frequently prosecuted prostitution offences in the periods before and after the 1979, 1983, 1988 and 1995 amendments.

Table 1: Charges in the New South Wales Local Court for the Most Common Brothel and Soliciting Offences 1972–2001¹¹⁰

Year	Soliciting ¹¹¹	Live on earnings	Own/manage parlour	Use massage parlour
1972	4288	46	0	0
1974	3301	17	0	0
1976	1930	20	0	0
1978	1804	13	0	0
1980	6	35	28	94
1981	0	53	21	84
1982	0	39	17	66
1983	210	40	21	26
1984	419	33	17	27
1986	180	11	7	11
1988	376	32	4	6
1990	522	1	3	12
1991	805	8	8	10
1992	712	6	3	21
1993	462	7	4	16

¹¹⁰ Unpublished statistics from the New South Wales Bureau of Crime Statistics and Research. No data are presented for the *Disorderly Houses Act 1943* (NSW) because charges may arise from premises declared disorderly for reasons other than prostitution.

¹¹¹ Between 1972 and 1979, soliciting offences were charged under the *Summary Offences Act 1970* (NSW) s 28. From 1979 to 1982 there were no soliciting offences. Between 1983 and 1988, soliciting offences were charged under the *Prostitution Act 1979* (NSW) s 8A. From 1988 onwards, the *Summary Offences Act 1988* (NSW) s 19(1) has made provision for soliciting offences.

Year	Soliciting	Live on earnings	Own/manage parlour	Use massage parlour
1994	312	14	11	42
1995	346	15	4	34
1997	278	2	0	2
1998	256	0	0	1
1999	165	1	1	0
2000	158	2	0	0
2001	274	0	0	0

Prosecutions for soliciting declined to zero following the repeal of the soliciting offence in 1979. They increased to 419 when the offence was partially re-criminalised by introduction of defined prohibited locations in 1983. There was a slight increase around the introduction of the *Summary Offences Act 1988* (NSW) (which increased the ambit of the soliciting offence from ‘near’ to ‘near or within view’ of the prescribed locations),¹¹² followed by a steady decline throughout the 1990s. The number of prosecutions for soliciting in the 1970s under the *Summary Offences Act 1970* (NSW) (when soliciting in a public place was an offence per se) was nearly 16 times the number prosecuted for soliciting in 2001.

Since the early 1990s, prosecutions for all the key prostitution offences have generally declined. Table 2 presents the prosecutions for all soliciting and public acts of prostitution offences between 1993 and 2001. Soliciting near or within view of a dwelling, school, church or hospital is the most heavily prosecuted offence. Of interest is the growing number of clients charged with the new client-specific soliciting offence introduced in 1999.¹¹³ In 2001, 37 per cent of soliciting prosecutions were directed at clients.

¹¹² *Summary Offences Act 1988* (NSW) s 19.

¹¹³ *Summary Offences Act 1988* (NSW) s 19A.

Table 2: Charges in the New South Wales Local Court for All Soliciting and Public Acts of Prostitution Offences 1993–2001¹¹⁴

Year	Solicit- ing near or within view of pre- scribed loca- tions: s 19(1)	Solicit- ing in pro- scribed locations: s 19(2)	Solicit- ing in a manner that harasses or distresses: s 19(3)	Solicit- ing by client near or within view of prescribed locations: ¹¹⁵ s 19A(1)	Public act of prosti- tu- tion: s 20(1)	Public act of prosti- tution: s 20(2)
1993	462	2	35	–	2	15
1994	312	2	13	–	3	17
1995	346	3	17	–	2	3
1996	264	3	8	–	5	51
1997	278	3	7	–	7	16
1998	256	3	6	–	5	28
1999	165	2	3	–	2	25
2000	158	1	2	11	3	35
2001	274	0	0	164	9	74

The New South Wales prostitution prosecution figures generally provide ‘a dramatic illustration of the decriminalisation’ of prostitution in New South Wales and show the declining involvement of police in all aspects of the industry.¹¹⁶ Barbara Sullivan has commented on the comparative rates of prosecutions/arrests for prostitution in New South Wales, Victoria and Queensland, and concluded that New South Wales had ‘significantly lower rates (in the order of 50%) ... than ... either Victoria or Queensland’.¹¹⁷ Sullivan has suggested that by decriminalising brothel prostitution and making legal space for street soliciting, New South Wales has reduced the public/private distinction operating in many

¹¹⁴ Unpublished statistics from the New South Wales Bureau of Crime Statistics and Research.

¹¹⁵ These new client-specific offences (*Summary Offences Act 1988* (NSW) s 19A) were enacted in 1999. They mirror the prohibitions contained in s 19. The only charges laid to date are those under s 19A(1): soliciting near or within view of a dwelling, school, church or hospital.

¹¹⁶ Brown et al, above n 88, 1067.

¹¹⁷ Barbara Sullivan, ‘Prostitution Law Reform in Australia. A Preliminary Evaluation’ (1999) 18(3) *Social Alternatives* 9, 13.

common law systems and helped improve the civil and human rights of all sex workers, including street workers.¹¹⁸

The work conditions in brothels have also been brought under the general regulatory system imposed by occupational health and safety laws in New South Wales. These laws impose an obligation on the employer to ensure the health, safety and welfare at work of all employees.¹¹⁹ Health and safety guidelines for brothels have been prepared and published by New South Wales WorkCover to enable brothel owners and managers to comply with their duties under the Act.¹²⁰ The guidelines recommend the provision of clean towels and bed linen, safe sex practices, and equipment and appropriate security systems to protect workers against client violence.

Finally, there is some evidence in New South Wales that the decriminalisation of prostitution has been associated with improvements in the sexual health of female sex workers. Research into female sex workers in Sydney in the early 1980s ‘revealed gonorrhoea incidence rates which are expected in the developing nations of Africa or Asia. An average sex worker would acquire over four new gonococcal and two new chlamydial infections each year’.¹²¹ Later research (in the early 1990s) found condom use reported in ‘over 95 per cent of commercial encounters. This has translated into zero prevalence rates for chlamydial and gonococcal infections at first presentation to [the Sydney Sexual Health] Centre, an extraordinary achievement’.¹²² Significant reductions have also been reported in gonorrhoea in female sex workers in Sydney between 1985 and 1990 (from 58 per cent to 38 per cent), and in herpes (51 per cent to 25 per cent) and trichomoniasis (52 per cent to 29 per cent).¹²³

Whilst it would be naïve to attribute these positive health outcomes solely to the reforms in the criminal law, there is little doubt that the law reforms played a role. Other relevant policies included the broad range of public health policies and programs introduced following the first wave of AIDS cases in Australia. From the mid 1980s, peer outreach services were funded by the New South Wales Health Department to address sexually transmitted infection (‘STI’) prevention and education in the sex industry, to encourage safe sex practices and to distribute condoms and information on health. The New South Wales Sex Workers Outreach Project (‘SWOP’) is the largest sex worker outreach program in Australia.¹²⁴ The fact that most workers were not liable to a prosecution under the criminal laws made it easier for the outreach and health services to contact sex workers and to gain entry into premises. The number and scope of sexual

¹¹⁸ Ibid 14.

¹¹⁹ See *Occupational Health and Safety Act 2000* (NSW) s 8.

¹²⁰ New South Wales WorkCover, *Health and Safety Guidelines for Brothels* (2001).

¹²¹ Basil Donovan and Christine Harcourt, ‘The Female Sex Industry in Australia: A Health Promotion Model’ (1996) 9 *Venereology* 63, 63.

¹²² Ibid 66.

¹²³ C R Philpot, C L Harcourt and J M Edwards, ‘A Survey of Female Prostitutes at Risk of HIV Infection and Other Sexually Transmissible Diseases’ (1991) 67 *Genitourinary Medicine* 384, 386.

¹²⁴ Donovan and Harcourt, above n 121, 65.

health services were also increased, and sex workers were able to use Medicare for regular STI examination (a right denied before 1986).¹²⁵

The purpose of this lengthy review of the law and the sex industry in New South Wales is to challenge the conclusion that the 'legal model, which is being implemented throughout the Western world, also creates a two-tiered access to health care, as well as good legal prostitutes and bad illegal prostitutes'.¹²⁶ Laws differ between countries and between states and territories in Australia. The specific differences are significant and the complexities cannot be ignored. The form of the legislation in New South Wales differs from that adopted elsewhere, and when combined with appropriate public health and occupational health and safety policies, the impact on workers has not been uniformly negative. This is not to suggest that public debates about the public nuisance aspects of the sex industry no longer emerge from time to time in New South Wales or that street prostitution has been transformed into a safe and publicly accepted occupation. Many local councils continue to attempt to refuse planning approval to brothels, and the health and welfare of sex workers in various parts of the industry remain problematic.

My conclusion is twofold. Firstly, there have been improvements for workers in New South Wales and those improvements have arisen, in part, from a patchwork of laws where the dominant approach has been to minimise the role of the criminal law rather than to introduce a grand scheme of licensing and regulation. Secondly, the laws in the various states and territories in Australia are different and these differences have an impact on the health, welfare and working lives of sex workers.

IV CONCLUSION

As suggested by Pitts, the volume offers a 'right riveting read';¹²⁷ it will also make a very useful appearance in the teaching materials for Australian undergraduate criminology courses. There is a wide sweep of topics and many of them provide good illustrations of several of the themes woven throughout the book. In their totality, the essays illustrate all of the 12 characteristics of contemporary penalty described by David Garland: the decline of the rehabilitative ideal; the re-emergence of punitive sanctions and expressive justice; changes in penal policy from 'decency and 'humanity' to 'insecurity, anger and resentment'; the return of the victim; the privileging of public protection; the politicisation of crime and the new populism; the reinvention of the prison; the transformation of criminological thought; the expansion of crime prevention and community safety; the enlistment of civil society in crime control and the expansion of private security; new management styles; and a perpetual sense of crisis.¹²⁸

The volume constitutes a significant addition to Australian theoretical perspectives in criminology. The essays vary, however, in the extent to which recent

¹²⁵ Ibid 64, 66.

¹²⁶ Carpenter, above n 9, 184.

¹²⁷ Pitts, 'Postscript', above n 18, 204.

¹²⁸ Garland, above n 16, 8–20.

Australian developments in crime control are viewed as mere illustrations of broader international trends, and conclusions drawn regarding the sameness of politics, policy and outcome. This approach is not adopted in several of the essays, and they are firmly located in a specific political and historical context. For example, although acknowledging the international embrace of zero tolerance policing, Cunneen examines the local variants and the outcomes in specific local contexts. The same is true of the essays by Newbold on drug law enforcement in New Zealand, Lee on fear of crime and Bessant in relation to child removal policies.

Some of the other essays in the volume¹²⁹ lack a recognition that ‘the facts of national differences shape how strategies have played out in their different locales’¹³⁰ and variously subscribe to ‘the dangerously self-fulfilling prophesy, that which happens in America will surely follow elsewhere’.¹³¹ To return to my introductory comments, I am troubled by the notion that the master pattern is the same despite differences in crime, culture, laws and politics. Whilst the drive to provide a comprehensive explanation of the huge growth in repressive contemporary criminal justice policies in many Western countries is understandable, the differences and complexities must also be respected. These local differences help to create a space for political and normative debate and engagement to contest current policy. The theoretical limitations are summarised by David Brown in his personal and biographical account of the recent history of critical criminology:

The first is the assumption that politics can be directly conducted in accordance with theory, in this case criminological theory ... The second is that theory, which is developed in particular national contexts, can be readily applied in different national and local contexts. A third and related tendency is that of seeing local instances as manifestations of a universal totality, such as late modernity, governmentality, globalisation, neoliberalism, etc. These three tendencies are often closely linked and help to produce a criminological convergence in which national, regional, local and cultural difference is downplayed ... [and] ... the complexity of the relationship between theory, government and politics [is underestimated].¹³²

Whilst *Hard Lessons* is attracted by the allure of the descriptive power of criminological theory in late modernity, it generally avoids being swept into Brown’s ‘criminological convergence’, and the essays present a thoughtful series of case studies which reflect a range of current issues in crime control and critical criminology in Australia.

¹²⁹ See, eg, Hil, above n 4; Carpenter, above n 9.

¹³⁰ Garland, above n 16, 165.

¹³¹ Zedner, above n 22, 354.

¹³² David Brown, ‘Losing My Religion: Reflections on Critical Criminology in Australia’ in Kerry Carrington and Russell Hogg (eds), *Critical Criminology: Issues, Debates, Challenges* (2002) 90.